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
**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 ↑↓ (+/- PBR)
  - Farm Saved “Seed” normal for many crops

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**How does PBR work?**

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

<table>
<thead>
<tr>
<th>PBR coexists with other laws of the land</th>
</tr>
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</table>
- 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 (i.e., 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

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**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

Source: GRDC website

INTERGRAIN WHEAT VARIETIES 2008
END POINT ROYALTY RATES AND LICENCES

<table>
<thead>
<tr>
<th>Variety</th>
<th>Yr</th>
<th>Breeder component</th>
<th>Variety Management Fee</th>
<th>Total EPR</th>
<th>Licensee</th>
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<tbody>
<tr>
<td>Magenta</td>
<td>07</td>
<td>$2.50</td>
<td>50c</td>
<td>$3.00/t</td>
<td>Crop Care Seed Technologies</td>
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<tr>
<td>EGA Castle Rock</td>
<td>03</td>
<td>$1.50</td>
<td>17c</td>
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<tr>
<td>Camm</td>
<td>98</td>
<td>70c</td>
<td>25c</td>
<td>$0.95/t</td>
<td>Free to trade</td>
</tr>
</tbody>
</table>

End Point Royalty (RPR)
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 (e.g., 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