Fact Sheet Aus-07

Farm-saved propagating material in horticulture

Growers have been retaining propagating material from their harvested crop to grow future plants and trees for thousands of years. While this practice is generally known as "farm-saved seed", the phrase has wider application than seed, as individuals may save other propagating material including grafted cuttings, bulbs and budwood. The *Plant Breeder's Rights Act 1994* defines propagating material as "any part or product from which another plant with the same essential characteristics can be produced".

In Australia, many of the commercially grown horticultural plant varieties are protected by plant breeder's rights. Under the *Plant Breeder's Rights Act 1994*, plant breeders are afforded certain exclusive rights in relation to the propagating material (eg produce or reproduce, sell, import the material). In limited circumstances there are exceptions to the rights of the plant breeder, including farm-saved seed. In addition to plant breeder's rights, it is possible to obtain patent protection under the *Patents Act 1990*, which does not include an exception for farm-saved seed (or other propagating material). This fact sheet explores the farm-saved seed exception under the *Plant Breeder's Rights Act*.

Plant Breeder's Rights Act

The *Plant Breeder's Rights Act* protects plant varieties that are new, distinct, uniform and stable. The owner of the protected variety or its reproductive material is given exclusive rights over the propagating material. These include the right to:

- produce or reproduce the material;
- offer the material for sale;
- sell the material.

The owner may initiate legal action seeking damage, or part of the profits gained, from any infringements of these exclusive commercial rights.

Not knowing whether a variety is protected is not an excuse at law and inadvertently trading in protected varieties is illegal. To this end the PBR logo is usually present on protected varieties:

In addition, information on protected varieties is available on the IP Australia website (see www.ipaustralia.gov.au).

The *Plant Breeder's Rights Act* provides for additional penalties for infringement of up to $75,000 for individuals and $275,000 for companies. However, there are some very important exceptions to these rights, including the ability of farmers to save seed in limited circumstances.

The farm-saved seed exemption

Under the *Plant Breeder's Rights Act 1994*, the conditioning and use of propagating material does not infringe an owner's right. Therefore, in certain circumstances, growers can save propagating material to sow in following years.

There has been some doubt about the practical effect of the farm-saved seed exception after the Federal Court's decision of *Cultivaust v Grain Pool* in 2004. While growers can save seed indefinitely there is a limit on a growers ability to commercially sell second (and further) generation crops from saved propagating material.

Doubt arises because the *Plant Breeder's Rights Act 1994* does not state what the grower may do with the propagating material generated from farm-saved seed beyond its further use as farm-saved seed. Essentially, a crop grown from farm-saved seed can only be commercialised if the owner of the variety has authorised the grower to do so.

To overcome any uncertainty about whether growers can commercially sell these second and future crops, many owners of protected varieties expressly prohibit growers from saving seed under the "Grower Agreement" or "Licence".

Key issues

Some of the major issues relating to farm-saved propagating material are grower licences, patents and end point royalties.

1) Grower licences (contracts)

While the *Plant Breeder's Rights Act* gives the breeder the exclusive right to commercialise the variety, it does not stipulate how this is to be achieved. It is therefore left to the owner to determine how the protected variety is used. Typically, this is done by way of contract (often referred to as a "Grower Agreement" or "Licence") which sets out the terms and conditions by which the variety can be used.

Specific clauses may relate to your ability to terminate the contract, outline costs and stipulate terms of use, including restricting farm-saved seed (often referred to as non-propagation clauses).

Importantly, if you agree to a contract's terms and conditions saying that you cannot save seed (or other propagating material), the contract overrides the exception in the *Plant Breeder's Rights Act.*

2) Patents

A plant variety may also be protected by a patent, either in conjunction with, or as an alternative to, plant breeder's rights. To do so, the variety must satisfy the requirements of a patent. This means that there must be some technical intervention: the invention is new; an inventive step; the invention must be fully described; and it must have some demonstrated use.

3) End-point royalties

As plant breeder's rights relate to the propagating material, royalties were traditionally collected at the point of sale as part of the seed cost. Increasingly, however, some breeders are electing to apply end point royalties on newly released varieties. This is thought to be a more equitable mechanism for generating a revenue stream back to the breeder.

End point royalties are payable on many varieties. A variety does not need to be protected by plant breeder's rights for this royalty to be applied, although this is usually the case. The "Grower Agreement" or "Licence" specifies the terms under which a grower can have access to the variety, and this agreement may include an end point royalty payment.

One downside of the end point royalty system is that it relies on a series of contracts. This may result in increased paperwork for growers, breeders, retailers and marketers. In addition, it means that some of the royalty paid by growers is taken up in administration/management costs.