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Details of Filing

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



Dated: 16/06/2020 4:29:19 PM AEST

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

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Amended Statement of claim

Amended on 16 June 2020 and filed pursuant to an order made on 9 June 2020

No. VID 243 of 2020

Federal Court of Australia
District Registry: Victoria
Division: General

KELVIN MCNICKLE

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

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A. THE APPLICANT AND GROUP MEMBERS

Group Members

1. The Applicant brings this proceeding as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on his own behalf and on behalf of all persons who:
 - (a) have been diagnosed with non-Hodgkin Lymphoma (**NHL**) by reason of the use of and/or exposure to, at any time between July 1976 and the date of commencement of this proceeding (the **Relevant Period**), the herbicide product or products which contained glyphosate and were branded as 'Roundup' or which contained glyphosate and were otherwise branded with the name 'Monsanto' (**Roundup Products**) (**NHL Group Members**); or
 - (b) are:
 - (i) the executors or administrators of, or beneficiaries of or persons with an interest in, the estates of deceased persons who would be NHL Group Members had they not died prior to the date this amended statement of claim is filed (**deceased NHL Group Members**) commencement of this proceeding; or
 - (ii) the dependents (howsoever described or referred to in the legislation set out in Schedule A) of NHL Group Members or deceased NHL Group Members;where, by reason of the matters pleaded below, a cause of action had vested in or may be brought by that person ~~the executor or administrator of the deceased NHL Group Member~~ (together the **Estate and Dependency Group Members**).
2. At the commencement of this proceeding there are more than seven group members who make the claims set out in this amended statement of claim against the Respondents.
3. All allegations made in respect of NHL Group Members in this amended statement of claim are to be taken to include deceased NHL Group Members ~~those individuals who would be NHL Group Members but for the fact that they died prior to the commencement of this proceeding.~~

The Applicant – Mr Kelvin McNickle

4. The Applicant (**Mr McNickle**) was born on 25 September 1982.
5. Throughout Mr McNickle's childhood:
 - (a) he grew up on a rural property near Coffs Harbour, New South Wales; and
 - (b) was regularly exposed to Roundup Products by reason of its use on the property by his father, by coming into direct contact with spray from the Roundup Products during its use and inhaling the fumes.
6. From about 1992 until about 1997, Mr McNickle:
 - (a) during his school holidays, assisted his father at his father's vegetation management business by using Roundup Products to treat tree stumps around Coffs Harbour, New South Wales;
 - (b) treated the tree stumps with a drenching unit consisting of a container housed within a knapsack and an application gun (**drenching unit**);
 - (c) in the course of preparing for and undertaking the task identified in the preceding subparagraph, came into direct contact with Roundup Products.

Particulars

- (i) As to (a), Mr McNickle is not able to recall which Roundup Product was used.
 - (ii) As to (b), Mr McNickle came into direct contact with the Roundup Products by reason of, *inter alia*:
 1. when mixing the Roundup Products, the solution would get onto his hands and soak through his clothes;
 2. when spraying with the drenching unit, drips or leaks would get onto his skin and/or clothes and soak through to his skin;
 3. the mist or spray from the application gun would get into his eyes and onto his face and body; and
 4. inhaling the fumes.
7. During 1998 for around eight months to a year, Mr McNickle:
 - (a) was employed approximately three to four days each week at his father's vegetation management business;

- (b) in that employment, undertook vegetation clearing in and around Coffs Harbour, New South Wales, and the surrounding region, by using Roundup Products called 'Roundup' and 'Roundup Biactive';
- (c) on each day of employment, used these Roundup Products by way of spraying vegetation with a wand attached to a 400 to 500 litre tank on the back of a tractor; and
- (d) in the course of preparing for and undertaking the task identified in the preceding subparagraph, came into direct contact with the Roundup Products.

Particulars

As to (d), Mr McNickle came into direct contact with the Roundup Products by reason of, *inter alia*:

- (i) when mixing the Roundup Products, the solution would get onto his hands and soak through his clothes;
- (ii) when spraying an area with the wand, drips or leaks would get onto his skin and/or clothes and soak through to his skin;
- (iii) the mist or spray from the wand would get into his eyes and onto his face and body; and
- (iv) inhaling the fumes.

8. From about 1999 until 2002, Mr McNickle:

- (a) was employed on a full-time basis by Kim Perkins Earthmoving & Tree Services;
- (b) in that employment, undertook vegetation clearing in and around Coffs Harbour, New South Wales, and the surrounding region, by using Roundup Products called 'Roundup' and 'Roundup Biactive';
- (c) on an almost daily basis, used these Roundup Products by way of spraying vegetation with a drenching unit; and
- (d) in the course of preparing for and undertaking the task identified in the preceding subparagraph, came into direct contact with the Roundup Products on an almost daily basis.

Particulars

As to (d), Mr McNickle refers to and repeats particular (ii) to paragraph 6.

9. From about 2002 until 2003 and from about 2004 until about 2015, Mr McNickle:
- (a) was employed on a full-time basis by PL & CV McNickle Pty Ltd;
 - (b) in that employment, undertook vegetation management in and around Coffs Harbour, New South Wales, by, inter alia, using the Roundup Products called 'Roundup' and 'Roundup Biactive';
 - (c) on an almost daily basis, used those Roundup Products by way of spraying vegetation with:
 - (i) until about 2008, a drenching unit;
 - (ii) from about 2008, a handheld pump pressurised sprayer and a hand held spray gun applicator attached to an electric pump spray unit fixed to the back of a tractor or ute;
 - (d) [NOT USED] until about 2008, a drenching unit;
 - (e) [NOT USED] from about 2008, a handheld pump pressurised sprayer;
 - (f) [NOT USED] a hand held spray gun applicator attached to an electric pump spray unit fixed to the back of a tractor or ute; and
 - (g) in the course of preparing for and undertaking the tasks identified in subparagraph 9(c), above the preceding subparagraph, came into direct contact with those Roundup Product on an almost daily basis.

Particulars

As to (c), Mr McNickle refers to and repeats particular (ii) to paragraph 6 and says further that while spraying with:

- (i) the handheld pump pressurised sprayer, the Roundup Products would come into direct contact with his skin by reason of the nozzle requiring frequent adjustment; and
- (ii) the hand held spray gun applicator attached to an electric pump spray unit and the handheld pump pressurised sprayer, he would regularly come into direct contact with the Roundup Product from the spray which soaked through his clothes, got

onto his hands and face and into his mouth and eyes.

10. In or about 2003, Mr McNickle:
- (a) was employed for about six months on a full-time basis by a business called Complete Vegetation Management;
 - (b) in that employment, undertook vegetation management in and around South East Queensland, by, inter alia, using a Roundup Product, probably 'Roundup Biactive';
 - (c) once or twice per week, used that Roundup Product by way of spraying vegetation with a drenching gun; and
 - (d) in the course of preparing for and undertaking the task identified in the preceding subparagraph, came into direct contact with that Roundup Product.

Particulars

As to (d), Mr McNickle refers to and repeats particular (ii) to paragraph 6.

11. From about 1998 until 2006 (except for the period referred to in paragraph 10), Mr McNickle:
- (a) continued to live with his parents;
 - (b) regularly used Roundup Products around the property referred to in 5 above, including to treat the perimeter fenceline, weeds and garden edges;
 - (c) used Roundup Products called 'Roundup'; and
 - (d) came into direct contact with the spray from the Roundup Products during its use and inhaling the fumes.
12. From about 2006 until 2015, Mr McNickle:
- (a) regularly used Roundup Products around his home and surrounding property of 260 square metres in Woolgoolga, New South Wales, including to treat bamboo stumps;
 - (b) used Roundup Products called 'Roundup'; and
 - (c) came into direct contact with the spray from the Roundup Products during its use and inhaling the fumes.

13. In about 2015 until his diagnosis, Mr McNickle:
- (a) volunteered to maintain the lawns and gardens at the Kingdom Hall of Jehovah's Witnesses in Darwin, Northern Territory;
 - (b) in that role, regularly sprayed the perimeter fenceline, weeds and garden edges with a Roundup Product called 'Roundup' using a handheld backpack garden sprayer; and
 - (c) came into direct contact with the spray from the Roundup Products during its use and inhaling the fumes.
14. On or around 8 May 2018, Mr McNickle was diagnosed with NHL.

Particulars

Mr McNickle was diagnosed with NHL with the histopathological subtype diffuse large-cell, high-grade, B cell, double hit.

B. THE RESPONDENTS

15. The First Respondent (**Monsanto Australia (Old)**):
- (a) was and is a corporation incorporated in Australia and capable of being sued;
 - (b) between July 1976 and around April 1988, had the company name Monsanto Australia Ltd and is now called Huntsman Chemical Company Australia Pty Ltd;
 - (c) between July 1976 and around April 1988:
 - (i) imported or caused to be imported into Australia Roundup Products for distribution;
 - (ii) from around 1983 onwards:
 - 1. imported or caused to be imported into Australia, glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products; and
 - 2. manufactured Roundup Products using that glyphosate and/or glyphosate intermediate;
 - (iii) distributed Roundup Products in Australia;

- (iv) promoted and marketed Roundup Products in Australia;
 - (v) used the “Monsanto” and “Roundup” trademarks, owned in accordance with paragraph 17-(c)-(iv)-below;
 - (vi) caused or permitted its name (Monsanto Australia Ltd) to be used in marketing and other materials related to the Roundup Products; and
 - (vii) was a wholly owned subsidiary of Monsanto Company US (Old) (as defined in paragraph 17 below);
- (d) by reason of the matters alleged in the preceding subparagraph, manufactured Roundup Products within the meaning of section 74A of the *Trade Practices Act 1974* (Cth) (**Trade Practices Act**).

16. The Second Respondent (**Monsanto Australia (New)**):

- (a) was and is a corporation incorporated in Australia and capable of being sued;
- (b) 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;
- (c) from 24 August 2018, changed its name to Monsanto Australia Pty Ltd;
- (d) from around April 1988:
 - (i) imported or caused to be imported into Australia for distribution Roundup Products;
 - (ii) until around 2002:
 1. imported or caused to be imported into Australia, glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products; and
 2. manufactured Roundup Products using that glyphosate and/or glyphosate intermediate;
 - (iii) distributed Roundup Products in Australia;
 - (iv) promoted and marketed Roundup Products in Australia;
 - (v) caused or permitted its name (Monsanto Australia Ltd and from 24 August

2018 Monsanto Australia Pty Ltd) to be used in marketing and other materials related to the Roundup Products;

(vi) until 7 June 2018, was an indirect wholly owned subsidiary of Monsanto Company US (Old) and Monsanto Company US (New) (as defined in paragraph 17 below) and thereafter of Bayer Aktiengesellschaft (AG) (**Bayer AG**);

(e) by reason of the matters alleged in the preceding subparagraph:

(i) manufactured the Roundup Products within the meaning of section 74A of the *Trade Practices Act*; and

(ii) was a manufacturer of the Roundup Products within the meaning of section 7 of the *Competition and Consumer Act 2010 (Cth) Schedule 2 – The Australian Consumer Law* (the **Australian Consumer Law**).

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

(a) since 2000:

(i) was and is a corporation registered in the United States of America and capable of being sued;

(ii) manufactured:

1. the Roundup Products; and/or

2. glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products;

(iii) supplied to Monsanto Australia (New) for importation into Australia:

1. Roundup Products; and/or

2. until around 2002, glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products;

(iv) until at least 4 February 2002, held trademarks for the name “Monsanto” and “Roundup”;

(v) until at least 4 February 2002, caused or permitted the name “Monsanto”,

the brand name Roundup and the Monsanto logo to be used in marketing and other materials related to the Roundup Products in Australia;

- (b) by reason of the matters alleged in the preceding subparagraph:
 - (i) manufactured the Roundup Products within the meaning of section 74A of the *Trade Practices Act*, and
 - (ii) was a manufacturer of the Roundup Products within the meaning of section 7 of the *Australian Consumer Law*;
- (c) by an agreement effective 1 September 2000, assumed all liability for Roundup Products, glyphosate and/or glyphosate intermediate from Pharmacia Corporation (previously called the Monsanto Company) (**Monsanto Company US (Old)**) which:
 - (i) from at least July 1976 until 2000, manufactured the Roundup Products;
 - (ii) from at least July 1976 until 2000, supplied to Monsanto Australia (Old) and/or Monsanto Australia (New) Roundup Products for importation into Australia;
 - (iii) from about 1983, supplied to Monsanto Australia (Old) and/or Monsanto Australia (New) for importation into Australia glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products;
 - (iv) from at least July 1976 until 2000, held trademarks in Australia for the name “Monsanto” and “Roundup”;
 - (v) from at least July 1976 until 2000, caused or permitted the name “Monsanto”, the brand-name Roundup and the Monsanto logo to be used in marketing and other materials related to the Roundup Products in Australia; and
 - (vi) by reason of the matters alleged in the preceding subparagraphs, manufactured the Roundup Products within the meaning of section 74A of the *Trade Practices Act*;
- (d) by an agreement effective 7 June 2018:
 - (i) Monsanto Company US (New) underwent a merger with a wholly owned subsidiary of Bayer AG; and

- (ii) the surviving entity continued as Monsanto Company US (New) as a wholly owned subsidiary of Bayer AG.

C. ROUNDUP PRODUCTS

18. Roundup Products were registered for use in Australia from at least July 1976.

Particulars

Roundup Products were registered in:

- (i) in Victoria by January 1976;
 - (ii) in South Australia by 11 November 1976;
 - (iii) in New South Wales by 1978;
 - (iv) in the Australian Capital Territory by 1980;
 - (v) in the Northern Territory by January 1988;
 - (vi) in Queensland by June 1988; and
 - (vii) from at least March 1995 with the Australian Pesticides Veterinary Medicines Authority (**APVMA**).
19. At all material times, Roundup Products were marketed and used as a herbicide.
20. At all material times, the active ingredient or main active ingredient which acted as a herbicide in Roundup Products was glyphosate.

Particulars

The chemical name for glyphosate is N-(phosphonomethyl)glycine.

21. At all material times, Roundup Products were supplied in Australia:
- (a) in a variety of formulations;
 - (b) with a variety of concentrations of glyphosate; and
 - (c) with glyphosate as a free acid or in the form of a salt, with the most common salt form being glyphosate isopropylamine salt.

Particulars

- (i) The formulations of Roundup Products supplied in Australia included aqueous concentrate, soluble concentrate,

emulsifiable concentrate, granular formulation, water dispersible granule, aerosol, liquid and wettable powder.

- (ii) The concentrations of glyphosate in Roundup Products supplied in Australia ranged from 3.6g/L to 570g/L and 15.2g/kg to 850g/kg.
- (iii) The other salt forms of glyphosate were glyphosate mono-ammonium salt, glyphosate mono-ethanolamine salt and glyphosate potassium salt.

22. At all material times, the Roundup Products contained, or most contained, surfactants.

Particulars

At least until 2012, the predominant surfactant used in Roundup Products was polyethoxylated tallow amines (**POEAs**).

D. CARCINOGENIC PROPERTIES OF ROUNDUP

23. At all material times:

- (a) glyphosate; and
- (b) glyphosate-based formulations; ~~and~~

were carcinogenic.

Particulars

- (i) Glyphosate is genotoxic and induces oxidative stress.
- (ii) Impurities which are present in glyphosate-based formulations, including formaldehyde and N-nitrosoglyphosate (**NNG**), are carcinogenic.
- (iii) Further particulars may be provided following discovery.

24. By reason of the matters alleged in the preceding paragraph, Roundup Products were carcinogenic.

25. At all material times, when Roundup Products contact the skin, the surfactants present increased absorption into the bloodstream by way of:

- (a) removing lipids from the skin by surfactant action;
- (b) increasing the hydration of the skin;
- (c) increasing contact with the skin by spreading water droplets by surfactant action;

- (d) increasing contact time with the skin due to the decrease of evaporation of water from the droplets containing surfactant;
 - (e) increasing blood flow to the skin due to irritant action of the surfactant; and
 - (f) intercellular water accumulation due to the irritant action of the surfactant.
26. In the premises, use of and/or exposure to Roundup Products increased an individual's risk of developing:
- (a) cancer; and/or
 - (b) NHL,
- (the **Roundup Cancer Risk**).

E. INJURIES

27. In the period from July 1976 until the commencement of these proceedings, Mr McNickle and NHL Group Members purchased and used or were exposed to Roundup Products.
28. By reason of the matters alleged at paragraphs 23 to 26, Mr McNickle and NHL Group Members developed NHL as a result of their use of or exposure to Roundup Products.

Particulars

- (i) Mr McNickle refers to:
 - a. paragraphs 5 to 13 above in relation to his use of and exposure to Roundup Products;
 - b. paragraph 14 above in relation to his development of NHL.
- (ii) Particulars for NHL Group Members will be provided following the trial of the common issues.

F. SAFETY DEFECT

29. The allegations at paragraphs 30 to 38 are pleaded at all material times from 9 July 1992 unless otherwise stated.
30. Monsanto Company US (New) and/or Monsanto Company US (Old) supplied the Roundup Products to:
- (a) Monsanto Australia (New); and

(b) Monsanto Australia (Old),

(together, the **Australian Suppliers**) for importation into and distribution in Australia.

31. The supply of Roundup Products by Monsanto Company US (New) and/or Monsanto Company US (Old) to the Australian Suppliers was:

(a) for resupply; and

(b) in trade and commerce between Australia and places outside Australia.

Particulars

As to paragraph (b), the Roundup Products were manufactured by Monsanto Company US (New) and/or Monsanto Company US (Old) in the United States of America and imported into Australia for supply to the Australian Suppliers.

32. From:

(a) July 1976 until around April 1988, Monsanto Australia (New);

(b) around April 1988, Monsanto Australia (Old),

imported into Australia:

(i) the Roundup Products; and/or

(ii) glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products;

and supplied the Roundup Products to other distributors (the **Intermediary Suppliers**) for resupply to consumers.

33. The supply by the Australian Suppliers to the Intermediary Suppliers was in trade or commerce within Australia.

34. By reason of the Roundup Cancer Risk, the safety of the Roundup Products was not such as persons generally are entitled to expect.

35. By reason of the matters alleged in the preceding paragraph, the Roundup Products had a defect within the meaning of section 75AC of the *Trade Practices Act* and/or a safety defect within the meaning of section 9 of the Australian Consumer Law.

36. Mr McNickle and group members have suffered loss and damage by reason of the Roundup

Products having a defect and/or a safety defect as alleged in paragraph 35.

Particulars

- (i) Mr McNickle refers to paragraphs 14 and 28 in relation to his injury.
- (ii) Mr McNickle has suffered loss and damage as follows:
 - 1. Health care expenses.
 - 2. Additional out of pocket expenses.
 - 3. The need for gratuitous and/or commercial care.
 - 4. Non-economic loss.
 - 5. Economic loss.
 - 6. Additional particulars may be provided following the service of evidence.
- (iii) Particulars for group members will be provided following the trial of the common issues.

37. In the premises, pursuant to section 138 and/or 139 of the *Australian Consumer Law*:

- (a) Monsanto Company (New) (including for any breach by Monsanto Company (Old) in accordance with the assumption of liabilities alleged in paragraph 17(c) above); and/or
- (b) Monsanto Australia (New);

are liable to compensate Mr McNickle and those group members whose loss or damage is not in respect of an amount which has been or could be recovered under a law of the Commonwealth, a State or a Territory that relates to workers' compensation (the **Safety Defect Group Members**) for their loss and damage.

38. In the premises, pursuant to section 75AD and/or 75AE of the *Trade Practices Act*:

- (a) Monsanto Company (New) (including for any breach by Monsanto Company (Old) in accordance with the assumption of liabilities alleged in paragraph 17(c) above);
- (b) Monsanto Australia (New); and/or
- (c) Monsanto Australia (Old),

are liable to compensate Mr McNickle and the Safety Defect Group Members for their loss and damage.

G. NOT OF ACCEPTABLE QUALITY

39. The allegations at paragraphs 40 to 51 are pleaded at all material times from 6 December 1978 unless otherwise stated.
40. The Roundup Products used by Mr McNickle and NHL Group Members or to which Mr McNickle and NHL Group Members were exposed:
- (a) prior to 13 May 1986, were acquired for a price and/or had a market value of less than \$15,000; and
 - (b) from 13 May 1986, were or could have been acquired for a price less than \$40,000.
41. Further and alternatively to the preceding paragraph, by reason of the Roundup Products being marketed and used as herbicide as alleged in paragraph 19 they were goods ordinarily acquired for personal, domestic or household use.
42. The Roundup Products used by Mr McNickle and some NHL Group Members or to which Mr McNickle and some NHL Group Members were exposed were acquired for a purpose other than using up the Roundup Products in trade or commerce in the course of treating other goods or fixtures on land within the meaning of section 4B(1) of the *Trade Practices Act* and section 3(2) of the *Australian Consumer Law*.
43. By reason of the matters alleged in paragraphs 40 to 42 above, the Intermediary Suppliers supplied Roundup Products:
- (a) to Mr McNickle and some NHL Group Members as consumers; and
 - (b) to other persons who were consumers, where Mr McNickle and some NHL Group Members acquired the Roundup Products from the consumer or used or were exposed to those Roundup Products,
- within the meaning of section 4B of the *Trade Practices Act* and section 3 of the *Australian Consumer Law*.
44. The supply by the Intermediary Suppliers to the persons identified in the preceding paragraph was in trade or commerce within Australia.
45. Mr McNickle refers to and repeats the matters alleged at paragraph 31 above relating to the supply of Roundup Products by Monsanto Company US (New) and/or Monsanto Company US (Old) to the Australian Suppliers being:

- (a) for resupply; and
 - (b) in trade and commerce.
46. From:
- (a) July 1976 until around April 1988, Monsanto Australia (New);
 - (b) around April 1988, Monsanto Australia (Old),
- acquired Roundup Products from Monsanto Company US (New) and/or Monsanto Company US (Old) for resupply.
47. By reason of the Roundup Cancer Risk, the Roundup Products:
- (a) were not as fit for the purpose that herbicide is commonly supplied;
 - (b) were not as free from defects; and
 - (c) were not as safe,
- as would be expected by a reasonable consumer.
48. By reason of the matters alleged in the preceding paragraph, the Roundup Products:
- (a) were not of merchantable quality within the meaning of sections 74D(1) and 74D(3) of the Trade Practices Act; and/or
 - (b) were not of acceptable quality within the meaning of section 54 of the Australian Consumer Law.
49. Mr McNickle and those NHL Group Members who acquired the Roundup Products from the consumer or used or were exposed to Roundup Products in accordance with paragraph 43 above, and some Estate and Dependency Group Members, (**Consumer Guarantee Group Members**) suffered loss and damage by reason of the Roundup Products not being of merchantable quality and/or acceptable quality as alleged in paragraph 48.
50. In the premises:
- (a) Monsanto Company (New) (including for any breach by Monsanto Company (Old) in accordance with the assumption of liabilities alleged in paragraph 17(c) above);
 - (b) Monsanto Australia (New); and/or

(c) Monsanto Australia (Old),

are liable to compensate Mr McNickle and the Consumer Guarantee Group Members for their loss and damage pursuant to section 74D(1) of the *Trade Practices Act*.

51. In the premises:

(a) Monsanto Company (New) (including for any breach by Monsanto Company (Old) in accordance with the assumption of liabilities alleged in paragraph 17(c) above); and/or

(b) Monsanto Australia (New);

are liable to compensate Mr McNickle and the Consumer Guarantee Group Members for their reasonably foreseeable loss and damage pursuant to section 271 and/or 272 of the *Australian Consumer Law*.

Particulars

As to the reasonable foreseeability of the loss and damage suffered by Mr McNickle and the Consumer Guarantee Group Members as and from 1 January 2011, Mr McNickle refers to the particulars to paragraph 53 below.

H. NEGLIGENCE

Duty of care

52. At all material times from:

(a) July 1976 to 2000, Monsanto Company US (Old);

(b) around 1983 until April 1988, Monsanto Australia (Old);

(c) April 1988 until around 2002, Monsanto Australia (New); and/or

(d) 2000 onwards, Monsanto Company US (New);

owed Mr McNickle and NHL Group Members a duty to exercise reasonable care to prevent harm arising from the Roundup Products.

Particulars

Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) owed the duty as manufacturer of the Roundup Products in the time periods set out

above.

53. Further, at all material times from:

- (a) July 1976 to 2000, Monsanto Company US (Old);
- (b) July 1976 until April 1988, Monsanto Australia (Old);
- (c) April 1988 onwards, Monsanto Australia (New); and/or
- (d) 2000 onwards, Monsanto Company US (New),

knew or ought to have known about the Roundup Cancer Risk.

Particulars

- (i) Mr McNickle refers to scientific literature or other information or material, from at least 1981, identifying the carcinogenic properties, or potential carcinogenic properties, of glyphosate and/or Roundup Products and their association with NHL, which were available to the Respondents. The scientific literature or other information or material includes animal studies and mechanistic and epidemiological evidence.
- (ii) Further, Mr McNickle refers to the fact that:
 - a. Toxicity studies undertaken on behalf of Monsanto Company US (Old) by Industrial Bio-Test Laboratory (**IBT**) of glyphosate in or around 1970-1974, which did not identify glyphosate Products as having carcinogenic properties, were invalid or unreliable.
 - b. In or around April to July 1976, deficiencies in the studies undertaken by IBT were identified by the US Food and Drug Administration and were reported publicly in July 1976. It can be inferred therefore that by at least July 1976 Monsanto Company US (Old) and Monsanto Australia (Old) were aware of those deficiencies and that reporting, and that there had been no adequate testing of the carcinogenicity of glyphosate and/or Roundup Products.
- (iii) Further:
 - a. In or around March 1985, the Environmental Protection Agency (US) (**EPA**)'s Toxicology Branch classified glyphosate as a 'Category C' oncogene, being a substance that is possibly carcinogenic to humans.
 - b. In or around February 1986, the *Federal Insecticide, Fungicide, and Rodenticide Act* (**FIFRA**) Scientific Advisory Panel (**SAP**) downgraded the classification referred to in the preceding particular to 'Category D', being a substance that is not classifiable as to human carcinogenicity. However, the SAP concluded that the occurrence of neoplasms in high glyphosate dose male mice in the study

leading to the earlier 'Category C' classification was "unusual".

- c. In around 1987, California's Department of Food and Agriculture considered that there were possible adverse oncogenic effects with glyphosate.
- d. In or around October 1991, the EPA downgraded the classification of glyphosate to 'Group E', being one that shows evidence of non-carcinogenicity for humans . However, the EPA stated "[i]t should be emphasized, however, that the designation of an agent in Group E is based on the available evidence at the time of evaluation and should not be interpreted as a definitive conclusion that the agent will not be a carcinogen under any circumstances".
- e. On 24 March 2015, the International Agency for Research on Cancer (**IARC**) classified glyphosate as a Group 2A carcinogen, being a substance that is a probable carcinogen to humans.

(iv) Further particulars may be provided following discovery.

54. Further, at all material times from:

- (a) July 1976 to 2000, Monsanto Company US (Old);
- (b) July 1976 until April 1988, Monsanto Australia (Old);
- (c) April 1988 onwards, Monsanto Australia (New); and/or
- (d) 2000 onwards, Monsanto Company US (New),

it was reasonably foreseeable to those companies that individuals:

- (i) who may use or be exposed to Roundup Products may suffer harm arising from the Roundup Products if they were not warned or not adequately warned about the Roundup Cancer Risk; and
- (ii) who had already used or been exposed to Roundup Products may suffer harm or further harm arising from the Roundup Products if information disclosing the Roundup Cancer Risk was not made available to those individuals.

55. In the premises, from

- (a) July 1976 to 2000, Monsanto Company US (Old);

- (b) July 1976 until April 1988, Monsanto Australia (Old);
- (c) April 1988 onwards, Monsanto Australia (New); and/or
- (d) 2000 onwards, Monsanto Company US (New),

owed Mr McNickle and NHL Group Members a duty to inform them of the Roundup Cancer Risk to prevent harm or further harm arising from the Roundup Products.

Standard of care

56. At all material times, the Roundup Cancer Risk was or gave rise to risks of harm which were foreseeable and not insignificant.

Particulars

- (i) Mr McNickle refers to and repeats the particulars to paragraph 53.
- (ii) Further particulars may be provided following discovery.

57. At all material times:

- (a) the probability of harm resulting from the Roundup Cancer Risk if care was not taken was not insignificant; and
- (b) the likely seriousness of harm resulting from the Roundup Cancer Risk was significant.

Particulars

- (i) Mr McNickle refers to and repeats the particulars to paragraph 53.
- (ii) Further particulars may be provided following discovery.

58. By reason of the matters alleged in paragraphs 56 and 57, a reasonable person in the position of Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) ~~the respondents~~ would not have:

- (a) manufactured the Roundup Products; and/or
- (b) distributed or supplied for sale in Australia the Roundup Products.

59. Further and alternatively, a reasonable person in the position of Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) ~~the respondents~~ would have taken reasonable care to ensure that:

- (a) the Roundup Products were promoted or marketed to potential purchasers and users with warnings or adequate warnings about the Roundup Cancer Risk; and/or

Particulars

- (i) Any information relating to the Roundup Products, including any website, should have clearly and prominently disclosed the Roundup Cancer Risk.
 - (ii) Further particulars may be provided following discovery.
- (b) information disclosing the Roundup Cancer Risk was made available to persons who had already purchased, used or been exposed to Roundup Products.

Particulars

- (i) Mr McNickle refers to and repeats the particulars to the preceding subparagraph.
- (ii) Further particulars may be provided following discovery.

Breach of duty

60. In breach of their duties of care, Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New):

- (a) manufactured the Roundup Products; and/or
 - (b) distributed or supplied for sale in Australia the Roundup Products,
- in circumstances where the products had the Roundup Cancer Risk.

61. Further, in breach of their duties of care, Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New):

- (a) promoted or marketed, or facilitated the promotion or marketing of, the Roundup Products without warning or adequate warning about the Roundup Cancer Risk; and/or

Particulars

- (i) The information or material used for marketing or promoting the Roundup Products did not disclose the Roundup Cancer Risk.
- (ii) Further particulars may be provided following discovery.

- (b) failed to make available information disclosing the Roundup Cancer Risk.

Particulars

- (i) Mr McNickle refers to and repeats the particulars to the preceding sub-paragraph.
- (ii) Further particulars may be provided following discovery.

Causation

62. As a result of the breaches alleged in paragraphs 60 and 61(a) above, Mr McNickle and NHL Group Members who used or were exposed to Roundup Products have been diagnosed with NHL by reason of the use of and/or exposure to Roundup Products.
63. As a result of the breaches alleged in paragraph 61(b) above, Mr McNickle and NHL Group Members delayed taking action to address the harm and thereby suffered further harm.

Loss and damage

64. Mr McNickle and group members have suffered loss and damage by reason of the negligence of Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) ~~the respondents~~.

Particulars

Mr McNickle refers to and repeats the particulars to the paragraph 36.

I. COMMON QUESTIONS OF LAW OR FACT

The questions of law or fact common to the claims of Mr McNickle and the group members or subgroup members are:

65. Were each of Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) ~~the respondents~~ manufacturers of the Roundup Products within the meaning of section 74A of the *Trade Practices Act* and/or section 7 of the *Australian Consumer Law*?
66. Did the Roundup Products have the Roundup Cancer Risk?
67. Did the Roundup Products:

- (a) have a defect within the meaning of section 75AC of the *Trade Practices Act*; and/or
 - (b) have a safety defect within the meaning of section 9 of the *Australian Consumer Law*?
68. Were the Roundup Products:
- (a) not of merchantable quality within the meaning of section 74D(1) and 74D(3) of the *Trade Practices Act*; and/or
 - (b) not of acceptable quality within the meaning of section 54 of the *Australian Consumer Law*?
69. Did Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) ~~the respondents~~ owe Mr McNickle and NHL Group Members:
- (a) a duty to exercise reasonable care to prevent harm from the Roundup Products; and/or
 - (b) a duty to inform them of the Roundup Cancer Risk?
70. What was the applicable standard of care in relation to:
- (a) manufacture of the Roundup Products; and/or
 - (b) promotion and marketing of the Roundup Products?
71. Did Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) ~~the respondents~~ breach their duties of care in:
- (a) manufacturing the Roundup Products;
 - (b) distributing and supplying for sale the Roundup Products;
 - (c) promoting or marketing, or facilitating the promotion or marketing of, the Roundup Products without warning or adequate warning about the Roundup Cancer Risk; and/or
 - (d) failing to make available information disclosing the Roundup Cancer Risk?

This amended pleading was prepared by Melanie Szydzik, counsel for Mr McNickle.

Date: 16 June ~~8 April~~ 2020

A handwritten signature in blue ink, appearing to read "Andrew Watson", written in a cursive style.

Signed by Andrew Watson
Lawyer for the Applicant

Schedule A

- (i) Part 3.1 of the *Civil Law (Wrongs) Act 2002 (ACT)*
- (ii) The *Compensation to Relatives Act 1897 (NSW)*
- (iii) The *Compensation (Fatal Injuries) Act 1974 (NT)*
- (iv) Part 10 of the *Civil Proceedings Act 2011 (QLD)*
- (v) Part 5 of the *Civil Liability Act 1936 (SA)*
- (vi) The *Fatal Accidents Act 1934 (Tas)*
- (vii) Part III of the *Wrongs Act 1958 (Vic)*
- (viii) The *Fatal Accidents Act 1959 (WA)*
- (ix) Sections 75AD(f) and 75AE of the *Trade Practices Act* and/or sections 138 and 139 of the *Australian Consumer Law*

Certificate of lawyer

I Andrew Watson certify to the Court that, in relation to the amended statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 16 June ~~8 April~~ 2020



Signed by Andrew Watson
Lawyer for the Applicant

Schedule

No. 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

GLOSSARY

APVMA	[18]	Monsanto Australia (New).....	[16]
Australian Consumer Law	[16]	Monsanto Australia (Old)	[15]
Australian Suppliers.....	[30]	Monsanto Company US (New).....	[17]
<u>Bayer AG</u>	<u>[16]</u>	Monsanto Company US (Old)	[17]
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.....	[4917]	NHL.....	[1]
<u>Deceased NHL Group Members.....</u>	<u>[1]</u>	NHL Group Members.....	[1]
drenching unit	[6]	NNG	[17]
EPA.....	[53]	POEAs	[22]
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FIFRA	[53]	Roundup Products	[1]
IARC	[53]	Safety Defect Group Members.....	[437]
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Intermediary Suppliers.....	[32]	Trade Practices Act	[15]