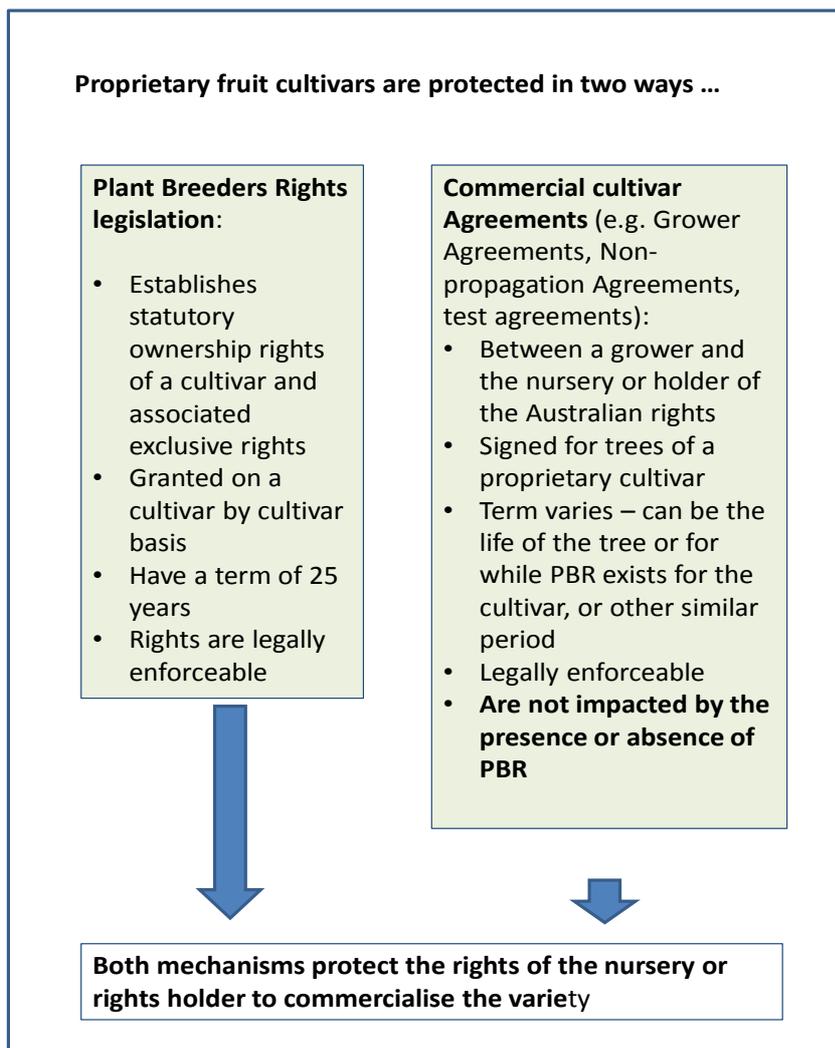


# FACT SHEET: Protection of Commercial Fruit Cultivars

*This is an overview only. Seek your own independent advice for your particular circumstances.*

## 1. Summary and Overview

Proprietary fruit cultivars are protected in two main ways – Plant Breeder’s Rights legislation and commercial cultivar agreements. Both mechanisms protect the rights of the nursery or rights holder to commercialise the variety in Australia. This relationship is set out in the diagram below.



This fact sheet provides an overview of the rights provided under Australia’s Plant Breeder’s rights legislation. It also provides an overview of common commercial cultivar agreements - the contracts commonly in use for proprietary fruit cultivars.

**Importantly, while the two protection mechanisms support each other, the cultivar contracts do not rely on PBR legislation, or on a valid grant of PBR for the variety, to be enforceable.**

## 2. Cultivar Categories

“**Proprietary Cultivars**” are cultivars which are protected by either:

- (a) Plant Breeder’s Rights (PBR), or
- (b) A **contract** such as a Non-Propagation Agreement (NPA), Grower’s Agreement or Test Agreement.

“**Proprietary PBR cultivars**” are cultivars that are protected by PBR rights. Owners (or their licensees) have the exclusive rights to produce and supply the cultivar. These cultivars may also be protected contractually by the signing of a contract, including any of the Cultivar Agreements listed below.

“**Proprietary NPA cultivars**” are cultivars that are supplied to commercial growers subject to a contract(s) that include terms and conditions such as Non-Propagation provisions, marketing restrictions, annual royalty payments and any other terms upon which the parties agree when entering into such agreements. Owners of these cultivars (or their licensees) hold the contractual rights to produce and supply the cultivar.

“**Public Cultivars**” are cultivars that are not claimed as being owned by anyone and are available without any royalty or other restriction. ‘Granny Smith’ apple, ‘Black Amber’ plum and ‘Golden Queen’ peach are examples of a Public Cultivar.

## 3. Common Commercial Cultivar Agreements

“**Growers Agreements**”, “**Non-Propagation Agreements**”, “**Test Agreements**” and the like are all agreements between a grower and the owner or licensee of a Proprietary Cultivar. These are binding contracts and cover the terms and conditions under which the cultivar is supplied to the grower. Many of these agreements remain valid for the life of the tree. Otherwise their term is as specified in the agreement.

They usually contain provisions that include:

- the right to inspect the grower’s properties;
- the prohibition of propagation of the cultivar;
- required payments by the grower;
- that control of the trees cannot be transferred without consent of the owner of the cultivar;
- that any sports or mutations are the property of the owner of the original cultivar.

They may also contain additional provisions including:

- In the case of a Test Agreement - that the trees can only be used to evaluate the cultivar; and;
- that the grower will market fruit from those trees as agreed by the parties

**These binding contracts are valid in their own right.** They are separate and distinct from any other protection that applies to the cultivar such as Plant Breeder’s Rights or any other form of protection.

## 4. Plant Breeder’s Rights (Australia)

“**PBR**” refers to the *Plant Breeder’s Rights Act 1994* (Cth) as amended.

### **General nature of PBR**

Plant breeder’s rights gives the Grantee of those rights the exclusive rights, or to license another person, to:

- (a) produce or reproduce the plant material;
- (b) condition the plant material for the purpose of propagation (conditioning includes cleaning, coating, sorting, packaging and grading);
- (c) offer the plant material for sale;
- (d) sell the plant material;
- (e) import the plant material;

- (f) export the plant material;
- (g) stock the plant material for any of the purposes described above in items (a) to (f).

*(Reference – Section 11 of the PBR Act)*

## **Harvested Material (e.g.. fruit)**

In certain circumstances, PBR provisions can also extend to harvested material (i.e. fruit) from illegally propagated cultivars.

*(Reference – Sections 14 and 15 of the PBR Act)*

## **Should I be concerned about infringing PBR or Grower/Non-Propagation Agreements?**

**Yes!** If you have infringed PBR rights, the PBR grantee can sue you in the Federal Court and claim money from you for the losses incurred. Breaching PBR is also a federal crime for which you can be penalized up to \$85,000 for individuals and \$425,000 for companies (in addition to any settlement amount charged by the PBR rights holder). **You can also be sued under the terms of any Non-Propagation, Grower or Test Agreements.**

***Ignorance of the law is not a defence.***

## **5. Obtaining further clarification on particular varieties**

If you wonder whether you can propagate a particular variety we strongly encourage you to contact the relevant licensed nursery or rights holder BEFORE you do so. You should seek clarification as to whether any contracts are in place such as Grower Agreements, Non-Propagation Agreements, or Test Agreements and as to the PBR status of the cultivar. The licensed nursery / rights holder will give you the information you need or direct you to someone who can help you.

## **6. Access to the best commercial fruiting cultivars**

The costs for importing Proprietary Cultivars into Australia are substantial. Breeders of Proprietary Cultivars are farmers like you. They spend enormous amounts of money to develop new cultivars that benefit you. They need to receive royalties to stay in business and to continue developing new cultivars. **Obtaining trees illegally is stealing.** Breeders will not tolerate the theft of their cultivars.

Australian growers who ignore the breeders' legal rights to collect royalties, jeopardise the Australian industry's access to new cultivars Without access to these cultivars Australia cannot compete in world markets. Infringers are cheaters who create an unfair advantage over honest growers and damage the integrity of the Australian industry .

As part of the fruit industry, you need to take responsibility to ensure that future access to new cultivars is protected.

## **7. Contact FRA**

**If you believe you may have illegally propagated and / or are in possession of illegally propagated cultivars on your property, we encourage you to immediately contact FRA. Presently, FRA members view a voluntary disclosure by a grower more favourably than in circumstances where FRA initiates the contact, for example, in the form of an FRA field audit.**

### **Contact details for FRA**

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