

## NOTICE OF FILING

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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: 5/11/2020 2:29:18 PM AEDT

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 17  
Rule 8.05(1)(a)

## Statement of Cross-Claim

No. VID 243 of 2020

Federal Court of Australia  
District Registry: Victoria  
Division: General

### **HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD (ACN 004 146 338)**

Cross-Claimant

### **MONSANTO COMPANY and other named in the Schedule**

Cross-Respondents

This statement of cross-claim is filed by the Cross-Claimant pursuant to order 1 of Lee J made on 12 October 2020 (Cross-Claim). Capitalised terms used in this Cross-Claim bear the same meaning as in the Second Further Amended Statement of Claim dated 20 October 2020 (**2FASOC**), unless otherwise indicated.

### **Parties**

1. The Cross-Claimant (**Monsanto Australia (Old)**):
  - a. was and is a corporation incorporated in Australia and capable of suing;
  - b. between around July 1976 and around 17 April 1988 had the company name Monsanto Australia Limited;
  - c. between around July 1976 and 31 March 1988 was a wholly owned subsidiary of the Monsanto Company (**Monsanto Company US (Old)**);
  - d. on 18 April 1988, was re-named Chemplex Australia Limited; and
  - e. in around June 1993, was further renamed Huntsman Chemical Company Australia Pty Limited, after (as alleged in paragraphs 11 to 12 below) it was acquired by the Huntsman Australia, Inc. in a 50-50 joint venture agreement with Consolidated Press

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Filed on behalf of (name & role of party)	Huntsman Chemical Company Australia, the First Respondent and Cross-claimant
Prepared by (name of person/lawyer)	Janet Whiting
Law firm (if applicable)	Gilbert + Tobin
03 8656 3387	Fax 03 8656 3400
Email	jwhiting@gtlaw.com.au
<b>Address for service</b> (include state and postcode)	Level 22, 101 Collins Street, VIC 3000

[Form approved 01/08/2011]

Holdings Limited (**Consolidated Press Holdings**), to be held through a joint venture company, HCPH Holdings Pty Ltd (**HCPH Holdings**).

2. The First Cross-Respondent (**Monsanto Company US (New)**):

- a. since around 9 February 2000 was and is a corporation registered in Delaware, in the United States of America, and capable of being sued;
- b. was created as a wholly owned subsidiary of Monsanto Company US (Old) and Pharmacia & UpJohn Inc, during the merger of those two companies (during which merger Monsanto Company US (Old) also changed its name to Pharmacia Corporation);
- c. by agreement effective 1 September 2000 with Pharmacia Corporation:
  - i. assumed all of the operations, assets and liabilities of Pharmacia Corporation's agricultural business to Monsanto Company US (New), including any obligations arising under contract or otherwise of Monsanto Company US (Old) prior to 1 September 2000; and
  - ii. indemnified Pharmacia Corporation for liabilities primarily related to the agriculture business prior to 1 September 2000.

3. The Second Cross-Respondent (**Monsanto Australia (New)**):

- a. was and is a corporation incorporated in Australia and is capable of being sued;
- b. was incorporated on 24 March 1987 as Animus No. 8 Limited;
- c. on 30 March 1988, was re-named to Legis (No. 20) Limited;
- d. prior to 31 March 1988, acquired, by way of transfer, the agricultural and re-sale business of Monsanto Australia (Old);
- e. was known as Monsanto Australia Limited from 19 April 1988 to 23 August 2018;
- f. on 24 August 2018, changed its name to Monsanto Australia Pty Ltd;
- g. at all material times was a wholly owned subsidiary of the Monsanto Company US (New).

## The McNickle Proceeding

4. In Federal Court of Australia Proceedings VID 243/2020 (the **McNickle Proceeding**), and on the grounds alleged in the 2FASOC, the Applicant seeks, *inter alia*, orders that Monsanto Australia (Old) pay the Applicant and group members:
  - a. statutory compensation for loss and damage pursuant to:
    - i. ss 74DA(1), 75AD and/or 75AE of the *Trade Practices Act 1974* (Cth); and/or
    - ii. ss 138, 139, 271 and/or 272 of the *Australian Consumer Law*;
  - b. damages at common law,  
  
(the **Alleged Loss**).
5. Monsanto Australia (Old) denies that it is liable for the Alleged Loss on grounds set out in its defence to the Amended Statement Of Claim filed on 10 July 2020 (**Defence**).
6. If, contrary to the denial of liability set out in the Defence, Monsanto Australia (Old) is liable for the Alleged Loss (or part thereof), Monsanto Australia (Old) seeks relief from Monsanto Company US (New) and Monsanto Australia (New) as set out in the Notice of Cross-Claim and makes the allegations set out in paragraphs 7 to 39 below.

## Indemnity from Monsanto Company US (New)

7. On 21 March 1988, an agreement was made in writing between Monsanto Company US (Old), as Seller, and Panimo Pty Ltd (a wholly owned subsidiary of Consolidated Press Holdings), as Purchaser, for the sale of Monsanto Australia (Old) (**1988 Share Sale Agreement**).

### Particulars

A copy of the 1988 Share Sale Agreement is available for inspection at the offices of the solicitors of Monsanto Australia (Old) upon reasonable request.

8. It was an express term of the 1988 Share Sale Agreement that on the Closing Date (which was 31 March 1988), Monsanto Company US (Old) would sell, as beneficial owner, to Panimo Pty Ltd (or would procure the sale as beneficial owner to Panimo Pty Ltd) all of the issued shares in the capital of Monsanto Australia (Old) for the purchase price set out in clause 1.2 of the Share Sale Agreement: clause 1.1.

9. It was an express term of the 1988 Share Sale Agreement that, prior to the Closing Date (31 March 1988) all of the tangible and intangible assets and liabilities of Monsanto Australia (Old) which were primarily used in:
- a. the agricultural chemicals business conducted by Monsanto Australia (Old) (**Ag Business**); and
  - b. the business of the resale by Monsanto Australia (Old) in Australia of products manufactured elsewhere by Monsanto Company US (Old) or its subsidiaries or affiliates, specifically including, but not limited to, Mitsubishi Monsanto Chemical Company (**Resale Business**),
- were transferred to Legis (No. 20) Pty Ltd (later Monsanto Australia (New)): clause 3.2(a).
10. It was an express term of the 1988 Share Sale Agreement that, from and after the Closing Date (31 March 1988), Monsanto Company US (Old) indemnified the purchaser, Panimo Pty Ltd, and its respective officers, directors and employees harmless from and against all liabilities, claims, damages and losses (including all related legal fees, costs and expenses in connection therewith) suffered and incurred by Panimo Pty Ltd, with respect to any claim by:
- a. any third party (including, but not limited to, any governmental authority) solely arising out of the sale of the products of the Ag Business or the Resale Business: clause 5.4(a); and/or
  - b. any claim by any third party (including, but not limited to, any governmental authority) solely arising out of the operation of the agriculture business or the resale business: clause 5.4(i).
11. On or around 30 June 1993, Consolidated Press Holdings (the Seller), and Huntsman Australia, Inc. entered into a 50-50 joint venture agreement for the acquisition of the shares in Chemplex Holdings Pty Ltd, a company incorporated in the State of New South Wales, and of which Monsanto Australia (Old) was a subsidiary, to be held through a joint venture company, HCPC Holdings Pty Ltd (the Buyer) (**1993 Share Purchase Agreement**).

### **Particulars**

A copy of the 1993 Share Purchase Agreement is available for inspection at the offices of the solicitors of Monsanto Australia (Old) upon reasonable request.

12. It was an express term of the 1993 Share Purchase Agreement (clause 2.1) that, in accordance with the terms of the agreement, Consolidated Press Holdings agreed to sell and HCPC Holdings Pty Ltd agreed to buy the Sale Shares free from all Encumbrances, where:

- a. "Sale Shares" was defined as the 400,000,002 ordinary shares in the capital of Chemplex Holdings Pty Ltd as at the date of the agreement, and any shares issued to Consolidated Press Holdings prior to Completion pursuant to clause 2.3.2 of the 1993 Share Purchase Agreement; and
  - b. "Encumbrances" was defined as "any mortgage, charge, pledge, lien, encumbrance, lease or other interest, licence, option, assignment, hypothecation, security interest, title retention, preferential right, trust arrangement, contractual right or setoff or any other security agreement or arrangement in favour of any person".
13. On or around 26 June 2002, all of Consolidated Press Holdings' interests in the joint venture company, HCPC Holdings Pty Ltd (which by that time were held in a variety of subsidiary companies of Consolidated Press Holdings) were transferred to Jon M. Huntsman (**2002 Purchase Agreement**).
14. It was an express term of the 2002 Purchase Agreement (Clause 1.3) that, in accordance with the terms of the agreement, the subsidiaries of Consolidated Press Holdings agreed to sell and Jon M. Huntsman agreed to buy the Australian Interests free of any Encumbrances, where:
  - a. "Australian Interests" was defined as, collectively, the "Class B Units", the HCPH Shares (being the 2,006 shares of the Class B Ordinary Shares of HCPH Holdings Pty Ltd) and the Australian Loans;
  - b. "Encumbrances" was defined as options, pledges, security interests, liens or other encumbrances or any restrictions or limitations on voting or transfer; and
  - c. the "Australian Interests" constituted all shares, rights, interests, indebtedness and claims of every type or nature owned or held by Sellers or any other member of the Sellers Group in respect of HCPH, the Unit Trust, or any of their Subsidiaries other than those to be released pursuant to the Mutual Release (clause 3.6).
15. In the premises, and by reason of the matters alleged in paragraphs 7 to 14 above, Monsanto Company US (New) has indemnified Monsanto Australia (Old) from any third-party claims arising out of the sale of products and/or the operation of the agriculture business of Monsanto Australia (Old).
16. The claims made by the Applicant in the McNickle Proceeding, as alleged in the 2FASOC, comprise a third-party claim arising out of the sale of products and/or the operation of the agriculture business of Monsanto Australia (Old).

17. In the premises, Monsanto Company US (New) is required to indemnify Monsanto Australia (Old) against the claims made against it by the Applicant in the McNickle Proceedings and the Alleged Loss.
18. On 30 June 2020, Monsanto Australia (Old) made a written request to Monsanto Company US (New) for indemnity in respect of the allegations made against it in the McNickle Proceeding and the Alleged Loss (**Request for Indemnity**).

#### **Particulars**

Letter from Huntsman Corporation to Bayer U.S. dated 30 June 2020.

19. As at the date of this statement of cross-claim, Monsanto Company US (New) has not confirmed that it will indemnify Monsanto Australia (Old) in respect of the allegations made against it in the McNickle Proceeding and the Alleged Loss.

#### **Indemnity from the Second Cross-Respondent and Operating Agreements**

20. Further and in the alternative to the allegations made in paragraphs 7 to 19 above, Monsanto Australia (Old) makes the allegations in paragraphs 21 to 27 below.
21. On or around 31 March 1988, Monsanto Australia (New) (then known as Legis (No. 20) Ltd) and Monsanto Australia (Old) (then known as Monsanto Australia Limited) entered into a written agreement in respect of the West Footscray plant site (**West Footscray Site**) pursuant to which it was agreed that, on and from 1 April 1988 Monsanto Australia (Old) would operate the agricultural plant for the Monsanto Australia (New) for the period and on the terms set out in the agreement (**West Footscray Operating Agreement**).

#### **Particulars**

A copy of the West Footscray Operating Agreement is available for inspection at the offices of the solicitor for Monsanto Australia (Old) on reasonable notice.

22. It was an express term of the West Footscray Operating Agreement that on and from 1 April 1988, Monsanto Australia (Old) would operate the agricultural plant at the West Footscray Site of Monsanto Australia (New) to produce the glyphosate, as well as perform work incidental to including the receipt, storage, loading and shipping of those products: clause 2.1.
23. It was an express term of the West Footscray Operation Agreement that Monsanto Australia (New) assumed full responsibility for and agreed to defend, indemnify, save and hold harmless Monsanto Australia (Old) from and against all claims, causes of action, suits, judgments, fines, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees) and liabilities of every nature and description resulting or arising from, among

other things, any product liability claims by customers of Monsanto Australia (New) for any Product manufactured under the West Footscray Operating Agreement, provided such Product conformed to the applicable specifications for such Product, where the "Product" was defined in Exhibit 2.1 as glyphosate: clause 5.3(b)(iii).

24. On or around 31 March 1988, Monsanto Australia (New) (then known as Legis (No. 20) Ltd) and Monsanto Australia (Old) (then known as Monsanto Australia Limited) entered into a written agreement in respect of the Rozelle plant site (**Rozelle Site**) pursuant to which it was agreed that, on and from 1 April 1988, Monsanto Australia (Old) would operate the agricultural plant for Monsanto Australia (New) for the period and on the terms set out in the agreement (**Rozelle Operating Agreement**).

### **Particulars**

A copy of the Rozelle Operating Agreement is available for inspection at the offices of the solicitor for Monsanto Australia (Old) on reasonable notice.

25. It was an express term of the Rozelle Operating Agreement that on and from 1 April 1988 Monsanto Australia (Old) would operate the agriculture plant at the Rozelle Site for Monsanto Australia (New) for the production of products listed in Exhibit 2.1 of the Rozelle Operating Agreement which included Roundup 41% and Roundup CT: clause 2.1.
26. It was an express term of the Rozelle Operating Agreement that Monsanto Australia (New) assumed full responsibility for and agreed to defend, indemnify, save and hold harmless Monsanto Australia (Old) from and against all claims, causes of action, suits, judgments, fines, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees) and liabilities of every nature and description resulting or arising from, among other things, any product liability claims by customers of Monsanto Australia (New) for any Products manufactured under the Rozelle Operating Agreement, provided such Products conformed to the applicable specifications for such Products, such Products including Roundup 41% and Roundup CT: clause 5.3(b)(ii).
27. In the premises, and by reason of the matters pleaded in paragraphs 20 to 26 above, to the extent that Monsanto Australia (Old) is liable in respect of any allegations against it in the McNickle Proceeding post 1 April 1988 (which is denied) and in respect of any product manufactured and/or otherwise dealt with pursuant to the West Footscray Operating Agreement and the Rozelle Operating Agreement (such Products including glyphosate, Roundup 41% and Roundup CT), Monsanto Australia (Old) is indemnified for that liability by Monsanto Australia (New).



## Contribution

28. Alternatively to the allegations in paragraphs 7 to 27 above, Monsanto Australia (Old) makes the allegations in paragraphs **Error! Reference source not found.** to 38 below.
29. In the 2FASOC, the Applicant has made allegations as against Monsanto Australia (Old), which allegations include claims which may not be apportionable within the meaning of s 34(1) of the *Civil Liability Act 2002* (NSW), s 87CB of the *Trade Practices Act 1974* (Cth) and/or s 87CB of the *Competition and Consumer Act 2010* (Cth) (**Non-apportionable Claims**).
30. If, which is denied, Monsanto Australia (Old) is liable in respect of any of the Non-apportionable Claims in the manner alleged in the 2FASOC and/or the Applicant can establish the matters alleged in the 2FASOC in respect of those claims, solely for the purpose of this Cross-Claim, Monsanto Australia (Old) pleads as against the Cross-Respondents as follows.

### *Contribution as against Monsanto Company US (New)*

31. As against Monsanto Company US (New), and solely for the purpose of this Cross-Claim, Monsanto Australia (Old) repeats the allegations made in the ASOC.
32. By reason of the matters pleaded in paragraph 31 above, Monsanto Company US (New) is a person from whom the Applicant and/or group members are entitled to recover the Alleged Loss as alleged in the 2FASOC.
33. Monsanto Australia (Old) is, accordingly, entitled in equity to indemnity or contribution from Monsanto Company US (New) in respect of any liability Monsanto Australia (Old) may be found to have to the Applicants and/or Group Members for their Alleged Loss.
34. Further, or in the alternative, Monsanto Company US (New) is a tortfeasor or wrongdoer who is liable to the Applicant and group members in respect of their Alleged Loss and Monsanto Australia (Old) is entitled to indemnity or contribution from Monsanto Company US (New) pursuant to:
  - a. s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) which applies by virtue of s 12 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW); or
  - b. s 23B of the *Wrongs Act 1958* (Vic).

### *Contribution as against Monsanto Australia (New)*

35. As against Monsanto Australia (New), and solely for the purpose of this Cross-Claim, Monsanto Australia (Old) repeats the allegations made in the 2FASOC in the McNickle Proceeding.

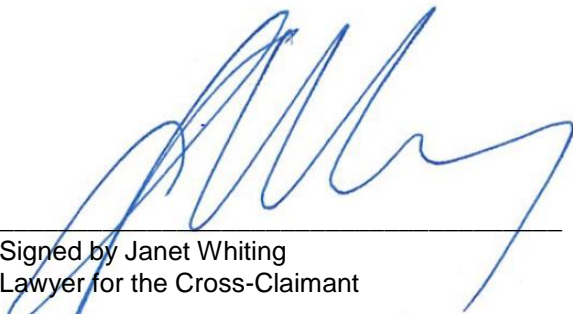
36. By reason of the matters pleaded in paragraph 35 above, Monsanto Australia (New) is a person from whom the Applicant and/or group members are entitled to recover the Alleged Loss as alleged in the 2FASOC.
37. Monsanto Australia (Old) is, accordingly, entitled in equity to indemnity or contribution from Monsanto Australia (New) in respect of any liability Monsanto Australia (Old) may be found to have to the Applicants and/or Group Members for their Alleged Loss.
38. Further, or in the alternative, Monsanto Australia (New) is a tortfeasor or wrongdoer who is liable, or would have been liable if sued, to the Applicant and/or group members in respect of their Alleged Loss and Monsanto Australia (Old) is entitled to indemnity or contribution from Monsanto Company US (New) pursuant to:
- a. s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) which applies by virtue of s 12 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW); or
  - b. s 23B of the *Wrongs Act 1958* (Vic).

#### **Relief sought**

39. In the premises, Monsanto Australia (Old) seeks the relief as set out in the Notice of Cross-Claim, namely:
- a. declarations that:
    - i. by clause 5.4 of the 1988 Share Sale Agreement, Monsanto Company US (New) agreed to indemnify the purchaser (Panimo Pty Ltd) and the benefit of that indemnity flows to Monsanto Australia (Old);
    - ii. such indemnity covers any third-party claims arising out of the sale of products and/or the operations of the agriculture business of Monsanto Australia (Old); and
    - iii. Monsanto Australia (Old) is therefore indemnified by Monsanto Company US (New) in respect of the claims brought against it by the Applicant and/or group members in the McNickle Proceeding;
  - b. declarations that:
    - i. the claims brought against Monsanto Australia (Old) in the McNickle Proceeding are product liability claims by customers of Monsanto Australia (New) for products manufactured under the West Footscray Operating Agreement and the Rozelle Operating Agreement;

- ii. accordingly, by reason of clause 5.3(b)(iii) of the West Footscray Operating Agreement and clause 5.3(b)(ii) of the Rozelle Operating Agreement, Monsanto Australia (Old) is indemnified by Monsanto Australia (New) in respect of the claims brought against Monsanto Australia (Old) in the McNickle Proceeding;
- c. in the alternative, indemnity or contribution in equity or pursuant to s 5(1)(c) of the *Law Reform Miscellaneous Provisions Act 1946* (NSW) or s 23B of the *Wrongs Act 1958* (Vic).
- d. interest.
- e. costs.
- f. such further order and other relief as this Honourable Court thinks appropriate.

Date: 5 November 2020



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Signed by Janet Whiting  
Lawyer for the Cross-Claimant

This pleading was prepared by Emma Bathurst of counsel.

## **SCHEDULE**

No. NSD VID 243 of 2020

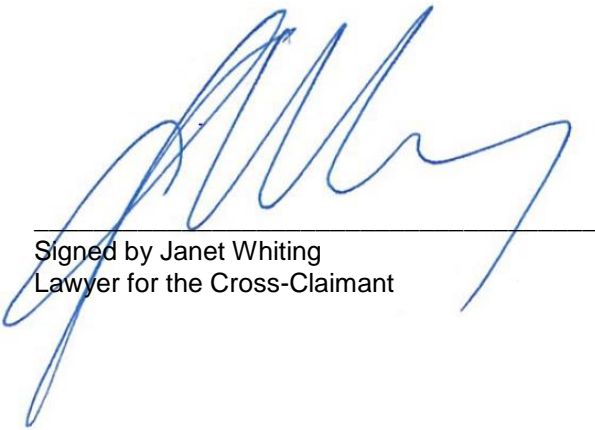
Federal Court of Australia  
District Registry: New South Wales  
Division: General

**MONSANTO AUSTRALIA PTY LTD**  
Second Cross-Respondent

### **Certificate of lawyer**

I Janet Whiting, certify to the Court that, in relation to the statement of cross-claim filed on behalf of the Cross-Claimant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 5 November 2020



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Signed by Janet Whiting  
Lawyer for the Cross-Claimant