INTRODUCTION

TruFlex canola claims and what growers should consider before litigation

Murray Thornhill, Managing Director together with Richard Dewar, Senior Associate of HHG Legal Group, and David Stead of Anasazi Agronomy Pty Ltd discuss this topic in detail.

There have been many reports of growers wanting to make claims for recovery of significant crop losses and other issues following their use of this product. it is very early days in this saga, but this article seeks to provide some perspective on the legal and agronomic issues that arise in these kinds of situations.

What should WA growers consider before taking any legal action over alleged TruFlex canola crop losses?

Growers and their legal and other professional advisers need to assess whether they can prove who is legally responsible, the true cause of the loss and the amount of their loss. That assessment involves the circumstances of each crop, agronomic evidence, and the potential cost and duration of proceedings. The value of any likely recovery needs to be weighed against the logistical, operational, financial and emotional demands, and inherent risks, of litigation. Read in more detail below:

CONSIDER THE CONSEQUENCES BEFORE COMMENCING A CLAIM

Abraham Lincoln famously wrote a "hot letter" to a General expressing his anger, put it in a drawer and decided not to send it. He was wary of expressing himself without considering the risks and consequences.

The same caution is relevant when considering litigation. Legal proceedings can place a substantial financial burden on a farming business already managing seasonal and commercial variables, from weather to soil amelioration and interest rates. Litigation should be analysed like any other investment decision, with a proper understanding of the risks and potential benefits weighed against your objectives.

It is not uncommon for expert witness, court costs and legal fees in a Supreme Court action to exceed $500,000 and run over several years to reach trial. The winner can expect to recover 60% of their costs, perhaps more perhaps less. A losing case will involve having to pay the other party's costs. Usually there are interim disputes over costs, documents, expert witnesses, the evidence and other issues. Even for a seemingly simple matter involving another party willing to work in good faith towards a resolution, the investment of time and cost can be life changing.

THE CONCERNS ABOUT TRUFLEX CANOLA PERFORMANCE

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Growers have reported pod abortion and reduced yields in some TruFlex canola crops. The cause or causes remain under investigation. The reported issues also include reduced plant vigour and poor branching. The alleged losses have serious financial implications for growers across WA.

Growers are seeking legal advice about their rights and considering options that include a class action.

Growers should consider the legal framework governing class actions. It is a highly specialised area of law, and there are a limited number of legal firms that specialize in the field.

This article summarises matters growers should consider. It is not a comprehensive assessment of the legal or agronomic risks.

WHAT GROWERS NEED TO PROVE

A grower commencing proceedings face at least three key requirements:

- Prove, on the balance of probabilities, that a party is legally responsible for their loss.
- Prove the amount of that loss, known as damages.
- Prove that the loss suffered was actually caused (in whole or part and in what degree) by the legal wrong for which the party is responsible.

Typically, causes of action have a six-year limitation period, but each grower will need legal advice on precisely what causes of action arise and the relevant limitation period. Some growers may therefore have up to six years from the date their cause of action arises to commence proceedings against the seed seller or developer.

WHO MAY BE LEGALLY RESPONSIBLE

A grower may have a claim against the party which sold the seed or the party which developed it. The legal basis will depend on the individual circumstances.

Possible grounds include the following:

- A claim arising from the grower's contract.
- A duty of care owed by the seed seller or developer.
- Fitness-for-purpose obligations under the Sale of Goods Act 1895
- Consumer guarantees under the Australian Consumer Law, if the consumer threshold is less than $100,000.
- Misleading representations about the seed's capabilities, application requirements, seeding rate, or spraying window.

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AGRONOMIC EVIDENCE AND THE CAUSE OF THE LOSS

The next step is to establish what caused the loss. A claim of this nature is likely to depend on evidence from an agronomist, who would assess the alleged crop problems and the circumstances in which they arose.

Relevant matters include:

- Compliance with directions and agricultural management practices for seeding and spraying.
- Soil amelioration and seasonal conditions, including rainfall and temperature.
- The terms of the License and Stewardship Agreement and completion of the mandatory accreditation course.
- Whether new or older generations of TruFlex were used.
- Variety, sowing and emergence dates, uneven establishment and flowering times.

Records that can help assess crop performance

Relevant assessment data includes pod counts on the main stem, recording total pod sites and remaining pods; pod length; seed size; reduced branching or lateral compensation; plant density; and the percentage of plants affected.

Where possible, compare these observations with unaffected areas. Comparisons with other varieties in the same paddock and soil type may also be relevant, provided the crops are of similar maturity. Differences in sowing dates and crop development should also be considered when assessing those comparisons. Photographs and accurate yield maps that correspond with crop delivery receipts would ultimately also be required.

SPRAYING GUIDANCE AND ITS IMPLICATIONS FOR A CLAIM

Publicly available information about TruFlex application requirements, limitations and potential sensitivities adds complexity to the assessment. Relevant guidance includes the following points.

Application window

TruFlex permits over-the-top glyphosate applications from the cotyledon stage, beyond the six-leaf stage, through to first flower. First flower is defined as the point when 50% of plants have at least one open flower.

Application frequency

Earlier generations permitted two applications. TruFlex allows up to three applications, with a minimum interval of 14 days between sprays.

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Formulation requirements

Crop safety is only guaranteed when specifically registered over-the-top glyphosate formulations are used in accordance with their labels.

Environmental conditions and crop stress

Growers are advised to avoid spraying in adverse environmental conditions or when crops are experiencing physiological stress.

This raises a question about the relationship between the spraying flexibility promoted for TruFlex and the practical limits associated with environmental conditions, crop stress, and formulation requirements. Were growers and agronomists adequately informed about circumstances in which an otherwise compliant application could compromise crop performance?

In the agronomist's assessment supplied for this article, seasonal stress, differences in crop development and the timing of glyphosate applications may have interacted to affect crop performance. That assessment does not establish a failure of the TruFlex genetic system. The proposed physiological explanation requires confirmation against supporting research and evidence from individual crops.

Each case is likely to differ, and preparing the necessary reports will be an extensive process.

HOW CROP LOSSES MAY BE ASSESSED

An agronomist will also need to assess each grower's loss. That can be difficult because no two paddocks are identical. Even an adjacent crop of the same TruFlex variety may produce a different yield without providing a like-for-like comparison.

The most accurate assessment is likely to involve affected and unaffected parts of the same paddock sharing a similar growing environment.

A court is unlikely to accept a neighbouring farm's or paddock's yield as an accurate measure of loss. Differences in rainfall, soil type, temperature, frost, fertiliser and chemical application rates can make it difficult for an agronomist to attest to the accuracy of a comparison, limiting the reliance a court may place on it.

A court may attribute only a small part of the loss to the supplier or manufacturer and the remainder to seasonal variables. This could significantly reduce damages, leaving a grower who has spent hundreds of thousands of dollars pursuing a claim with an uncommercial result.

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INSURANCE MAY NOT MEAN A QUICK SETTLEMENT

A supplier's or manufacturer's insurer may accept a claim under the relevant policy. The involvement of an insurer does not necessarily mean the dispute will settle promptly. Insurance lawyers and their firms are well resourced and experienced in handling complex litigation, and insurers will make their own cost vs benefit analysis of the risks of litigation, which will be very different to the grower's assessment of their own situation.

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