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Orcharding for the Future

New Fruit Varieties for the Australian Fruit Industries

by

Gavin Porter (General Manager, ANFIC)

I read with interest the recent article written by Phillip Wilk on 'Through the branches – Plant Breeder's Rights; do you own your trees?' and felt I would put pen to paper and provide an Australian Fruit Variety Manager perspective.

As a Company involved with Fruit Variety Management in Australia for more than 20 years, the answer to this posed question of, '...., do you own your trees?' is a categorical **YES!**

If you as a grower are invoiced for a fruit tree purchase and you pay your money in full, then as a grower you now own the trees. It doesn't matter whether the new fruit variety is protected by PBR and/or a non-propagation agreement, if you purchase the tree, it belongs to you.

The only exception to this rule would be if you signed a contractual agreement with a fruit variety manager or owner/breeder to **lease** the trees. Effectively you would then be providing a 'growing service' to produce fruit while the trees and the fruit would continue to be owned by the owner/breeder. Commonly you would be compensated for your costs and the time spent managing these varieties. The owner/breeder and/or authorised marketer would 'control' all aspects of the fruit production, marketing and sale from these **leased** varieties in return for coordinated marketing and promotion, and hopefully good returns to the grower.

Therefore, if you purchase the trees and pay the money owed, you own these trees and the trees become a capital item for your business.

ANFIC understands the Low Chill Industry well considering its professional and personal relationship with Professor Wayne B. Sherman and the University of Florida. ANFIC's policy for minimum tree number purchase is 10 trees but fewer trees could be supplied if replacements are needed.

Any Variety Manager in Australia, who is in this business for the long term, cannot expect to be in business for much longer if they are 'cashing in' on new fruit varieties. The high costs of variety management by not-for-profit companies like ANFIC certainly don't provide huge profits at the expense of growers.



Plant Breeders Rights

I took the liberty of contacting the PBR Registrar, Mr Doug Waterhouse and requested his clarification of the PBR Act in Australia and the link, if any, to commercialisation contracts and rate of royalties for PBR protected varieties. I have included his reply below.

Dear Gavin,

Thank you for your email of 17 October 2005.

The article you have referred me to is "Through the branches - Plant Breeder's Rights; do you own your trees?" by Phillip Wilk, writing for NSW Department of Primary Industries (NSW DPI) in the *Low Chill Stone Fruit Grower*, September 2005. Mr Wilk's main point seems to be that breeders are using PBR as a lever to license their varieties on unfair terms, including not handing over ownership of the trees and setting high royalty rates. However, as you point out this is no criticism of the PBR scheme, because PBR has nothing to say about contractual terms or the rate of royalties.

The *Plant Breeder's Rights Act* (PBR Act), administered by IP Australia, grants an exclusive time limited intellectual property right to a breeder in a new variety. Breeders have to satisfy strict criteria including novelty, distinctness, uniformity and stability, in order to be granted PBR. Like regular patents, PBR may form a base for other activities such as the commercialisation of the new variety. The PBR scheme facilitates innovation and the development of better varieties. However, PBR does not indicate or prescribe, in any way, how commercialisation should occur. Indeed the PBR Act is silent on commercialisation of new varieties other than that they should be reasonably accessible to the public within 2 years of the grant of rights.

Once the breeder has obtained a right for the new variety, that breeder may decide to attempt to license or sell his or her PBR, which is essentially a property right. This is usually done through contractual arrangements. Contracts are two way voluntary agreements that set out obligations for both parties. Breeders and growers freely enter into contracts for their mutual benefit in the context of other Australian laws, for example fair trade safe guards such as the *Trade Practices Act 1974*. It goes without saying that parties should understand their obligations and their rights before deciding to enter into a legally binding contract. The legal profession should be able to assist a party in interpreting contractual terms and assessing their specific effect, as well as giving advice on fair trade legislation.

Yours sincerely

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As can be seen from Doug's reply, the PBR Act does not indicate or prescribe, in any way, how commercialisation should occur. The Australian Competition & Consumer Commission (ACCC) also holds a dim view to any practice of commercialisation that is not in the best interests of any member of the community, including growers.

Intellectual Property Protection

In all cases, the bottom line in variety management is the protection of the Intellectual Property/Investment of a new fruit variety on behalf of the owner/breeder. Significant funds are paid by variety managers to gain exclusive access to new fruit varieties and this investment requires protection. Costs of >\$50 000 per variety for quarantine expenses (3-5 years Post-entry quarantine), virus testing and initial variety development alone, before first tree sales occur, is very common. This amount does not cover annual Licence Fees paid to owner/breeders!

The only restriction on these purchased trees is the form of protection for any additional and therefore illegal propagation of these trees. Both PBR and Non-Propagation agreements state that you cannot propagate any additional trees as you are in breach of the PBR Act (1994) or the signed non-propagation agreement. As a grower you can market your fruit wherever you want and to whomever you want with confidence and no restrictions as you own the trees and all fruit produced. It's that simple.

Ultimately, PBR and non-propagation agreements (including rights of entry onto grower's properties) are aimed at minimising illegal propagation of new fruit varieties. The owner/breeders of these new varieties want to protect their investment against illegal propagation and provide them an opportunity to recoup these costs through some type of royalty.

Exclusive coordination of new fruit variety tree sales through nursery groups, for instance, enables a quick and easy option to collect a tree royalty for remittance to the owner/breeder at the initial point of sale.

Fruit variety managers in Australia also use other methods of variety protection against illegal propagation and these may include:

- DNA fingerprinting
- Trademarks
- Grower Club production and marketing of varieties (Coordinated Marketing)
- National Licensing Association (Australia) (NLA-AU) – Promotion of ethical practices in agriculture (see below)

Non-propagation agreements state that if a property is placed on the market for sale, before the sale is completed, ANFIC should be notified to arrange a transfer of the protected varieties to the new owners. This is a simple and quick process and maintains the owner/breeders protection of their varieties.



New Fruit Variety Access in Australia is changing

Without a doubt, it is becoming more and more difficult to make a dollar growing fruit in Australia. Increasing costs of production and either the same or lower market prices received for fruit each season, is making fruit growing less and less viable.

The same market forces affecting fruit growers are affecting fruit breeders around the world. Increasing costs associated with fruit breeding is forcing owner/breeders to demand higher royalties and may include higher tree royalties and even fruit production royalties. These royalty increases are demanded by the owner/breeders of varieties and are not set by Fruit Variety Managers in Australia!

‘Coordinated Grower Clubs’/Contracts

This new type of fruit production system through ‘Coordinated Grower Clubs’ is probably the single most criticised method of fruit growing in Australia.

Why do these ‘Coordinated Grower Clubs’ even exist?

The simple answer is because an owner/breeder demands a fruit production royalty, the easiest option to collect the fruit production royalty is through a closely managed ‘Grower Club’ with authorised Marketers which are capable of calculating these royalties easily. The marketers have access to the wholesale price received as well as the quantity of fruit sold by the growers in the market place.

What benefits should these ‘Coordinated Grower Clubs’ provide to growers?

- Access to technical advice through shared information and newsletters
- Capped production levels with grower commitment
- Limited and Authorised Market Agent choice
- Coordination of marketing through selected and authorised market agents and/or exporters
- Balanced Wholesale Market/Direct Selling/Export markets
- Annual Coordinated Marketing Plan
- Sustainable returns for their efforts

Membership of and the guidelines to be followed within a ‘Grower Club’ may not suit every grower. There will continue to be choices available for new varieties for those growers not interested in this type of fruit production system.

ANFIC has the view that if a ‘Grower Club’ cannot make money for all participants; owner/breeder, growers, marketers and consumers, then there is no valid reason for its existence. It has to be a win: win situation for all participants of the ‘Grower Club’ program.



New fruit Varieties for the Australian Fruit Industries

ANFIC has long held the belief that new fruit varieties, capable of assisting a fruit grower to increase fruit production levels, lower your costs of production or increase market prices received through superior fruit quality, may demand a tree royalty for these benefits.

There are some exceptions to this rule, for example, an exceptional fruit variety that has vastly superior attributes for fruit growers, marketers and consumers, may justify an additional fruit production royalty.

Although not every new fruit variety has these superior attributes, growers may still be requested to pay increased royalties as an additional cost of production, without any increased return to the grower.

As a fruit grower looking at which new fruit variety to plant, one of the characteristics in this decision making process should include the royalty amount required. There is no point growing a new fruit variety with a high tree royalty, when an equally suitable public fruit variety (with no royalty) will provide you with a better return.

ANFIC believes that in the future, there will be new fruit varieties to suit all growers' requirements.

There will be:

- public varieties available with no royalties,
- fruit varieties with only modest tree royalties,
- fruit varieties with both tree and fruit production royalties and
- fruit varieties available only through 'Coordinated Grower Clubs'.

Growers ultimately will have several fruit variety access choices available dependent on their own personal, family, financial, regional and marketing requirements. This variety mix will no doubt suit the market place and growers alike.

How do you make these new fruit variety choice decisions?

Access to reliable and respected information is the key to any decision for your orchard business. You need to make fully informed decisions on new fruit varieties as the high costs of establishment and production can lead to a costly mistake!

The performance of new fruit varieties as reported in Nursery catalogues or seen overseas is no guarantee of their performance in Australia. Grower trials of new fruit varieties are crucial to allow you to make these important decisions.

While 2 trees of any new fruit variety may assist you in having a closer look, a semi-commercial planting of 50-100 trees may be required to provide you with enough fruit to put through your packing shed and test your market.

Contact other local growers, your preferred nursery, ANFIC, visit overseas



breeding programs or search the internet for any information about new varieties. Don't rely on others to tell you what to plant. It's your business and at the end of the day you need to make these well informed decisions.

The main fruit industry goal surely is the production of high quality fruit to create repeat consumer sales and therefore good returns to the growers in the long term. Since moving to Bathurst, NSW I now have to purchase low chill stonefruit from the supermarkets rather than grow my own. The small, green and shrivelling Flordaprince fruit offered for sale on the supermarket shelves now certainly doesn't create these repeat sales or instil confidence in a low chill stonefruit industry embracing the latest technology and new varieties.

For further information:

ANFIC:

Web <http://www.anfic.com.au>

Plant Breeders Rights:

Web <http://www.ipaustralia.gov.au/pbr/index.shtml>





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Why the NLA?

In an ideal world, commercial growers of permanent crops would purchase only licensed plants from legitimate sources. Current industry practice is far from ideal – infringement of proprietary plants is common, and until recently, accepted. The National Licensing Association (NLA) concept started in the United States in 2002 as the NLA-US. The NLA-AU was established as a separate company in Australia in 2005. Since its inception, the NLA program has challenged industry practices by speaking out against infringement of intellectual property rights in plants, promoting ethical practices in agriculture, and taking enforcement action against infringers.

The NLA is not the first or only organization to join industry members together to enforce intellectual property rights. Well known examples include the music copyright licensing associations such as ASCAP (American Society of Composers and Performers), and BMI (Broadcast Music Industry). Within the agricultural industry, Monsanto Corporation has filed dozens of lawsuits against growers for infringement of its seed patents in the United States and Canada. The Canadian Supreme Court recently upheld a decision favourable to Monsanto in one of these infringement cases.

The NLA promotes and facilitates the licensing of infringing plants through voluntary compliance by growers, while at the same time educating the growing community regarding the legal and economic benefits of purchasing licensed plants in the beginning. NLA is showing infringers that it costs much less to buy legal trees in the first place than to buy “bootleg” or illegal trees, and then defend them in an intellectual property infringement lawsuit later.

Current industry practice places a grower who purchases licensed



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plants -- and pays the required royalty -- at a competitive disadvantage as compared to one who grows unlicensed plants for which no royalty is paid. The NLA's enforcement activities help to level the playing field among growers by creating a business climate where all growers of a proprietary variety pay an honest royalty for the plants they purchase or propagate.

The NLA's ultimate goal is to foster ethical behaviour in the agricultural community. When growers respect the intellectual property rights of nurseries and breeding programs, everyone wins: Breeding programs receive the royalties that support their ongoing research and development of valuable new varieties; nurseries have access to those varieties, and use their expertise to provide quality, true to type virus free plants to growers; and growers remain competitive in the global agricultural community by producing crops from the new varieties that are in demand in global markets.

The NLA-US's experience in the United States suggests that since the formation of NLA-US in 2002, U.S. member nurseries have generally experienced an increase in both overall nursery sales and the granting of propagation licenses. This increase suggests that awareness of and respect for intellectual property rights in permanent crop agriculture is increasing. The NLA-AU believes the U.S. nursery industry's experience may be indicative of what is yet to come in Australia. Certainly, the NLA-AU and its members anticipate a day when the ultimate goal of the NLA is met, and the services of the NLA are no longer necessary.

The NLA-AU Structure

The concept of the National Licensing Association is simple: Breeding programs and nurseries that exclusively control intellectual property rights in plant varieties join the NLA-AU as members, under the terms of the NLA membership agreement. The members appoint the NLA as their attorney in fact for the purposes of enforcement of the right, title and interest of the intellectual property rights of each variety. Under this authority, the NLA takes action as necessary to enforce the members' intellectual property rights, through investigation of infringing plantings, contact with infringing growers, settlement discussions and resolution, and, when necessary, litigation. NLA actions are taken in the name of the member(s) whose rights are being enforced.

Historically, holders of intellectual property rights in permanent crop



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plants, especially nurseries, have been slow to enforce those rights against infringers, because the infringers are often their customers who buy *some* legal plants. If an infringement action is pursued, the nursery risks losing what business it does get from that customer. To alleviate this problem, the NLA has relieved individual members of decision making authority when it comes to enforcement. Members transfer their enforcement rights to the NLA, and can then honestly tell their customers that the decision to enforce is out of their control. Under the terms of the NLA membership agreement, individual nurseries cannot dictate the course of action taken by the NLA in a given case.

Competing nurseries licensed to sell the same variety have been loathe to share sales information with one another, making it impossible to determine whether a given planting contains plants legitimately purchased from one or more licensees, or from none of them. The NLA structure allows each member to disclose sales and customer information to a central confidential source, for inclusion in an infringement evaluation, without fear that the information will be accessed or misused by a competitor.

In return for the assignment of enforcement rights, each member receives a percentage of the proceeds from enforcement of that member's intellectual property rights (60% of net recovery). Additionally, all NLA members share equally in 10% of the net recovery obtained by the NLA in the enforcement of all member intellectual property rights, regardless of whose rights are enforced.

The NLA-AU Infringement Policy

The NLA-AU Infringement Policy rewards voluntary compliance. Infringers pay less, and NLA members recover more, when infringement claims are voluntarily and amicably resolved. An incremental fee schedule reflects the additional costs associated with a litigated resolution.

The incentive to the grower that has planted infringing trees is to come forward and license the trees without the forceful urging of the NLA. The most cost effective path is for all growers to initiate early licensing of infringing plantings. The more action the NLA is called upon to initiate to obtain licensing of infringing trees, the greater the cost is to the grower. The NLA initiates litigation as a last resort.



In bringing enforcement actions for intellectual property infringement, the NLA looks not only to the infringing grower, but also to the entities that are in privity with the infringing grower, such as farm management companies, real estate companies, banks and any others that directly infringe, or who indirectly infringe, by aiding and abetting infringement through inducement of or contribution to infringing activities.

