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### Details of Filing

Document Lodged: Non-Prescribed Pleading  
File Number: VID243/2020  
File Title: KELVIN MCNICKLE v HUNTSMAN CHEMICAL COMPANY  
AUSTRALIA PTY LTD & ORS  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 4/07/2022 8:11:28 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<sup>c</sup>NICKLE**

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 Second Further Amended Points of Claim**

In this Points of Claim, the following definitions apply:

**43FASOC** means the Fourth ~~Third~~ Further Amended Statement of Claim dated 4 July 2022  
~~10 February 2022~~

**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. The First Respondent (Monsanto Australia (Old)):**

- (a) between July 1976 and around April 1988 was known as Monsanto Australia Ltd;
- (b) imported into Australia or caused to be imported into Australia:
  - i. between July 1976 and around November 1993, Roundup Herbicide, for distribution and sale; and/or
  - ii. from 1983 onwards 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:
  - i. Roundup Herbicide;

ii. glyphosate and/or glyphosate intermediate;

to other distributors (**the Intermediary Suppliers**) and third parties (**Third Parties**) for resupply to consumers;

(d) from 1988 to about November 1993 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 subparagraphs 6(c)(iv) below; and

(j) was until around 17 April 1987 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 1996 to 2020, imported Roundup Herbicide or caused Roundup Herbicide to be imported into Australia for distribution and sale;

(c) from 1996 to 2020, imported Roundup Biactive or caused Roundup Biactive to be imported into Australia for distribution and sale;

(d) from around April 1988 until around 2002, 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 until around 2002, manufactured Roundup Herbicide and Roundup Biactive using Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for supply in Australia;
- (ea) from around April 1988 to November 1993, had Monsanto Australia (Old) produce glyphosate for it (that is, Monsanto Australia (New)) for use in the manufacture of Roundup Products;
- (f) from around April 1988 to 2002, supplied Roundup Herbicide and Roundup Biactive and glyphosate and/or glyphosate intermediate to the Intermediary Suppliers and Third Parties for resupply to consumers;
- (fa) by no later than 1999 appointed distributors of Roundup Herbicide and Roundup Biactive through which Roundup Herbicide and Roundup Biactive were resupplied to customers in Australia;

#### Particulars

- A. from 1999 to 2020, Evergreen Garden Care Australia Pty Ltd (formerly known as Scotts Australia Pty Ltd) or its affiliates/related entities (in relation to Roundup Herbicide) (**Scotts**).
  - B. from 2002 to 2013, Nufarm Australia Limited (in relation to both Roundup Herbicide and Roundup Biactive) (**Nufarm**).
  - C. from 2013 to 2019, Sinochem International Crop Care (Overseas) Pte. Ltd (in relation to both Roundup Herbicide and Roundup Biactive) (**Sinochem**).
  - D. Further particulars may be provided.
- (fb) by no later than 2002 engaged third parties including Nufarm to manufacture and distribute Roundup Herbicide and Roundup Biactive and glyphosate and/or glyphosate intermediate on Monsanto Australia (New)'s behalf in accordance with specifications and quality assurance manuals provided by Monsanto Australia (New) and/or the Third Respondent (**Monsanto Company US (New)**);

#### Particulars

- A. Manufacturing Agreement between Monsanto Australia Limited and Nufarm Australia Limited dated 23 December 2002, cl 2 (a) and (c), Schedule A.
  - B. Further particulars may be provided.
- (fc) no later than 2011, supplied third parties such as Intec Industries Pty Ltd (**Intec**) with glyphosate and/or glyphosate intermediate and surfactants for the manufacture and distribution of Roundup Products in accordance with specifications and quality assurance manuals provided by Monsanto Australia (New) and/or Monsanto Company US (New);

## Particulars

A. Manufacturing Agreement between Monsanto Australia (New) and Intec dated c. August 2011 cll 4, 5.3, Schedule D.

B. Further particulars may be provided.

- (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 or caused Roundup Herbicide to be promoted and marketed in Australia;
- (i) from 1996, promoted and marketed Roundup Biactive in Australia or caused Roundup Biactive to be promoted and marketed in Australia;
- (j) caused or permitted or licenced 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) from around 1988 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. until around 2002, 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;

(iia) supplied to third parties:

- A. Roundup Herbicide and Roundup Biactive for distribution in Australia; and
- B. glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products for sale in Australia;

**Particulars**

- A. An Agreement for the Supply of Glyphosate Products between Monsanto Company and Nufarm dated 14 June 2002 cll. 3.1, 7.1.
- B. Supply and Distribution Agreement between Monsanto Company and Sinochem dated 1 March 2013 cl 5.1.
- C. Further particulars may be provided.

(iib) appointed exclusive distributors in Australia to promote the sale and distribution and product image of Roundup Herbicide and Roundup Biactive in Australia;

**Particulars**

- A. Amended and Restated Exclusive Agency and Marketing Agreement between Monsanto Company (Old) and the Scotts Company dated 30 September 1998, and as amended and restated from time to time including on 31 August 2017 and 1 August 2019 (with respect to Roundup Herbicide).
- B. Exclusive Distribution Agreement between Monsanto Company, Monsanto Australia Limited and Nufarm dated 31 August 2010 cll 3.1 and 5.1 (with respect to Roundup Herbicide and Roundup Biactive).
- C. Supply and Distribution Agreement between Monsanto Company and Sinochem dated 1 March 2013 recitals and cl 2.1 (with respect to Roundup Herbicide and Roundup Biactive).
- D. Further particulars may be provided.

- 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 the Fourth Respondent (Pharmacia LLC; ~~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) and third parties for importation, sale and distribution in Australia;
  - iii. from about 1983, supplied to Monsanto Australia (Old) and Monsanto Australia (New) and third parties for importation into Australia one or other of Glyphosate Intermediate, Glyphosate Salts and/or glyphosate for use in the manufacture of Roundup Products;
- (iiia) by no later than 1998, appointed the Scotts Company (an Ohio corporation) as its exclusive agent for the marketing and distribution of Roundup Products in Australia;

### Particulars

Amended and Restated Exclusive Agency and Marketing Agreement between Monsanto Company (Old) and the Scotts Company dated 30 September 1998, and as amended and restated from time to time.

- 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 43FASOC 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 26 to 27 of the 43FASOC, at all material times Roundup Herbicide and Roundup Biactive were carcinogenic.

17. Mr McNickle refers to and repeats paragraphs 27 to 30 of the 43FASOC as though they were pleaded herein (noting that, for the purposes of this Second Further Amended Points of Claim, references to 'Roundup Products' in paragraphs 27~~24~~ to 30~~26~~ of the 43FASOC are taken to refer to Roundup Herbicide and Roundup Biactive only).

**D. The Applicant**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

D. Mr McNickle's injuries

[Redacted]

[Redacted]

E. Loss and damage

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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## 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

Fourth Respondent: Pharmacia LLC