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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID243/2020
File Title: KELVIN MCNICKLE v HUNTSMAN CHEMICAL COMPANY
AUSTRALIA PTY LTD & ORS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 12/04/2021 5:24:01 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

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Federal Court of Australia
District Registry: Victoria
Division: General

VID 243 of 2020

KELVIN M^cNICKLE

Applicant

**HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD (ACN 004 146 338) and
others named in the Schedule**

First Respondent and others according to the Schedule

Applicant's Amended Points of Claim

In this Points of Claim, the following definitions apply:

2FASOC means the Second Further Amended Statement of Claim dated 19 October 2020.

Outline of Evidence means the Applicant's outline of evidence dated 23 September 2020.

Roundup Products means:

- A. in the period 1987 to 2000, Roundup Herbicide; and
- B. in the period 2000 to 2018, Roundup Herbicide and Roundup Biactive.

A. The Respondents

A.1. The First Respondent

1. Between July 1976 and around April 1988, the First Respondent (**Monsanto Australia (Old)**):
 - (a) was known as Monsanto Australia Ltd;
 - (b) imported into Australia or caused to be imported into Australia:
 - i. Roundup Herbicide, for distribution and sale; and/or
 - ii. Glyphosate salts, including one salt form known as glyphosate isopropylamine salt (**Glyphosate Salts**) via a process of conversation of Glyphosate Intermediate and/or glyphosate for use in the manufacture of Roundup Herbicide;
 - (c) supplied Roundup Herbicide to other distributors (**the Intermediary Suppliers**) for resupply to consumers;
 - (d) produced:

- i. Glyphosate Salts via a process of conversion of Glyphosate Intermediate; and/or
 - ii. glyphosate,

for use in the manufacture of Roundup Herbicide;
 - (e) manufactured Roundup Herbicide using Glyphosate Salts, Glyphosate Intermediate and/or glyphosate;
 - (f) distributed Roundup Herbicide in Australia;
 - (g) promoted or marketed Roundup Herbicide in Australia;
 - (h) caused or permitted its name (Monsanto Australia Ltd) to be used in marketing and other materials related to Roundup Herbicide;
 - (i) used the 'Monsanto' and 'Roundup' trademarks, owned in accordance with sub-paragraphs 6(c)(iv) below; and
 - (j) was a wholly owned subsidiary of Monsanto Company US (Old) (as defined in sub-paragraph 6(c) below).
2. Further, between 1 April 1988 and November 1993, Monsanto Australia (Old) produced glyphosate for the Second Respondent pursuant to an operating agreement between Legis No 20 Ltd and Monsanto Australia (Old) dated 31 March 1988 (**Operating Agreement**).
3. By reason of the matters alleged in paragraphs 1 and 2 above, Monsanto Australia (Old) manufactured Roundup Herbicide within the meaning of s 74A of the *Trade Practices Act 1974* (Cth) (**Trade Practices Act**).
- A.2. *The Second Respondent*
4. The Second Respondent (**Monsanto Australia (New)**):
- (a) was known as Monsanto Australia Limited from 19 April 1988 to 23 August 2018, and is now known as Monsanto Australia Pty Ltd;
 - (b) from around April 1988, imported Roundup Herbicide or caused Roundup Herbicide to be imported into Australia for distribution and sale;
 - (c) from 1996, imported Roundup Biactive or caused Roundup Biactive to be imported into Australia for distribution and sale;
 - (d) from around April 1988, imported or caused to be imported into Australia one or other of Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for use in the manufacture of Roundup Herbicide and/or Roundup Biactive;
 - (e) from around April 1988, manufactured Roundup Herbicide and Roundup Biactive using Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for supply in Australia;

- (f) from around April 1988, supplied Roundup Herbicide and Roundup Biactive to the Intermediary Suppliers for resupply to consumers;
- (g) from around April 1988, distributed Roundup Herbicide and Roundup Biactive in Australia by itself or via a network of re-sellers, affiliates, related entities of Monsanto Australia and/or appointed distributors;
- (h) from around April 1988, promoted and marketed Roundup Herbicide in Australia;
- (i) from 1996, promoted and marketed Roundup Biactive in Australia;
- (j) caused or permitted its name (Monsanto Australia Ltd and from 24 August 2018, Monsanto Australia Pty Ltd) to be used in marketing and promotion of Roundup Herbicide and Roundup Biactive in Australia;
- (k) from 1988 to at least 2015 used the 'Monsanto' and 'Roundup' trademarks, owned in accordance with sub-paragraphs 6(c)(iv) below; and
- (l) until 7 June 2018, was an indirect wholly owned subsidiary of Monsanto Company US (Old) and Monsanto Company US (New) (as defined in paragraph 6 below) and thereafter of Bayer Aktiengesellschaft (AG) (**Bayer AG**).

5. By reason of the matters alleged in paragraphs 2 and 4 above:

- (a) manufactured Roundup Herbicide and Roundup Biactive within the meaning of s 74A of the Trade Practices Act; and
- (b) was a manufacturer of Roundup Herbicide and Roundup Biactive within the meaning of s 7 of the *Competition and Consumer Act (Cth) Schedule 2 – the Australian Consumer Law* (**the Australian Consumer Law**).

A.3. *The Third Respondent*

6. The Third Respondent (**Monsanto Company US (New)**):

- (a) from 2000:
 - i. manufactured:
 - A. one or other of Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for use in the manufacture of Roundup Herbicide and/or Roundup Biactive;
 - B. Roundup Herbicide; and/or
 - C. Roundup Biactive;
 - ii. supplied to Monsanto Australia (New) for importation into and/or distribution in Australia:
 - A. one or other of Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for use in the manufacture of Roundup Herbicide and/or Roundup Biactive;

- B. Roundup Herbicide; and/or
 - C. Roundup Biactive;
- iii. until around 2002, caused or permitted the word 'Monsanto', the brand name 'Roundup' and/or the Monsanto logo to be used on product labels; and
 - iv. until around 2002, caused or permitted the word 'Monsanto', the brand name 'Roundup' and/or the Monsanto logo to be used in marketing and/or other informational materials in Australia as they related to about Roundup Herbicide and Roundup Biactive.
- (b) by reason of the matters alleged in sub-paragraph 6(a) above:
- i. manufactured Roundup Herbicide and Roundup Biactive within the meaning of s 74A of the Trade Practices Act; and
 - ii. was a manufacturer of Roundup Herbicide and Roundup Biactive within the meaning of s 7 of the Australian Consumer Law;
- (c) further, by agreement effective 1 September 2000, assumed all liabilities as they related to Monsanto Roundup products, Glyphosate Intermediate, Glyphosate Salts and/or glyphosate from Pharmacia Corporation (previously known as Monsanto Company (**Monsanto Company US (Old)**) which:
- i. from at least July 1976 until 2000, manufactured one or other of Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for use in the manufacture of Roundup Products;
 - ii. from approximately 1976 until 2000, supplied Roundup Products to Monsanto Australia (Old) and Monsanto Australia (New) for importation, sale and distribution in Australia;
 - iii. from about 1983, supplied to Monsanto Australia (Old) and Monsanto Australia (New) for importation into Australia one or other of Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for use in the manufacture of Roundup Products;
 - iv. from at least July 1976 until around 2000, held the 'Monsanto' Australian trademark number 77856 and the 'Roundup' Australian trademark number 227919 (together, **the Australian Trademarks**) which have thereafter been held:
 - A. until around 4 February 2002, by Pharmacia Corporation; and
 - B. at all material times after 4 February 2002, by Monsanto Technology LLC;
 - v. from at least 1976 to 2000, caused or permitted the word 'Monsanto', the brand name 'Roundup' and the Monsanto logo to be used on product labels;
 - vi. from at least 1976, caused or permitted the word 'Monsanto', the brand name 'Roundup' and/or the Monsanto logo to be used in

marketing and other materials in Australia as they related to Roundup Herbicide;

- vii. from at least 1996, caused or permitted the word 'Monsanto', the brand name 'Roundup' and/or the Monsanto logo to be used in marketing and other materials in Australia as they related to Roundup Herbicide and Roundup Biactive; and
- viii. by reason of the matters alleged in subparagraphs 16(c)(i) to (vii) above, manufactured Roundup Herbicide and Roundup Biactive within the meaning of s 74A of the Trade Practices Act.

7. The Applicant (**Mr McNickle**) refers to and repeats sub paragraph 17(d) of the 2FASOC as though it were pleaded herein.

B. Roundup Products

B.1. Roundup Herbicide

8. Roundup Herbicide is a herbicide product which:

- (a) is formulated using Glyphosate Intermediate and Glyphosate Salts;
- (b) contains glyphosate;
- (c) includes either 'Roundup' or 'Monsanto' in the product name registered with the Australian Pesticides and Veterinary Medicines Authority (**APVMA**); and
- (d) is sold in Australia.

9. As at 1987 and at all material times thereafter, Roundup Herbicide has been registered for use in Australia.

10. At all material times when Roundup Herbicide was sold in Australia. the active ingredient or main active ingredient in Roundup Herbicide was glyphosate as glyphosate isopropylamine salt.

11. At all material times when Roundup Herbicide was sold in Australia, Roundup Herbicide contained surfactants and/or impurities.

B.2. Roundup Biactive

12. Roundup Biactive is a herbicide product which:

- (a) is formulated using Glyphosate Salts;
- (b) contains glyphosate;
- (c) includes either 'Roundup' or 'Monsanto' in the product name registered with the APVMA; and
- (d) is sold in Australia.

13. From at least 29 May 1996 and at all material times thereafter, Roundup Biactive has been registered for use in Australia.
14. At all material times when Roundup Biactive was sold in Australia, the active ingredient or main active ingredient in Roundup Herbicide was glyphosate as glyphosate isopropylamine salt.
15. At all material times when Roundup Biactive was sold in Australia, Roundup Biactive contained surfactants and/or impurities.

C. Carcinogenic properties of Roundup Herbicide, Roundup Biactive and glyphosate

16. By reason of the matters pleaded in paragraph 23 of the 2FASOC, at all material times Roundup Herbicide and Roundup Biactive ~~the Roundup Products~~ were carcinogenic.
17. Mr McNickle refers to and repeats paragraphs 24 to 26 of the 2FASOC as though they were pleaded herein (noting that, for the purposes of this Amended Points of Claim, references to 'Roundup Products' in paragraphs 24 to 26 of the 2FASOC are taken to refer to Roundup Herbicide and Roundup Biactive only).

D. The Applicant

18. From about 1987, Mr McNickle came into direct contact with and was regularly exposed to Roundup Herbicide during its use.

Particulars

Mr McNickle refers to paragraphs 13 to 16, 17 to 28, 39, 65, 81, 84, 120, 132 and 138 of the Outline of Evidence and paragraphs 5 to 13 of the 2FASOC and the particulars subjoined thereto.

19. From about 2000, Mr McNickle came into direct contact with and was regularly exposed to Roundup Biactive during its use.

Particulars

Mr McNickle refers to paragraphs 29, 39, 82, 84, 98, 103, 104, 105, 116, 126, 131 and 135 of the Outline of Evidence and paragraphs 8 to 12 of the 2FASOC and the particulars subjoined thereto.

20. Mr McNickle otherwise refers to and repeats paragraphs 4 to 14 of the 2FASOC as though they were pleaded herein.

D. Mr McNickle's injuries

21. In the period from 1987 to around May 2018, Mr McNickle was exposed to, had direct contact with, used or purchased Roundup Products.

22. By reason of the matters pleaded at paragraphs 16 and 17 above and paragraphs 23 to 26 of the 2FASOC, Mr McNickle developed non-Hodgkin lymphoma as a result of his use of or exposure to Roundup Products.

E. Loss and damage

23. Mr McNickle has suffered loss and damage and will continue to suffer loss and damage by reason of the matters pleaded at paragraphs 35, 48, 60 and 61(a) and (b) of the 2FASOC.

Particulars of Injury

- i. Non-Hodgkinson lymphoma;*
- ii. Hair loss, neuropathy, loss of sense of smell and taste, skin burn, sensitivity to sunlight, nausea, constipation, muscle tightness and cramps, mouth ulcers and tooth decay due to treatment by chemotherapy and radiotherapy;*
- iii. Loss of mobility and strength;*
- iv. Restriction of movement;*
- v. Migraine;*
- vi. Fatigue and sleep disturbance;*
- vii. Distress and anxiety;*

Particulars of Loss of Earnings and Earning Capacity

- viii. Mr McNickle was born on 25 September 1982 and is now aged 39 years.*
- ix. As a consequence of his injuries, Mr McNickle has been and remains incapacitated for his pre-injury employment in vegetation management. When last in employment in this capacity in 2015, he earned approximately \$1,000 to \$1,200 gross per week;*
- x. Mr McNickle at present because of his injuries is only capable of performing light work and limited hours. He undertakes gardening work averaging approximately 2.5 hours per week. He occasionally can work longer hours;*
- xi. Mr McNickle has also performed some casual work installing security cameras and like assistance, averaging from 1-2 days per week.*
- xii. Full particulars of Mr McNickle's claim for past economic loss including loss of superannuation benefits will be provided prior to trial;*
- xiii. But for the injuries, Mr McNickle with the agreement of his parents planned to take over the management of the business of PL & CV McNickle and eventually would have become sole owner and proprietor of the business;*

- xiv. *Full particulars of Mr McNickle's claim for future economic loss will be provided prior to the hearing of this matter.*

Particulars of medical expenses

- xv. *Mr McNickle has incurred, and continues to incur, medical and like expenses relating to his injuries. Full particulars of the claim for past and future medical expenses will be provided prior to trial;*

Particulars of attendant care

- xvi. *Mr McNickle has been provided with care and assistance by his wife, Ilea, since beginning to feel unwell from his injuries in March 2018. The care and assistance has varied depending on the well-being of Mr McNickle;*
- xvii. *Mr McNickle makes claims for the cost of such care both for the past care and anticipated future care. Full particulars will be provided prior to trial.*

AND THE APPLICANT CLAIMS

The Applicant refers to and repeats as pleaded herein the details of claim set out in the Amended Originating Application dated 16 June 2020.

This Points of Claim was prepared by Jack Rush QC, Melanie Szydzik and Rebecca Howe, counsel for Mr McNickle.

Date: 12 9 April 2021



Signed by Lee Taylor
Lawyer for Mr McNickle

~~Signed electronically pursuant to the Special Measures Information Note (SMIN-1) by the deponent at Melbourne in the state of Victoria on 9 April 2021.~~

Schedule

VID 243 of 2020

Federal Court of Australia

District Registry: Victoria

Division: General

Respondents

Second Respondent: Monsanto Australia Pty Ltd (ACN 006 725 560)

Third Respondent: Monsanto Company