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Australia - legal framework:
relevant laws; jurisprudence and current trends

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UPOV Symposium on Contracts in relation to PBR
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The Commercial Reality

- It is widely acknowledged for many crops, that if the breeder loses control of the variety after the first seed is sold, then the opportunity to recover costs and accumulate funds for future investment, is low.
- What is needed:
 - Control beyond the first sale, and/or
 - Practical methods to recoup costs at one, or more places, in the marketing chain

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Australian 'Operating Environment'

- Legal framework - key features
 - Legislation
 - PBR Act (UPOV 91 compliant) eg authorisation, exhaustion
 - Trade Practices Act
 - Common law: case law, contract law, civil actions
- Operational framework
 - Release of new varieties
 - Little government control on release (excl weed, GMO, drugs)
 - No compulsory merit testing; no national list
 - Breeders decide how to commercialise
 - Direct commercialisation
 - Contracts/licenses \updownarrow (+/- PBR)
 - Farm Saved "Seed" normal for many crops



How does PBR work?

Key Concept

PBR is a restricted monopoly

- Breeder's authorisation is required for a limited range of [commercial] activities
- Therefore the exercise of PBR is the 'right' to exclude others from doing those activities

PBR coexists with other laws of the land

- Authorisation may be subject to conditions or limitations provided those conditions comply with other laws of the land



Exercising PBR

- PBR 'monopoly' vs Trade Practices Act
 - "It is now accepted that intellectual property laws do not intrinsically clash with competition law because they do not generally create comprehensive legal or economic monopolies". Alan Fels (Australian Competition and Consumer Commission (ACCC))
- Contract conditions are more likely to be problematic
 - Closed loop marketing arrangements are not inherently anti-competitive, each case has to be taken on its merits. Mike Kiley ACCC

It is likely that the TPA will be amended to specifically include a reference to PBR though it is not strictly necessary as the High Court of Australia confirmed that PBR is a special form of patent



The Australian Model(s)

- Commercialisation is becoming more sophisticated
 - Especially since 1994 when PBR law was upgraded to UPOV 91
- The trend is strongly toward using normal commercial contracts to establish:
 - Obligation to pay a royalty at one, or more, points in the marketing chain
 - Obligations pass with the ownership of the material
- Many contracts are aimed at End Point Royalties (EPRs)
 - EPRs not restricted to major field crops. EPRs also used in fruit and flower production

Commercial contracts – *Zee Sweet v Magnom Orchards, 2003*

- Court action in relation to a commercial contract supported by PBR
 - \$2 per tree royalty and a 5% production royalty
 - quality control & packing requirements
- Magnom guilty of breach of contract
 - contract provisions did not breach Trade Practices Act
 - contract included conditions additional to PBR including
 - non-propagation (ie no FSS)
 - EPR and reporting requirements
 - penalties
 - destruction 14,000 peach/nectarine trees + costs \$750k
 - Confirmed that 'Closed loop' marketing arrangements not inherently anti competitive

Added incentive to use contracts

Cultivaust P/L v Grain Pool P/L, 2005

FSS Interpretation (1/2)

Extent of PBR

- Exhaustion of PBR by the sale of initial seed does not extend to cover the sale of second and subsequent generations of crops, assuming they are grown from retained farm saved seed.
 - The harvest from farm saved seed, except for further farm saved seed, is to be treated as material on which PBR operates



Added incentive to use contracts

Cultivaust P/L v Grain Pool P/L, 2005

FSS Interpretation (2/2)

Onus is on the breeder to protect their interest

- The reasonable opportunity to impose conditions is intended to be exercised with respect to lawfully acquired propagating material at the time of its acquisition.



Issues

- Growers faced with many different contracts
 - Different conditions/obligations
- Compliance
 - Often relies on access to 'point-of-delivery information' (including variety identity)
 - Contacts establish reporting requirements
 - Accumulators choosing to provide a commercial service to the breeder in return for \$ and indemnity/freedom to operate
 - Software upgrades



Industry Standard License Agreement

Developed in consultation with stakeholders

- Reduce complexity
- Isolates 'nay-sayers'

Standard agreement + schedules where terms and conditions vary between varieties

Two types

- Traditional style licence (both parties sign)
- 'Bag licence' version (opening bag triggers obligation)

Growers responsibility to ensure that EPR is paid

Record keeping and reporting requirements

Transparency

**INDUSTRY STANDARD
PBR LICENCE AGREEMENT**

CONTRACT BETWEEN
Commercialising Party: _____ Grower: _____

WARRANTY: GRANTED BY LICENSOR TO THE GRANTEE. WARRANTY: GRANTED BY GRANTEE TO THE GRANTEE.

Introduction
A. We are the holder of, or authorised agent to license, the PBR in the Licensed Varieties.
B. You wish to buy Seed of the Licensed Varieties.
C. We have agreed to make our Seed available to you on the attached terms and subject to the PBR Act.

SIGNED AS AN AGREEMENT
Signed for Commercialising Party: _____ Signed by Grower: _____
By an authorized officer in the presence of: _____ By an authorized officer in the presence of: _____

DATE OF SIGNATURE: _____ DATE OF SIGNATURE: _____
SIGNED AT: _____ SIGNED AT: _____
NAME OF OFFICE: _____ NAME OF OFFICE: _____
ADDRESS: _____ ADDRESS: _____

TERMS AND CONDITIONS
IT IS AGREED

1. **Meaning of Words**
1.1 The meaning of words starting with a capital letter that are used in this Contract is set out in Schedule 1.

2. **Grant of Licence**
2.1 In return for you paying the EPR we grant you a non-exclusive licence for the Permitted Use for:
(1) produce or reproduce the Seed to grow Grain;
(2) grow more Seed on your own farm; and
(3) Sell Grain.

3. **What you cannot do**
3.1 You may do anything allowed in this Contract (including the Schedules) but you must not Sell or otherwise dispose of Grain or Seed in breach of our rights under the PBR Act.
3.2 If the scope of exercising your rights under this Contract is limited, you acknowledge that we are entitled to claim remedies of PBR in that limited extent solely in accordance with the PBR Act.

4. **Payments**
4.1 You must pay us or our EPR Collector the EPR for all Grain other than Farm Stored Seed in accordance with Schedule 2.
4.2 You authorize the EPR Collector to make all deductions necessary to enable the EPR Collector to pay the EPR to us.

5. **Your Obligations**
5.1 You must:
(1) comply with this Contract and any special conditions set out in Schedule 2;
(2) register your name, address and contact information with the Seller;
(3) make sure that anything you do under this Contract complies with all applicable laws;
(4) if you have authorized you to Sell Grain for further Propagation, promptly notify us if you become aware of any unauthorized propagation, production, sale or use of that Grain; and
(5) if you wish to sell any property you obtain Seed in grain, notify us and provide details of the purchaser;
(6) make sure that in a condition of sale that the purchaser takes over your obligations under this Contract; and
(7) pay or have paid all EPRs due on any Grain that is on the property of the state of sale.

6. **Rewards**
6.1 You must:
(1) keep records in sufficient detail to enable the EPR to be fairly and accurately determined;
(2) within 30 days after receiving a request from us make those records available to us in an auditable and accessible form;
(3) pay our costs of any audit that shows you have complied with this Contract; and
(4) keep the records for at least 7 years from the date you buy Seed.

6.2 Any audit shows that you have overpaid us by more than 5% we will pay the costs of the audit and credit the overpayment against future payments.

Source: GRDC website

INTERGRAIN WHEAT VARIETIES 2008 END POINT ROYALTY RATES AND LICENCES

End Point Royalty (RPR)					
Variety	Yr	Breeder component	Variety Management Fee	Total EPR	Licensee
Magenta	07	\$2.50	50c	\$3.00/t	Crop Care Seed Technologies
EGA Castle Rock	03	\$1.50	17c	\$1.67/t	Grainstrust
Camm	98	70c	25c	\$0.95/t	Free to trade



Sanctions

- Breach of contract
 - Civil action
 - No access to future new varieties
- Infringement of PBR
 - Disposal of harvest
Civil/criminal action
- Positive variety identification available (eg DNA)
 - Increasing chances of being caught



Summary

- Commercial contracts
 - Must be 'fair'
 - Increasingly accepted - if standardised
 - 'Opt-in' or 'Opt-out' is acceptable
 - Better where point of sale information is available
 - There will always be some non-compliance
- Role of PBR
 - Foundation for 'normal' commercial arrangements
 - Provides repeated opportunities, especially when variety 'escapes' to third parties
 - International harmonised rights - facilitates contracts that span more than one jurisdiction.
- PBR + Contracts = the best of both worlds