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Details of Filing

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Form 33

Rule 16.32

THIRD RESPONDENT'S DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

Federal Court of Australia No. VID 243 of 2020

District Registry: Victoria

Division: General

KELVIN MCNICKLE

Applicant

HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD & ORS

Respondents

In answer to the Second Further Amended Statement of Claim (**2FASOC**), the Third Respondent (**Monsanto Company**) states as follows:

Part A – The Applicant and Group Members

Group Members

1. In answer to paragraph 1, it says:

~~(a) the definition of Roundup Products is vague and embarrassing;~~

~~(b) under cover of that objection:~~

(a) it admits that the Applicant has ~~purported to~~ commenced this proceeding as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**);

Filed on behalf of Monsanto Company, Third Respondent
Prepared by Peter Butler AM RFD
Herbert Smith Freehills
Tel +61 2 9225 5686 Fax +61 2 9322 4000
Email Peter.Butler@hsf.com Ref 82691702
Address for service ANZ Tower, 161 Castlereagh Street, Sydney NSW 2000

(b) it admits that the products listed in **Schedule A** to the Defence hereto are herbicide products which:

(i) contain glyphosate; and

(ii) include either 'Roundup' or 'Monsanto' in the product name registered with the Australian Pesticides and Veterinary Medicines Authority (**APVMA**); and

(iii) were or are sold in Australia,

(**Monsanto Roundup Products**);

(c) it says further that:

~~A. what is meant by 'glyphosate' where that word is used throughout the ASOC is vague and embarrassing;~~

(i) the manufacture of Monsanto Roundup Products involves conversion of intermediate products (Glyphosate Intermediate) to glyphosate acid (also known as Glyphosate technical), (Glyphosate), which in turn is further converted to Glyphosate salts for use in formulation of the Monsanto Roundup Products; and

(ii) N-(phosphonomethyl)glycine is the International Union of Pure and Applied Chemistry name of glyphosate, the active ingredient;

~~(iii) it says further that:~~

~~A. the Commonwealth and State and Territory governments have established legislative schemes, and the Commonwealth Government has established a regulatory approval process for the registration and sale of agricultural and veterinary chemical products, being the National Registration Scheme for Agricultural and Veterinary Chemicals (**National Registration Scheme**) that is now administered by the APVMA, an independent statutory authority;~~

~~B. the National Registration Scheme is embodied in the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (**Agvet Code Act**), in delegated legislation and standards made under the Agvet Code Act and in other legislation and~~

delegated legislation including the *Agricultural and Veterinary Chemicals Code Regulations 1995* (Cth) (**Agvet Code Regulations**), the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (Cth) (**Agvet Levy Act**), the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) (**Agvet Admin Act**), the *Agricultural and Veterinary Chemicals Regulations 1999* (Cth) (**Agvet Regulations**), the *Agricultural and Veterinary Chemical Products (Collection of Levy) Regulations 1995* (**Agvet Levy Regulations**) and the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995* (Cth) (**Agvet Admin Regulations**);

C. prior to the National Registration Scheme, each of the various states and territories regulated agricultural chemical products;

D. under the Commonwealth legislative scheme:

(1) agricultural chemical products are, and have been since 1995, included on a Register of Agricultural and Veterinary Chemical Products (**Register**); and

(2) approved active constituents are included on a Record of Approved Active Constituents for Chemical Products (**Record**);

E. the Monsanto Roundup Products:

(3) were at various times included on the Register as a herbicide containing glyphosate; and

(4) had active constituents which were recorded in the Record; and

(iv) it denies that the Applicant has an alleged claim in respect of, or arising out of, the same, similar or related circumstances as those alleged by all Group Members as each individual claim relies on entirely different facts and injuries; and

(d) it otherwise does not know and therefore cannot admit the allegations in paragraph 1.

2. It does not know and therefore cannot admit the allegations in paragraph 2.

3. It denies the allegations contained in ~~In answer to~~ paragraph 3.~~, it:~~

~~(a) refers to and repeats paragraph 1 above; and~~

~~(b) otherwise denies the allegations contained in paragraph 3.~~

The Applicant – Mr Kelvin McNickle

4. It does not know and therefore cannot admit the allegations in paragraph 4.

5. It does not know and therefore cannot admit the allegations in paragraph 5.

6. It does not know and therefore cannot admit the allegations in paragraph 6.

7. It does not know and therefore cannot admit the allegations in paragraph 7.

8. It does not know and therefore cannot admit the allegations in paragraph 8.

9. It does not know and therefore cannot admit the allegations in paragraph 9.

10. It does not know and therefore cannot admit the allegations in paragraph 10.

11. It does not know and therefore cannot admit the allegations in paragraph 11.

12. It does not know and therefore cannot admit the allegations in paragraph 12.

13. It does not know and therefore cannot admit the allegations in paragraph 13.

14. It does not know and therefore cannot admit the allegations in paragraph 14.

THE RESPONDENTS

15. In answer to paragraph 15, it:

(a) admits that the First Respondent:

(i) was and is a corporation incorporated in Australia and capable of being sued;

(ii) was a wholly owned subsidiary of **Monsanto Company US (Old)** between 1974 and 1987; and

(iii) between 29 July 1976 and 17 April 1988, had the name Monsanto Australia Limited;

(b) says further that the First Respondent:

(i) was called Huntsman Chemical Company Australia Limited from 6 July 1993 to 15 April 1996; and

(ii) has been called Huntsman Chemical Company Australia Pty Ltd since 16 April 1996; and

(c) otherwise does not plead to paragraph 15 as the Applicant makes no allegations against it.

16. In answer to paragraph 16, it:

(a) admits that the Second Respondent:

(i) was and is a corporation incorporated in Australia and capable of being sued;

(ii) from around April 1988 until 23 August 2018, had the same company name as Monsanto Australia (Old) prior to April 1988, being Monsanto Australia Ltd, and says further that it was known as Monsanto Australia Limited from 19 April 1988 to 23 August 2018;

(iii) from 24 August 2018, changed its name to Monsanto Australia Pty Ltd; and

(b) otherwise does not plead to paragraph 16 as the Applicant makes no allegations against it.

17. In answer to paragraph 17, it

(a) refers to and repeats paragraphs 15 and 16 above;

(b) admits that Monsanto Company US (New) was incorporated under the laws of the State of Delaware within the United States of America on 9 February 2000;

(c) in relation to sub-paragraph (a), says that, ~~in the absence of particulars of the specific products alleged to have been manufactured, or the specific products alleged to have been supplied to Monsanto Australia (New) for importation into Australia, and given the matters referred to in paragraphs 1(a) and 1(b) above, the allegation is vague and embarrassing. Under the cover of that objection it says:~~

(i) in relation to sub-paragraph 17(a)(ii):

A. it denies it manufactured the products defined by the Applicant as 'Roundup Products', or the Monsanto Roundup Products save for Roundup Ready PL Herbicide which it manufactured and sold in the United States as Roundup WeatherMAX Herbicide from 2002 to present, and which was not registered in Australia until 28 October 2016;

B. it admits that at various times from 2000 it manufactured one or other of Glyphosate Intermediate and/or Glyphosate;

(ii) in relation to sub-paragraph 17(a)(iii):

A. it denies that it supplied to Monsanto Australia (New) for importation into Australia the products defined by the Applicant as 'Roundup Products' or the Monsanto Roundup Products;

B. it does not currently know and therefore cannot admit whether, from 2000 until around 2002, it supplied to Monsanto Australia (New) for importation into Australia one or other of Glyphosate Intermediate and/or Glyphosate for use in the manufacture of the Monsanto Roundup Products. Further particulars will be provided when available following discovery and evidence;

C. it says further that Roundup Ready PL Herbicide was supplied to Monsanto Australia (New) for importation into Australia from on or around 28 October 2016, however, the Third Respondent does not currently know and is therefore unable to admit which entities supplied it in Australia. Further particulars will be provided when available following discovery and evidence;

(iii) in relation to sub-paragraph 17(a)(iv):

A. it denies the allegations contained in paragraph 17(a)(iv) of the Statement of claim;

B. it says further that:

(1) in or around early 2000, Monsanto Company US (Old) merged with Pharmacia & UpJohn, Inc., a publicly-

owned pharmaceuticals company, with Monsanto Company US (Old) being the surviving corporation;

(2) during the merger referred to above, Monsanto Company US (New) was created and was incorporated under the laws of the State of Delaware within the United State of America on 9 February 2000 as a wholly owned subsidiary of Monsanto Company US (Old);

(3) upon completion of the merger referred to above, Monsanto Company US (Old) changed its name from Monsanto Company to Pharmacia Corporation;

C. says further that, prior to the merger referred to in paragraph 17(c)(iii)B(1) above, the "Monsanto" Australian trademark number 77856 (**Monsanto Trademark**) and the "Roundup Australian trademark number 227919 (**Roundup Trademark**), were registered to Monsanto Company US (Old);

D. says further that, following the merger referred to in paragraph 17(c)(iii)B(1) above, and by reason of the name change referred to in paragraph 17(c)(iii)B(3) above, the Monsanto Trademark and the Roundup Trademark were held by Pharmacia Corporation;

E. On 4 February 2002, a full assignment from Pharmacia Corporation to Monsanto Technology LLC in respect of the Monsanto Trademark and the Roundup Trademark was registered with IP Australia;

PARTICULARS

IP Australia Trademark Register Extracts for Australian Trademark Numbers 77856 and 227919.

(iv) in relation to sub-paragraph 17(a)(v), it says that:

~~A. it says that in the absence of particulars, the reference to marketing and other materials, and the Monsanto logo, is vague and embarrassing;~~

A. ~~under cover of that objection i~~In respect of the Monsanto Roundup Products during the period 2000 to 4 February 2002:

(1) it admits that the words 'Roundup' and 'Monsanto' and a US Monsanto vine design logo were used on product labels; and

(2) it does not otherwise currently know and therefore cannot admit whether it permitted the words 'Roundup', 'Monsanto' and any Monsanto logo to be used in marketing and other materials in Australia during the period 2000 to 4 February 2002. Further particulars will be provided when available following discovery and evidence;

(d) in relation to sub-paragraph 17(b), it:

(i) refers to and repeats sub-paragraph 17(c) above; and

(ii) otherwise denies the allegations contained in sub-paragraph 17(b);

(e) in relation to sub-paragraph 17(c), ~~it says that, in the absence of particulars of the specific products alleged to have been manufactured, or the specific products alleged to have been supplied to Monsanto Australia (Old) and/or Monsanto Australia (New), and given the matters referred to in paragraphs 1(a) and 1(b) above, the allegation is vague and embarrassing. Under the cover of that objection~~ it:

(i) refers to and repeats paragraphs 17(c)(iii)B above;

(ii) says further that:

A. Monsanto Company (New) entered into an agreement with Pharmacia Corporation that was effective 1 September 2000 (**Separation Agreement**);

B. the Separation Agreement related to the transfer of the operations, assets and liabilities of the agricultural business from Pharmacia Corporation to Monsanto Company US (New);

C. Pursuant to the Separation Agreement, Monsanto Company US (New) was required to indemnify Pharmacia Corporation for liabilities primarily related to the agricultural business;

D. the Separation Agreement was amended on 1 July 2002 (**Amended Separation Agreement**); and

E. the Amended Separation Agreement clarified rights and obligations relating to indemnification.

(iii) says further that:

A. in relation to sub-paragraph 17(c)(i), it denies that from at least July 1976 until 2000 it manufactured the Monsanto Roundup Products or the products defined by the Applicant as 'Roundup Products';

B. in relation to sub-paragraph 17(c)(ii), it denies that from at least July 1976 until 2000 it supplied to Monsanto Australia (Old) and/or Monsanto Australia (New) the Monsanto Roundup Products or the products defined by the Applicant as 'Roundup Products';

C. in relation to sub-paragraph 17(c)(iii) it:

(1) says that at various times from about 1988 to 2000, it supplied to Monsanto Australia (Old) and/or Monsanto Australia (New) one or other of Glyphosate Intermediate and/or Glyphosate; and

(2) otherwise does not currently know and is therefore unable to admit the allegations in sub-paragraph 17(c)(iii). Further particulars will be provided when available following discovery and evidence.

D. in relation to sub-paragraph 17(c)(iv) it refers to and repeats paragraph 17(c)(iii)C above;

E. in relation to sub-paragraph 17(c)(v), it says that:

~~(1) says that in the absence of particulars, the reference to marketing and other materials, and the Monsanto logo, is vague and embarrassing;~~

(1) ~~under cover of that objection~~ in respect of the Monsanto Roundup Products from at least July 1976 until 2000:

i. it admits that the words 'Roundup' and 'Monsanto' were used on product labels; and

ii. it otherwise does not know and therefore cannot admit whether it permitted the words 'Roundup', 'Monsanto' and any Monsanto logo to be used in marketing and other materials in Australia. Further particulars will be provided when available following discovery and evidence;

F. in relation to sub-paragraph 17(c)(vi), it denies the allegations.

(f) in relation to sub-paragraph (d), it:

(i) says that Bayer AG acquired Monsanto Company US (New) in a transaction that closed on 7 June 2018 (subject to the fulfillment of certain conditions, which were fulfilled as of August 2018);

(ii) says further that, following the acquisition, Monsanto Company US (New) was, and continues to be, an indirect wholly-owned subsidiary of Bayer AG, with a separate corporate existence in the State of Delaware, its state of incorporation;

(iii) otherwise denies the allegations in sub-paragraph (d); and

(g) otherwise denies the allegations in paragraph 17.

ROUNDUP PRODUCTS

18. In answer to paragraph 18, it:

(a) refers to and repeats paragraph 1 above;

(b) says further that:

(i) based on searches conducted the first registration was for Roundup Herbicide from at least November 1976;

PARTICULARS

Roundup Herbicide is recorded by the APVMA in the register of Agricultural and Veterinary Chemical Products (**Register**) as first registered:

(i) in Victoria on 29 July 1994;

(ii) in South Australia on 11 November 1976;

(iii) in Australia Capital Territory on 28 September 1990;

(iv) in Northern Territory on 5 January 1988;

(v) in Queensland on 30 June 1988; and

(vi) with the APVMA on 11 November 1995.

Roundup Herbicide is recorded by the New South Wales Pesticide Registration Section, Department of Agriculture and Fisheries in its Notification of Registration and Approval of a New Product, as first registered for use on 28 September 1981.

(ii) each of the products encompassing the Monsanto Roundup Products was registered for use in Australia at various and different points in time thereafter; and

(c) otherwise does not know and therefore cannot admit the allegations contained in paragraph 18 of the 2FASOC.

19. In answer to paragraph 19, it:

(a) refers to and repeats paragraphs 1 and 17 above;

(b) otherwise denies the allegations contained in paragraph 19 of the 2FASOC.

20. In answer to paragraph 20, it:

(a) admits that glyphosate was an active ingredient in the Monsanto Roundup Products; and

(b) otherwise denies the allegations contained in paragraph 20.

21. In answer to paragraph 21, it:

(a) denies that Roundup Products as alleged were supplied in Australia as pleaded;

(b) says further that it refers to and repeats paragraphs 17(c)(ii)A, 17(c)(ii)B, 17(c)(ii)C, 17(e)(iii)B, and 17(e)(iii)C above; and

(c) otherwise does not currently know and is therefore unable to admit which companies or entities supplied the Monsanto Roundup Products in Australia, and consequently does not know and therefore cannot admit the allegations contained in paragraph 21. Further particulars will be provided when available following discovery and evidence.

22. In answer to paragraph 22, it:

(a) refers to and repeats paragraphs 17(c)(i)A, 17(c)(ii)A, 17(e)(iii)A and 17(e)(iii)B above;

(b) admits that some of the Monsanto Roundup Products contained surfactants; and

(c) otherwise denies the allegations contained in paragraph 22.

PROPERTIES OF ROUNDUP

23. It denies the allegations contained in paragraph 23.

24. In answer to paragraph 24, it:

(a) refers to and repeats paragraphs ~~1,~~ 15, 16, 17 above, and paragraph 35 below; and

(b) otherwise denies the allegations contained in paragraph 24.

25. In answer to paragraph 25, it:

(a) admits that, generally, surfactants:

(i) are surface acting agents which are designed to lower the surface tension of the medium in which they are dissolved;

(ii) may assist in removal of lipids from the epidermal surface;

(iii) may increase the hydration state of the skin (under closed exposure conditions);

(iv) may decrease evaporation of water from droplets;

(v) may increase sub-epidermal blood flow; and

(vi) may aid in intra-epidermal and sub-epidermal intercellular water accumulation;

(b) says that it refers to and repeats the matters pleaded in ~~paragraph 1 above and~~ paragraphs 26 and 35 below;

(c) says further and alternatively, that even if there is an interaction between glyphosate and human skin (which is denied), such interaction is likely to be very limited and of negligible effect on humans;

(d) says that the matter of surfactants is a matter for expert evidence at trial; and

(e) otherwise denies the allegations contained in paragraph 25.

26. In answer to paragraph 26, it:

(a) refers to and repeats ~~paragraph 1 (in particular the fact that the group member definition is limited to persons diagnosed with NHL and does not extend to persons with cancer), and~~ paragraph 25 above and paragraph 35 below;

(b) otherwise denies the allegations contained in paragraph 26;

(c) says further and alternatively, that even if Roundup Products or the Monsanto Roundup Products are carcinogenic (which is denied), when used as intended they do not increase an individual's risk of developing, nor cause, NHL, having regard to:

(i) the matters referred to in paragraphs 28 and 35 below;

(ii) the fact that the causes of NHL are many and varied;

(iii) the many objective factors and matters personal to the Applicant or particular Group Members which impact upon whether NHL will develop; and

PARTICULARS

1. the Third Respondent relies upon matters including the matters referred to in the particulars to paragraph 35 below and says that further particulars may be provided following lay and expert evidence.

2. The types of objective factors include:

A. methods of application of the Monsanto Roundup Products;

B. the location where the glyphosate was sourced and quality of the product;

C. interactions between adjuvants and organic material within the environment;

D. water quality and quantity; and

E. metabolism and rates of excretion of glyphosate from the human body.

3. The types of matters personal to the Applicant include:

A. age;

B. personal medical history;

C. allergy de-sensitisation injections;

D. history of cancer;

E. family medical history (including history of cancer);

F. body weight;

G. diet;

H. alcohol consumption;

I. smoking;

J. weakened immune system (including from medications, human immunodeficiency virus (HIV), genetically inherited syndromes);

K. autoimmune diseases including rheumatoid arthritis, systemic lupus, erythematosus, Sjogren disease or celiac disease;

L. infections including infections that directly transform lymphocytes, including Epstein-Barr virus (EBV), human herpesvirus 8 or human T-cell lymphotropic virus; infections that weaken the immune system, HIV,

infections that cause chronic immune stimulation such as Helicobacter pylori, Chlamydophilia psittaci, hepatitis C or Campylobacter jejuni;

M. exposure to certain medications, including chemotherapy and rheumatoid arthritis medications;

N. radiation exposure;

O. gender;

P. race/ethnicity;

Q. exposure to chemicals including benzene;

R. exposure to outdoor pollution;

S. exposure to engine exhaust and diesel;

T. exposure to combustion of biomass fuels;

U. exposure to other herbicides, insecticides, fungicides and pesticides;

V. solar and ultraviolet radiation; and

W. occupational circumstances including shift work.

(d) says further that in the absence of allegations of material fact as to how Roundup Products, or the Monsanto Roundup Products, are said to increase an individual's risk of developing NHL, it is unable to plead further to paragraph 26.

E. INJURIES

27. In answer to paragraph 27, it:

(a) does not know and therefore cannot admit the allegations in paragraph 27; and

(b) says further that not all the Monsanto Roundup Products were registered in 1976 and/or were available for use from 1976.

28. In answer to paragraph 28, it:

(a) refers to and repeats paragraphs 23 to 26 above and paragraph 35 below;

(b) otherwise denies the allegations contained in paragraph 28; and

(c) says further that there are numerous reasons why the Applicant and NHL Group Members may have developed NHL other than by reason of use of, or exposure to, Roundup Products or the Monsanto Roundup Products including:

(i) genetic predisposition;

(ii) gene changes and DNA mutations caused by factors unrelated to Roundup Products or the Monsanto Roundup Products including:

A. abnormal cell division;

B. biological or internal factors such as age, gender, inherited genetic defects;

C. environmental exposure including through radiation and smoke;

D. occupational risk factors;

E. life-style related factors including obesity, lack of exercise, diet;

F. personal and family medical history including viruses, hormones, chronic inflammation; and

G. matters referred to in the particulars to paragraph 26 above;

(iii) interaction of gene mutations;

(iv) random chance;

(v) the aetiology of NHL; and

(vi) the number of sub-types of NHL.

F. DEFECTIVE GOODS/SAFETY DEFECT

29. It does not plead to paragraph 29 as it makes no allegations against it.

30. In answer to paragraph 30, ~~it says that in the absence of particulars of the specific products alleged to have been imported or caused to be imported into Australia for distribution, or specific products alleged to have been manufactured, distributed and marketed or promoted, and given the matters referred to in paragraphs 1(a) and 1(b) above, the allegation is vague and embarrassing. Under cover of that objection~~ it:

(a) refers to and repeats paragraphs 16 and 17 above; and

(b) otherwise denies the allegations in paragraph 30.

31. In answer to paragraph 31, it:

(a) refers to and repeats paragraphs ~~1(a),~~ 1(b), 16, 17(c)(ii)A, 17(e)(iii)B, and 30 above; and

(b) otherwise denies the allegations contained in paragraph 31.

32. In response to paragraph 32, it:

(a) says that it understands the intention of paragraph 32(a) of the 2FASOC to be a reference to "Monsanto Australia (Old)" and paragraph 32(b) of the 2FASOC to be a reference to "Monsanto Australia (New)" and hereafter pleads on that basis;

(b) refers to and repeats the matters in paragraphs 17(c)(ii), 17(e)(iii)B and 17(e)(iii)C above;

~~(c) says that the plea is vague and embarrassing as to what is meant by 'other distributors';~~

(c) says that the Second Respondent was not incorporated until 24 March 1987; and

(d) says further that the Second Respondent, or affiliates or related entities of the Second Respondent, appointed distributors of the Monsanto Roundup Products, being:

(i) from 1999 to 2020, Evergreen Garden Care Australia Pty Ltd (formerly known as Scotts Australia Pty Ltd) or its affiliates/related entities;

(ii) from 2002 to 2013, Nufarm Australia Limited; and

(iii) from 2013 to 2019, Sinochem International Crop Care (Overseas) Pte. Ltd;

through which various Monsanto Roundup Products were distributed via a network of re-sellers at various times after 1999.

(e) otherwise does not plead to paragraph 32 as the Applicant makes no allegations against it.

33. In answer to paragraph 33, it:

~~(a) says the plea is vague and embarrassing as to what is meant by 'the supply by the Australian Suppliers to the Intermediary Suppliers'; and~~

~~(b) under cover of that objection it:~~

(a) refers to and repeats paragraphs ~~1,~~ 15 to 17 and 30 to 32 above;

(b) otherwise does not plead to paragraph 33 as the Applicant makes no allegations against it.

34. In answer to paragraph 34, it:

(a) refers to and repeats paragraphs ~~1~~, 26 and 28 above and paragraph 35 below; and

(b) otherwise denies the allegations contained in paragraph 34.

35. In answer to paragraph 35, it:

(a) refers to and repeats paragraph~~s 1 and~~ 17;

(b) otherwise denies the allegations contained in paragraph 35;

(c) says further that:

(i) [NOT USED]

(ii) the respective class of persons to whom the Monsanto Roundup Products were directed would have expected that the Monsanto Roundup Products, being products intended to be used for lawn and garden, agricultural, commercial and/or industrial uses, would be used only for such purposes and would not be used for any other purpose;

(iii) the Monsanto Roundup Products were registered for use in Australia according to the following general registration process ~~generally described in paragraph 1 above,~~ and could be safely used according to prescribed label directions;

A. the Commonwealth and State and Territory governments have established legislative schemes, and the Commonwealth Government has established a regulatory approval process for the registration and sale of agricultural and veterinary chemical products, being the National Registration Scheme for Agricultural and Veterinary Chemicals (**National Registration Scheme**) that is now administered by the APVMA, an independent statutory authority;

(1) the National Registration Scheme is embodied in the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (**Agvet Code Act**), in delegated legislation and standards made under the Agvet Code Act and in other legislation and delegated legislation including the *Agricultural and Veterinary Chemicals Code Regulations 1995* (Cth) (**Agvet Code Regulations**), the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (Cth), the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth), the *Agricultural and Veterinary Chemicals Regulations 1999* (Cth), the *Agricultural and Veterinary Chemical Products (Collection of Levy) Regulations 1995* and the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995* (Cth);

(2) prior to the National Registration Scheme, each of the various states and territories regulated agricultural chemical products;

(3) under the Commonwealth legislative scheme:

i. agricultural chemical products are, and have been since 1995, included on the Register; and

ii. approved active constituents are included on a Record of Approved Active Constituents for Chemical Products (**Record**);

B. the Monsanto Roundup Products:

(1) were at various times included on the Register as a herbicide containing glyphosate; and

(2) had active constituents which were recorded in the Record.

(d) says further that having regard to all relevant circumstances including:

(i) the matters set out in s 75AC(2) of the TPA;

(ii) prevailing scientific knowledge identifying the absence of any reasoned basis to conclude that glyphosate is carcinogenic;

PARTICULARS

The scientific knowledge will be the subject of expert evidence at trial. The Third Respondent relies upon the matters including those detailed in **Schedule B.**

(iii) the fact that regulatory approval has been given for use of the Monsanto Roundup Products and glyphosate in Australia and elsewhere throughout the world;

PARTICULARS

Regulatory approvals given for use of the Monsanto Roundup Products within Australia and elsewhere throughout the world will be the subject of lay and expert evidence at trial. The Third Respondent relies upon regulatory approvals given for use of the Monsanto Roundup Products in Australia; registrations and approvals given by the United States Environmental Protection Agency (**US EPA**); and regulatory evaluations of the carcinogenicity of glyphosate, including those published by:

A. the APVMA;

B. the US EPA;

C. the European Food Safety Authority;

D. the European Chemicals Agency;

E. the Health Canada Pest Management Regulatory Agency; and

F. the Environmental Protection Authority of New Zealand.

(iv) the fact that the APVMA, in its 'Final regulatory position: Consideration of the evidence for a formal reconsideration of glyphosate (March 2017)' (**APVMA 2017 Regulatory Position**), concluded that 'the scientific weight-of-evidence indicates that:

exposure to glyphosate does not pose a carcinogenic or genotoxic risk to humans' and on that basis declined to formally re-consider glyphosate's registration in Australia;

(v) the fact that on 22 June 2020 the US District Court (Eastern District of California) in *National Association of Wheat Growers et al v Becerra, Attorney General of California* found that the statement that glyphosate is 'known to the state of California to cause cancer' is 'misleading' and 'the great weight of evidence indicates that glyphosate is not known to cause cancer';

PARTICULARS

The Third Respondent relies upon pages 4 to 7 and 18 to 21 of the decision in *National Association of Wheat Growers et al v Becerra, Attorney General of California* (ED Cal, No. 2:17-cv-2401 WBS EFB, 22 June 2020).

(vi) the fact that:

A. as part of the APVMA evaluation process of an agricultural chemical product, the APVMA receives input where required regarding human and environmental safety from several government agencies including the Australian Government Department of Health, the Australian Government Department of Agriculture, Water and Environment and Food Standards Australia New Zealand;

B. when an agricultural chemical product is approved for registration by the APVMA, the APVMA must also approve each active constituent for the product (before or at the same time as the agricultural chemical product) and the label text of containers for the product (at the same time as the agricultural chemical product) in accordance with s 14 of the *Agricultural and Veterinary Chemicals Code* (**Agvet Code**), as set out in the Schedule to the Agvet Code Act*;*

C. the approval of the label is subject to the conditions of approval or registration as set out in s 23 of the Agvet Code and the

conditions prescribed by the Agvet Code Regulations including the labelling standards and requirements set out in regulation 18E of the Agvet Code Regulations;

D. pursuant to sub-regulations 18F(1)(a) and (b) of the Agvet Code Regulations, a label must not contain misleading or deceptive information about either the information required by sub-regulation 18D(1) to be stated on the label; or the use, safety, environmental impact or efficacy of the chemical product to which the label relates;

E. further, pursuant to sub-regulation 18F(2), if the label is, or is required to be, attached to a container, information must not accompany or be placed on the container, including in the form of another label, if the information expressly or impliedly negates or varies information required by sub-regulation 18D(1) to be stated on the label; or qualifies or minimises the substance or effect of the information required by sub-regulation 18D(1) to be stated on the label;

F. further, pursuant to sub-regulation 18G(1) of the Agvet Code Regulations, the holder of the approval of the label in relation to the label must not make any claim, or cause or permit any claim to be made about a registered chemical product or a chemical product which contains a registered chemical product that is inconsistent with an instruction on the label for a container for the chemical product;

G. the APVMA 2017 Regulatory Position concluded that the weight of the scientific evidence indicated that exposure to glyphosate does not pose a carcinogenic or genotoxic risk to humans; and

H. in the premises, if labels for the Monsanto Roundup Products included information that glyphosate was carcinogenic this would be inaccurate or otherwise misleading and would not

meet prescribed Australian labelling requirements pursuant to regulations 18F and/or 18G of the Agvet Code Regulations*;*

(vii) the matters referred to in paragraph 26 above;

(viii) the fact that the risk of any substance causing NHL is dependent upon a wide range of factors including:

A. the chemical composition of the substance said to cause the NHL;

B. the dose;

C. the duration of exposure (including whether it is short or long-term exposure);

D. the route of exposure including environmental, intentional consumption or administration;

E. the concentration of the exposed substance having regard to absorption and distribution within the body;

F. the rate of excretion; and

G. individual susceptibility including the matters referred to in the particulars to paragraph 26(c)(ii) and 28 above; and

(ix) the availability of other herbicides and similar products to the Monsanto Roundup Products in the marketplace;

(x) the use of and/or exposure to glyphosate and glyphosate-based formulations within the Monsanto Roundup Products, when used in their intended application, did not, and do not, increase an individual's risk of developing NHL;

(e) by reason of the matters referred to in sub-paragraphs 35(c) and (d) above, pursuant to s 75AC(1) of the TPA the safety of the Monsanto Roundup Products was such as persons using such products in the manner intended were generally entitled to expect;

(f) says further that, in the premises referred to in sub-paragraphs 35(c) and (d) above the Monsanto Roundup Products did not have a defect within the

meaning of s 75AC of the TPA or a safety defect within the meaning of s 9 of the ACL;

(g) says further, pursuant to s 142(a) of the ACL, the safety defect which is alleged to have caused the loss or damage – the increased risk of developing NHL – did not exist at the time that the Monsanto Roundup Products were supplied by the actual manufacturer; and

(h) says further and alternatively, that even if the increased risk of NHL (which is denied) was a defect or alternatively a safety defect (which is denied), and compensable as such, then:

(i) pursuant to s 75AK(1)(c) of the TPA; and

(ii) alternatively, s 142(c) of the ACL,

the state of scientific knowledge at the time when the particular Monsanto Roundup Products were supplied by their actual manufacturer is not such as to enable that defect, alternatively safety defect, to be discovered. Accordingly, s 75AK(1)(c) provides a complete defence to the claim under s 74AD of the TPA and s 142 of the ACL affords a complete defence to the claim under s 138 of the ACL.

PARTICULARS

The scientific knowledge will be the subject of expert evidence at trial. The Third Respondent also relies upon the particulars provided under paragraph 35 and the matters detailed in **Schedule B**.

36. In answer to paragraph 36, it:

(a) refers to and repeats paragraphs 23 to 26 and 35 above;

(b) otherwise denies the allegations contained in paragraph 36;

(c) says that to the extent that the Applicant and/or Group Members have suffered loss and damage because NHL is a disease of unknown aetiology and the causes of the development of NHL are many and varied, loss and damage:

(i) cannot be causatively linked to the alleged fact of the Roundup Products or the Monsanto Roundup Products having a defect and or a safety defect as alleged in paragraph 35; and

(ii) depends upon a variety of objective factors as well as matters personal to the Applicant or particular Group Members including the matters referred to in the particulars subjoined to paragraph 26 above;

(d) says further that after the expiry of the last relevant commercial patent relating to glyphosate in Australia held by Monsanto Technology LLC in approximately 2000, to the extent that the Applicant and/or Group Members used glyphosate sourced from other suppliers, and consequently suffered loss and damage, such loss and damage did not arise by reason of the Monsanto Roundup Products having a safety defect; and

(e) says further, that if the Roundup Products or the Monsanto Roundup Products did have a defect as alleged (which is denied), then if the Applicant's and Group Members' injury and loss in the liability action was caused by reason of the Roundup Products having a defect and/or a safety defect, the amount of the Applicant's and/or Group Members' loss and damage is to be reduced to such extent as the court thinks fit, having regard to the Applicant's and/or Group Members' share in causing the loss pursuant to s 75AN of the TPA.

37. In answer to paragraph 37, it:

(a) admits that pursuant to s 146 of the ACL and s 75AI of the TPA, it is not liable in respect of loss and damage comprising an amount which has been or could have been recovered under a law of the Commonwealth, a State or a Territory that relates to workers' compensation;

(b) otherwise denies the allegations contained in paragraph 37;

(c) says further that the Applicant has no entitlement to commence a defective goods action insofar as:

(i) pursuant to s 143(1) of the ACL, at the date of commencement of this proceeding, more than 3 years had elapsed since the Applicant became aware, or ought reasonably to have become aware, of all of the following:

A. the alleged loss or damage;

B. the safety defect of the goods; and

C. the identity of the person who manufactured the goods; and

(ii) more than 10 years had elapsed between the supply by the manufacturer of the goods to which the action relates and the date of commencement of this proceeding;

(d) alternatively, if the Applicant and Group Members are entitled to commence a defective goods action and the manufacturer of goods is liable to compensate the Applicant or the Group Members pursuant to s 138(1) of the ACL, then pursuant to s 138(2) of the ACL, the amount of compensation which the Applicant and/or Group Members may recover is limited to the amount of the loss or damage suffered by the individual and does not include an amount for personal injury damages;

(e) further and alternatively, if the amount of compensation which the Applicant and/or Group Members may recover pursuant to s 138(2) of the ACL includes an amount in respect of personal injury damages, then to the extent that the Applicant and Group Members seek an award of personal injury damages which does not result from smoking or other use of tobacco products, by virtue of s 87E of the CCA, Part VIB of the CCA applies to the Applicant's and Group Members' claims brought under Part 3-5 of the ACL;

(f) further and alternatively, insofar as Part VIB applies pursuant to s 87F of the CCA:

(i) where the Applicant and Group Members' alleged injuries, to which the personal injury damages relate, were discoverable more than 3 years before commencement of this proceeding; or

(ii) after the end of the long-stop period for that death or injury (which pursuant to s 87H is the period of 12 years following the act or omission alleged to have caused the death or injury),

the court must not award personal injury damages to the Applicant and/or Group Members;

(g) further and alternatively, if an award of damages may be made, any award of damages is subject to the bars and limitations in respect of personal injury damages set out in Part VIB of the CCA including:

(i) for non-economic loss, set out in s 87L to s 87T of the CCA;

(ii) for loss of earning capacity, set out in s 87U and s 87V of the CCA;

(iii) for loss of gratuitous attendant care services, set out in ss 87W and 87X of the CCA;

(iv) for future economic loss, set out in s 87Y of the CCA;

(v) for loss of superannuation entitlements, set out in s 87Z of the CCA;

(vi) for interest on awards of damages, set out in s 87ZA of the CCA; and

(vii) should be reduced pursuant to s 146 of the ACL and s 75AI of the TPA, in respect of loss and damage comprising an amount which has been or could have been recovered under a law of the Commonwealth, a State or a Territory that relates to workers' compensation; and

(h) further, where the Applicant brings the defective goods action on behalf of an individual who has died because of alleged injuries, then pursuant to s 138(3) of the ACL, a law of a State or a Territory about liability in respect of the death of individuals applies as if:

(i) the action was an action under the law of the State or Territory for damages in respect of the injuries; and

(ii) the safety defect was the manufacturer's wrongful act, neglect or default.

38. In answer to paragraph 38, it:

(a) denies the allegations contained in paragraph 38;

(b) says that:

(i) any award of damages is subject to s 75AD of the TPA save that s 75AD does not apply to a loss in respect of which an amount has been, or could be, recovered under workers' compensation law pursuant to s 75AI of the TPA;

(ii) insofar as this liability action (as defined in s 75AA of the TPA as an action having been commenced under s 75AD of the TPA) was not commenced within 3 years after the time the Applicant became aware, or ought reasonably to have become aware, of the alleged loss, the defect and the identity of the person who manufactured the action

goods; or within 10 years of the supply by the manufacturer of the action goods, the Applicant has no entitlement to commence this action pursuant to s 75AO of the TPA; and

(iii) in the premises referred to in the preceding paragraphs, the Applicant's claim is, and/or the Group Members' claims may be, statute barred;

(c) further and alternatively, if the Applicant and/or Group Members are entitled to commence this action, and are seeking an award of personal injury damages which does not result from smoking or other use of tobacco products, by virtue of s 87E of the TPA, Part VIB of the TPA applies to the Applicant's and Group Members' claims;

(d) insofar as:

(i) pursuant to s 87F(1)(a) of the TPA, a period of more than 3 years has elapsed after the date of discoverability for the Applicant's injury to which the personal injury damages relates; and

(ii) pursuant to s 87F(1)(b) of the TPA, the proceeding was commenced after the end of the long-stop period for the Applicant's injury,

the court must not award personal injury damages to the Applicant;

(e) further, to the extent that any of the Applicant's claims under the TPA relate to a contravention alleged to have occurred before 13 July 2004, the limitation period may not be extended; and

(f) further and alternatively, if an award of damages may be made, any award of damages is subject to the bars and limitations in respect of personal injury damages:

(i) for non-economic loss, set out in s 87L to s 87T of the TPA;

(ii) for loss of earning capacity, set out in s 87U and s 87V of the TPA;

(iii) for loss of gratuitous attendant care services, set out in ss 87W and 87X of the TPA;

(iv) for future economic loss, set out in s 87Y of the TPA;

(v) for loss of superannuation entitlements, set out in s 87Z of the TPA; and

(vi) for interest on awards of damages, set out in s 87ZA of the TPA.

G ACCEPTABLE QUALITY

39. It does not plead to paragraph 39 as it makes no allegations against it.

40. It does not know and therefore cannot admit the allegations in paragraph 40.

41. It denies the allegations contained in paragraph 41.

42. It does not know and therefore cannot admit the allegations in paragraph 42.

43. It does not know and therefore cannot admit the allegations contained in paragraph 43.

44. It does not know and therefore cannot admit the allegations contained in paragraph 44.

45. In answer to paragraph 45, it:

(a) refers to and repeats the matters pleaded in paragraphs 1 and 31 above; and

(b) otherwise denies the allegations contained in paragraph 45.

46. In answer to paragraph 46, it:

(a) says that it understands the intention of paragraph 46(a) of the 2FASOC to be a reference to 'Monsanto Australia (Old)' and paragraph 46(b) of the 2FASOC to be a reference to 'Monsanto Australia (New)' and hereafter pleads on that basis;

(b) says that the Second Respondent was not incorporated until 24 March 1987;

(c) refers to and repeats paragraphs 1, 15 to 17 and 32 above;

(d) otherwise does not plead to this paragraph as it contains no allegations against it..

47. In answer to paragraph 47, it:

(a) denies the allegations contained in paragraph 47 of the 2FASOC;

(b) says further that it refers to and repeats the matters set out above in paragraphs ~~1,~~ 26, 28 and 35; and

(c) says further that:

(i) the defects alleged to have rendered the goods unacceptable did not exist at the time of delivery as the ~~Roundup Cancer Risks~~ risk described in paragraph 26 of the 2FASOC (if it ~~they~~ existed, which is denied), ~~by definition in paragraph 26 of the ASOC~~, required action to be taken by the Applicant in the form of use and/or exposure by the Applicants and/or Group Members to the Roundup Products after delivery; and

(ii) alternatively, if the defects existed at the time of delivery, the goods were as fit for the purpose that goods of that type are commonly supplied.

48. In answer to paragraph 48, it:

(a) denies the allegations in paragraph 48;

(b) says further that it refers to and repeats the matters set out above in paragraphs ~~1,~~ 26, 28 and 35;

(c) says further, and in the alternative, if Monsanto Roundup Products were supplied by Monsanto Company US for resupply (which is denied), that pursuant to s 74D(3) of the TPA the Monsanto Roundup Products were of merchantable quality because they were as fit for the purpose or purposes for which goods of that kind are commonly bought as it was reasonable to expect having regard to:

(i) the description applied to the Monsanto Roundup Products by it;

PARTICULARS

The descriptions applied to the Monsanto Roundup Products are contained on the product label, in safety data sheets and in product summaries on the APVMA website.

(ii) the price received by it for the goods; and

(iii) all the other relevant circumstances including:

A. the state of scientific knowledge;

PARTICULARS

The scientific knowledge will be the subject of expert evidence at trial. It also relies upon the particulars provided under paragraph 35 and the matters detailed in **Schedule B**.

B. the manner in which the Monsanto Roundup Products have been marketed;

C. instructions for, or warnings with respect to, the Monsanto Roundup Products;

D. the ordinary or usual risk of harm in other herbicides and similar products to the Monsanto Roundup Products in the marketplace; and

E. the sophistication of the customers purchasing the Monsanto Roundup Products;

(d) says further and in the alternative, if Monsanto Roundup Products were supplied by Monsanto Company US for resupply (which is denied), and were not of merchantable quality (which is denied), this occurred after the Monsanto Roundup Products left the control of the Second and Third Respondent and occurred by reason of:

(i) the manner of use of, or exposure to, the Monsanto Roundup Products by the Applicant and/or Group Members and/or another person, or an act or default of the Applicant and/or Group Members or another person not being it or a servant or agent of it; and/or

(ii) a cause independent of human control,

and accordingly, by reason of s 74D(2) of the TPA, the Third Respondent is not liable to compensate the Applicant and or the Group Members for loss and damage pursuant to s 74D(1) of the TPA;

(e) says further and in the alternative, if Monsanto Roundup Products were supplied by Monsanto Company US for resupply (which is denied), that the Monsanto Roundup Products were:

(i) fit for all purposes for which goods of that kind are commonly supplied;

(ii) acceptable in appearance;

(iii) free from defect;

(iv) safe and durable,

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods) would have regarded as acceptable having regard to the matters in s 54(3) of the ACL;

(f) says further and in the alternative, if Monsanto Roundup Products were supplied by Monsanto Company US for resupply (which is denied), that, in the premises, pursuant to s 54(2) of the ACL, the Monsanto Roundup Products were of acceptable quality having regard to a variety of matters including:

(i) the matters set out in s 54(3) of the ACL which include:

A. the nature of the goods;

B. the price of the goods (if relevant);

C. any statements made about the goods on any packaging or label on the goods;

D. any representation made about the goods by the supplier or manufacturer of the goods; and

E. any other relevant circumstances relating to the supply of the goods including the state of scientific knowledge; and

PARTICULARS

The scientific knowledge will be the subject of expert evidence at trial. It also relies upon the particulars provided under paragraph 35 and the matters detailed in **Schedule B**.

(ii) the matters set out in paragraph 48(c) above; and

(g) says further and alternatively, if the Monsanto Roundup Products were not of acceptable quality (which is denied), they did not become of unacceptable quality as a result of anything inherent in the Monsanto Roundup Products and accordingly, pursuant to s 54(6) of the ACL, the Monsanto Roundup Products did not fail to be of acceptable quality.

49. In answer to paragraph 49, it:

(a) refers to and repeats paragraphs 26, 35, 47 and 48 above;

(b) otherwise denies the allegations contained in paragraph 49; and

(c) says further that:

(i) if the Applicant and/or Group Members suffered loss and damage, it did not occur by reason of the Roundup Products or Monsanto Roundup Products not being of merchantable quality; and

(ii) says further that after the expiry of the last relevant commercial patent relating to glyphosate in Australia held by Monsanto Technology LLC in approximately 2000, to the extent that the Applicant and/or Group Members used glyphosate sourced from other suppliers, and consequently suffered loss and damage, such loss and damage did not arise by reason of the Monsanto Roundup Products having a safety defect.

50. In answer to paragraph 50, it:

(a) refers to and repeats paragraphs 47 to 49 above;

(b) otherwise denies the allegations contained in paragraph 50; and

(c) says further that:

(i) pursuant to s 74J(1) of the TPA, any action by the Applicant and/or Group Members was required to be commenced within 3 years after the day on which the cause of the action accrued;

(ii) pursuant to s 74J(2) of the TPA, a cause of action is deemed to have accrued on the day the consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer first became aware, or ought reasonably to have become aware that the goods were not of merchantable quality;

(iii) pursuant to s 74J(3) of the TPA, it is a defence to an action brought under s 74D, being a provision within Division 2A of the TPA, that an action was not commenced within 10 years after the time of first supply to a consumer of the goods to which the action relates;

(iv) the Applicant's claim was not commenced within the time period required pursuant to ss 74J(1) and 74J(2) of the TPA and is statute barred; and

(v) insofar as the date this proceeding was commenced, Group Members had not commenced claims within the timeframes referred to in the preceding paragraphs, they will be statute barred notwithstanding s 33ZE(1) of the FCAA;

(d) says further that insofar as the Applicant and Group Members are entitled to commence this action, and are seeking an award of personal injury damages which does not result from smoking or other use of tobacco products, by virtue of s 87E of the TPA, Part VIB of the TPA applies to the Applicant's and Group Members' claims and the court must not award personal injury damages to the Applicant and Group Members where Part VIB applies if:

(i) pursuant to s 87F(1)(a) of the TPA, a period of more than 3 years has elapsed after the date of discoverability for the Applicant's injury to which the personal injury damages relates; and

(ii) alternatively, pursuant to s 87F(1)(b) of the TPA, the proceeding was commenced after the end of the long-stop period for the Applicant's injury and s 87F(1A) does not apply;

(e) says further that, to the extent that any of the claims under the TPA relate to a contravention alleged to have occurred before 13 July 2004 the limitation period may not be extended; and

(f) says further and alternatively, if an award of damages may be made, any awards of damages are subject to the bars and limitations in respect of personal injury damages:

(i) for non-economic loss, set out in s 87L to s 87T of the TPA;

(ii) for loss of earning capacity, set out in s 87U and s 87V of the TPA;

(iii) for loss of gratuitous attendant care services, set out in ss 87W and 87X of the TPA;

(iv) for future economic loss, set out in s 87Y of the TPA;

(v) for loss of superannuation entitlements, set out in s 87Z of the TPA; and

(vi) for interest on awards of damages, set out in s 87ZA of the TPA.

51. In answer to paragraph 51, it:

(a) refers to and repeats paragraphs 47 to 49 above;

(b) says that the guarantee under s 54 of the ACL was complied with;

(c) otherwise denies the allegations contained in paragraph 51 of the 2FASOC; and

(d) says further and alternatively:

(i) if the guarantee under s 54 of the ACL was not complied with (which is denied), then pursuant to s 273 of the ACL, the Applicant and/or Group Members may not commence an action for damages under this Division where more than 3 years has elapsed after the day on which they first became aware, or ought reasonably to have become aware, that the guarantee to which the action relates had not been complied with;

(ii) if the guarantee was not complied with and the Applicant's and/or Group Members' claims are not statute barred by reason of s 273 of the ACL, then pursuant to s 271(2) of the ACL, the Applicant and/or Group Members may not recover damages from it because the guarantee in s 54(1) of the ACL was not complied with only because of a cause independent of human control, namely the development of NHL, that occurred after the goods left the control of the manufacturer;

A. the Applicant and Group Members, to the extent that they are affected persons, may only recover damages from the manufacturer in accordance with s 271 of the ACL;

B. the damages recoverable under s 271 of the ACL are limited in accordance with s 272 of the ACL; and

C. sections 271 and 272 of the ACL do not entitle the Applicant to recover personal injury damages; and

(iii) if the Applicant and/or Group Members are not precluded under ss 271 to 273 of the ACL from recovering personal injury damages, the Applicant and Group Members are nevertheless not entitled to be compensated for any loss and damage suffered by them because of the failure to comply with the guarantee to which the action relates, because it was not reasonably foreseeable that the Applicant and/or Group Members, assuming them to be affected persons, would suffer NHL as a result of such a failure;

(e) says further that any claim in respect of such personal injury damages, pursuant to s 87E of the CCA, is subject to Part VIB of the CCA which applies to proceedings taken under the ACL that relate to Division 2 of Part 5-4 of the ACL;

(f) says that insofar as:

(i) pursuant to s 87F(1)(a) of the CCA, a period of more than 3 years has elapsed after the date of discoverability for the Applicant's injury to which the personal injury damages relates; and

(ii) pursuant to s 87F(1)(b) of the CCA, the proceeding was commenced after the end of the long-stop period for the Applicant's injury,

the court must not award personal injury damages to the Applicant; and

(g) says further and alternatively, if an award of personal injury damages may be made, any award is subject to the bars and limitations in respect of personal injury damages:

(i) for non-economic loss, set out in s 87L to s 87T of the CCA;

(ii) for loss of earning capacity, set out in s 87U and s 87V of the CCA;

(iii) for loss of gratuitous attendant care services, set out in ss 87W and 87X of the CCA;

(iv) for future economic loss, set out in s 87Y of the CCA;

(v) for loss of superannuation entitlements, set out in s 87Z of the CCA; and

(vi) for interest on awards of damages, set out in s 87ZA of the CCA.

NEGLIGENCE

52. In answer to paragraph 52, it

(a) refers to and repeats paragraph 17 above;

(b) says it was reasonable to expect that if a person(s), such as the Applicant and Group Members, used any herbicide product, including the Monsanto Roundup Products, that such person would,:

(i) prior to use of that product, review all information, including warnings, and appreciate for themselves a variety of pertinent matters including that:

A. given the intended application of the product, the product would not be expected to be free from all risk even if used in the manner expected;

B. the product should not be swallowed, or inhaled, and steps should be taken to protect against being absorbed through the skin, eyes or mouth; and

C. there was a need to follow all safety directions including requirements to use personal protective equipment and to ensure that the application equipment is not faulty and used correctly;

(ii) prior to use of any of the products in an employment context, be informed by their respective employer(s) about the content of all information, including warnings, and appreciate for themselves a variety of pertinent matters including that:

A. subject to legislation, products supplied had signal words if required by the Poisons Standard;

B. the products should not be swallowed, or inhaled, and steps should be taken to protect against being absorbed through the skin, eyes or mouth; and

C. there was a need to follow all safety directions including requirements to use personal protective equipment and to ensure

that the application equipment is not faulty and used correctly; and

(iii) use and apply the product only to plants in lawn and garden, agricultural, commercial and/or industrial uses; and

(c) says that as a consequence of the matters pleaded in paragraphs 52(a) and (b), it:

(i) denies that it owes the Applicant and/or Group Members a duty of care;

(ii) alternatively, says that it satisfied the applicable standard of care; and

(iii) otherwise denies the allegations contained in paragraph 52 of the 2FASOC.

53. In answer to paragraph 53, it:

(a) denies the allegations contained in paragraph 53; and

(b) refers to and repeats the matters in paragraphs 26 and 35 above.

54. In answer to paragraph 54, it:

(a) denies the allegations contained in paragraph 54; and

(b) refers to and repeats paragraphs 26 and 35 above.

55. In answer to paragraph 55, it:

(a) refers to and repeats paragraphs 17, 24, 35 and 52 above;

(b) otherwise denies the allegations contained in paragraph 55;

(c) says further and alternatively, that if it is established that the Third Respondent owed the Applicant and group members a duty of care, then having regard to the existence of factors including those set out in paragraphs 26, 28 and 35 above as well as:

(i) the steps taken by Monsanto Australia (Old) and Monsanto Australia (New) to provide information, including warnings and labels in relation to the Monsanto Roundup Products;

PARTICULARS

The warnings and safety directions are contained in the labels provided with the product and in the safety data sheets available on the manufacturer's website and on sellers' websites.

(ii) the fact that:

A. prior to use of any Monsanto Roundup Products, the Applicant and Group Members ought reasonably to have reviewed all information, including warnings, and appreciated for themselves a variety of pertinent matters including that:

(1) given the intended application for the Monsanto Roundup Products, the Monsanto Roundup Products would not be expected to be free from all risk even if used in the manner expected;

(2) the Monsanto Roundup Products should not be swallowed, or inhaled, and steps should be taken to protect against being absorbed through the skin, eyes or mouth;

(3) there was a need to follow all safety directions including requirements to use personal protective equipment and to ensure that the application equipment is not faulty and used correctly; and

(4) save as excepted by any relevant legislation (if any), Monsanto Roundup Products must be used in a manner consistent with all directions for use.

B. prior to use of any of the Monsanto Roundup Products in an employment context, the Applicant and/or Group Members would be informed by their respective employer(s), about the content of all information, including warnings, and appreciate for themselves a variety of pertinent matters including that:

(1) subject to legislation, Monsanto Roundup Products supplied had signal words if required by the Poisons Standard;

(2) given the intended application for the Monsanto Roundup Products, the Monsanto Roundup Products would not be expected to be free from all risk even if used in the manner expected;

(3) the Monsanto Roundup Products should not be swallowed, or inhaled, and steps should be taken to protect against being absorbed through the skin, eyes or mouth;

(4) there was a need to follow all safety directions including requirements to use personal protective equipment and to ensure that the application equipment was not faulty and used correctly; and

(5) save as excepted by any relevant legislation (if any), Monsanto Roundup Products must be used in a manner consistent with all directions for use; and

C. the Monsanto Roundup Products would be used and applied only to plants in agricultural, commercial, industrial and/or lawn and garden uses;

(iii) the inability of it to control the acts and/or omissions of the Applicant and/or the Group Members in their use of, and exposure to, the Monsanto Roundup Products;

(iv) that it had no control over the source of risk of harm of NHL developing;

(v) the existence of factors beyond the control of the Third Respondent which have a critical bearing on the risk and process of development of NHL; and

(vi) the fact that from at least 15 March 1995 (when the Agvet Code Act commenced) the matters about which information and warnings could

be provided on labels affixed to Monsanto Roundup Products were prescribed by the Agvet Code Act and the Agvet Code Regulations,

no duty of care of the type alleged was owed; and

(d) otherwise denies the allegations in paragraph 55.

STANDARD OF CARE

56. It denies the allegations in paragraph 56.

57. In answer to paragraph 57, it:

(a) refers to and repeats paragraphs 26, 28 and 35 above; and

(b) otherwise denies the allegations in paragraph 57.

58. It denies the allegations in paragraph 58 of the 2FASOC.

59. In answer to paragraph 59, it:

(a) refers to and repeats paragraph 35 above; and

(b) otherwise denies the allegations in paragraph 59.

BREACH OF DUTY

60. In answer to paragraph 60, it:

(a) refers to and repeats paragraph 17 above; and

(b) otherwise denies the allegations in paragraph 60 of the 2FASOC.

61. In answer to paragraph 61, it:

(a) refers to and repeats paragraph 35 above;

(b) denies the allegations in paragraph 61; and

(c) says that if the Monsanto Roundup Products are found to present the risk pleaded in paragraph 26 ~~have had the Roundup Cancer Risks~~ (which is denied), the state of scientific knowledge was not such as to enable it to discover the ~~Roundup Cancer Risks~~ that risk and accordingly it did not breach any duty of care owed at common law; and

PARTICULARS

The scientific knowledge will be the subject of expert evidence at trial. The Third Respondent also relies upon the particulars provided under paragraph 35 above and the matters detailed in **Schedule B**.

~~(c) otherwise denies the allegations in paragraph 61.~~

CAUSATION

62. In answer to paragraph 62 it:

(a) refers to and repeats paragraphs 28(c) and 35(c) above; and

(b) otherwise denies the allegations contained in paragraph 62.

63. It denies the allegations in paragraph 63 ~~of the ASOC~~ and ~~.~~

~~64. It~~ says further that after the expiry of the last relevant commercial patent relating to glyphosate in Australia held by Monsanto Technology LLC in approximately 2000, to the extent that the Applicant and/or Group Members used glyphosate sourced from other suppliers, and consequently suffered loss and damage, such loss and damage did not arise by reason of the Monsanto Roundup Products having a safety defect.

LOSS AND DAMAGE

64. In answer to paragraph 64, it:

(a) denies the allegations contained in paragraph 64;

(b) says further that to the extent that the Applicant's alleged cause of action in negligence accrued in NSW:

(i) insofar as:

A. pursuant to s 51 of the *Limitation of Actions Act 1969* (NSW) the Applicant's claim is brought after the expiration of a limitation period of 30 years running from the date from which the limitation period for the cause of action runs;

B. alternatively, pursuant to s 50C of *Limitation of Actions Act 1969* (NSW), more than 12 years has elapsed from the date of the act or omission which allegedly resulted in the injury (the 'long-stop limitation period'),

the Applicant's cause of action cannot be maintained unless the Court extends the long-stop limitation period pursuant to ss 62A and 62B of the *Limitation of Actions Act 1969* (NSW); and

(ii) further and alternatively, if these proceedings were commenced more than 3 years after the date of discoverability (as defined in s 50C of *Limitation of Actions Act 1969* (NSW)), these proceedings cannot be maintained unless the Court extends time in accordance with s 60G of the *Limitation of Actions Act 1969* (NSW);

(c) says further that, to the extent that the alleged cause of action accrued in Queensland, if more than 3 years has elapsed since the date on which the cause of action arose these proceedings cannot be maintained, pursuant to s 11 of the *Limitation of Actions Act 1974* (Qld);

(d) says further that, to the extent that the alleged cause of action accrued in the Northern Territory, if more than 3 years has elapsed since the date on which the cause of action arose these proceedings cannot be maintained pursuant to s 12(1)(b) of the *Limitation Act 1981* (NT), unless the Court extends time pursuant to s 44(1) of the *Limitation Act 1981* (NT);

(e) says further and alternatively, that the common law does not relevantly operate to impose obligations that are more onerous or extensive than those imposed on it by ss 74D, 75AC and 75AD of the TPA and ss 9, 54, 138, 271 and 272 of the ACL;

(f) says further, that the Applicant's common law cause of action and claims for damages and compensation must be determined in accordance with the *Civil Liability Act 2002* (NSW), alternatively the *Civil Liability Act 2003* (Qld), further and alternatively the *Personal Injuries (Liability and Damages) Act 2003* (NT), (or such other applicable Acts as may apply depending on where the Applicant's causes of action accrued) as well as Part VIB of the TPA and Part VIB of the CCA; and

(g) says further and alternatively, that if it was negligent (which is denied) and to the extent that the Applicant is entitled to an award of damages, such award of damages is required to be reduced by such sum as is just and equitable having regard to the Applicant's contribution to the loss and damage suffered.

COMMON QUESTIONS OF LAW OR FACT

65. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 65 as it makes no allegations against it.

66. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 66 as it makes no allegations against it.

66A Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 66A as it makes no allegations against it.

66B Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 66B as it makes no allegations against it.

67. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 67 as it makes no allegations against it.

68. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 68 as it makes no allegations against it.

69. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 69 as it makes no allegations against it.

70. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 70 as it makes no allegations against it.

71. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 71 as it makes no allegations against it.

GROUP MEMBER CLAIMS

72. Further, it states that the Group Members' causes of action, including claims for damages brought by the executors or administrators of the estates of deceased persons, will be subject to, and it relies upon, the limitation periods prescribed by state and territory legislation including:

(a) *Limitation of Actions Act 1969* (NSW);

(b) *Limitation of Actions Act 1974* (Qld);

(c) *Limitation of Actions Act 1958* (Vic);

(d) *Limitation Act 2005* (WA);

(e) *Limitation Act 1935* (WA);

(f) *Limitation Act 1985* (ACT);

(g) *Limitation Act 1974* (TAS);

(h) *Limitation of Actions Act 1936* (SA);

(i) *Limitation Act 1981* (NT);

(j) *Fatal Accidents Act 1959* (WA);

(k) TPA including ss 74J, 75AO, 87F, 87G and 87H;

(l) CCA including ss 87F, 87G and 87H and s 143 and s 273 of the ACL.

73. Further, the Group Members' causes of action and claims for damages and compensation, including claims for damages brought by the executors or administrators of the estates of deceased persons, must be determined in accordance with the applicable laws of a state or territory:

(a) *Civil Liability Act 2002* (NSW);

(b) section 2(2) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW);

(c) *Civil Liability Act 2003* (Qld);

(d) section 66(2)(d) of the *Succession Act 1981* (Qld);

(e) *Wrongs Act 1958* (Vic);

(f) section 29(2)(c) of the *Administration* and Probate Act 1958 (Vic);

(g) *Civil Liability Act 2002* (WA);

(h) section 4(2)(c) of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA);

(i) *Civil Law (Wrongs) Act 2002* (ACT);

(j) *Civil Liability Act 2002* (Tas);

(k) section 27(3)(c) of the *Administration and Probate Act 1935* (Tas);

(l) *Civil Liability Act 1936* (SA);

(m) section 3(1)(d) of the *Survival of Causes of Action Act 1940* (SA);

(n) *Personal Injuries (Liability and Damages) Act 2003* (NT);

(o) section 6(1)(c) of the *Law Reform (Miscellaneous Provision) Act 1956* (NT);

(p) Part VIB of the TPA and Part VIB of the CCA.

Date: ~~28 August~~27 October 2020

Herbert Smith Freehills

Solicitors for the Third Respondent

This pleading was prepared by Steven Finch SC, Robert Craig SC and Anna Robertson, counsel for the Third Respondent.

Certificate of lawyer

I ~~Peter Butler~~ Jason Betts certify to the Court that, in relation to the defence filed on behalf of the Third Respondent, the factual and legal material available to me at present provides a proper basis for:

(a) each allegation in the pleading; and

(b) each denial in the pleading; and

(c) each non admission in the pleading.

Date: ~~28 August~~27 October 2020

Herbert Smith Freehills

Solicitors for the Third Respondent

Federal Court of Australia No. VID 243 of 2020

District Registry: Victoria

Division: General

KELVIN MCNICKLE

Applicant

HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD & ORS

Respondents

Schedule A to the Defence of the Third Respondent

Product name	Registration date
Concentrate Advance Roundup Weedkiller	2000-08-11
Concentrate Roundup Path Weedkiller	2014-07-17
Concentrate Roundup Powermax Weedkiller	2003-05-22
Concentrate Roundup Weedkiller	2003-05-27
Concentrate Tough Roundup Weedkiller	2012-11-28
Fast Action Roundup G Ready to Use Weedkiller	2017-12-19
Fast Action Roundup Ready to Use Weedkiller	2008-11-27
Pacer Herbicide By Monsanto	NSW, WA (date unknown) QLD (no application - date unknown) SA, VIC (archived - date unknown) NT, ACT, TAS (not included in APVMA list of states)
Pacer Sol-Tech Herbicide By Monsanto	NSW, QLD, SA, TAS, VIC, WA (date unknown) NT and ACT (not included in APVMA list of states)
Regular Roundup G7.2 Ready to Use Weedkiller	2017-12-20
Regular Roundup Ready to Use Weedkiller	2013-08-07
Roundup AP Weedkiller	2018-08-13
Roundup Biactive Herbicide	1996-05-29
Roundup Complete Herbicide	2014-08-15

Roundup CT Broadacre Herbicide by Monsanto	1990-09-28 ACT NSW, SA, TAS, VIC and WA (date unknown) 1988-01-06 NT 1988-06-30 QLD 1985-01-17 SA 1995-04-13 APVMA All States & Territories
Roundup CT Xtra Broadacre Herbicide By Monsanto	1997-11-24
Roundup Dry Herbicide by Monsanto	1996-05-16
Roundup Dura Herbicide	2014-03-31
Roundup Herbicide	1995-11-11 APVMA 1976-11-11 SA 1988-01-05 NT 1988-06-30 QLD 1990-09-28 ACT 1994-07-29 VIC NSW, TAS and WA (date unknown)[1]
Roundup M Concentrate Weedkiller	2018-10-08
Roundup Max Herbicide by Monsanto	2001-01-08
Roundup Power Max Herbicide by Monsanto	2003-01-10
Roundup Ready Herbicide With Plantshield	2001-08-13
Roundup Ready PL Herbicide	2016-10-28
Roundup Ready to Use Weedkiller	2007-07-11
Roundup Ready to Use Weedkiller Gel	2013-03-26
Roundup Spot Weed Killer Sure Shot Foam	1998-09-25
Roundup Ultra Max Herbicide	2013-05-08
Squadron Herbicide By Monsanto	1997-02-26 NSW, QLD, SA, TAS, WA NT, VIC (date unknown) ACT (not included in APVMA list of states)
Tillmaster CT Herbicide By Monsanto	1990-04-06 SA ACT, NSW, QLD, TAS, VIC,WA (date unknown) NT (not included in APVMA list of states)
Tillmaster Herbicide By Monsanto	1986-04-14 SA QLD (date unknown) VIC (date unknown)

	ACT, NT, NSW, TAS, WA (not included in APVMA list of states)
Tough Roundup Ready to Use Weedkiller	2013-04-02

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KELVIN MCNICKLE

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Respondents

Schedule B to the Defence of the Third Respondent

1.	Australian Pesticides and Veterinary Medicines Authority – Final regulatory position: Consideration of the evidence for a formal reconsideration of glyphosate (March 2017)
2.	United States Environment Protection Agency (**US EPA**) – Evaluation of the Carcinogenic Potential of Glyphosate (Final Report) (1 October 2015)
3.	US EPA – Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential (12 December 2017)
4.	US EPA – Letter from the EPA to registrants regarding label requirements for glyphosate products (7 August 2019)
5.	US EPA – Glyphosate Interim Registration Review Decision Case Number 0178 Glyphosate (22 January 2020)
6.	Health Canada – Re-evaluation decision Glyphosate (28 April 2017)
7.	New Zealand Environmental Protection Agency – Review of the Evidence Relating to Glyphosate and Carcinogenicity (August 2016)
8.	US District Court (Eastern District of California) decision in *National Association of Wheat Growers et al v Becerra, Attorney General of California* (ED Cal, No. 2:17-cv-2401 WBS EFB, 22 June 2020)
9.	Andreotti et al. (2018). Glyphosate Use and Cancer Incidence in the Agricultural Health Study, *Journal of the National Cancer Institute*
10.	US EPA – Glyphosate: Epidemiology Review of Zhang et al. (2019) and Leon et al. (2019) publications for Response to Comments on the Proposed Interim Decision (6 January 2020)
11.	Hohenadel et al. (2011). Exposure to Multiple Pesticides and Risk of Non-Hodgkin Lymphoma in Men from Six Canadian Provinces, *International Journal of Environmental Research and Public Health*
12.	Orsi et al. (2009). Occupational exposure to pesticides and lymphoid neoplasms among men: results of a French case-control study, *Journal of Occupational and Environmental Medicine*
13.	Kier (2015) Review of Genotoxicity Biomonitoring Studies of Glyphosate-Based

Formulations, *Critical Reviews in Toxicology*

14. Oltmanns et al. (2016). Effectiveness of personal protective equipment against dermal exposure – a comparative study

15. Solomon (2016). Glyphosate in the General Population and In Applicators: A Critical Review of Studies on Exposures.

16. Tomasetti et al. (2017). Stem cell divisions, somatic mutations, cancer etiology, and cancer prevention, *Science* 355, 1330–1334 (2017)

17. Word et al. (2012). Advances in the Diagnosis and Management of Lymphoma. *Blood and Lymphatic Cancer: Targets and Therapy* 2012:2 29–55