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Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
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Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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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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Form 33

Rule 16.32

FOURTH RESPONDENT'S DEFENCE TO FOURTH FURTHER AMENDED STATEMENT OF CLAIM

Federal Court of Australia VID 243 of 2020

District Registry: Victoria

Division: General

KELVIN MCNICKLE

Applicant

HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD & ORS

Respondents

Notes:

i. Where the Fourth Respondent adopts the defined terms or headings used in the Fourth Further Amended Statement of Claim, it does so for convenience only, and by doing so, does not admit any factual assertions contained in, or in any way implied by, any defined term used in the Fourth Further Amended Statement of Claim.

ii. Headings are used in this Defence for ease of reference only. They do not form part of this Defence.

In answer to the Fourth Further Amended Statement of Claim (**4FASOC**), the Fourth Respondent (**Pharmacia LLC**) states as follows:

A. THE APPLICANT AND GROUP MEMBERS

Group Members

1. In answer to paragraph 1, it says:

Filed on behalf of Pharmacia LLC, Fourth Respondent
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(a) the Applicant has not sought and has not been granted leave of the Court to amend the definition of NHL Group Members or deceased NHL Group Members definition;

(b) the amendment to the definition of NHL Group Members in paragraph 1(1) is inconsistent with the definition of NHL Group Members in the Second Further Amended Originating Application filed on 4 July 2022;

(c) in the premises, the amendments to paragraphs 1(a) and 1(b)(i) are liable to be struck out

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

(e) 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**);

(f) it says further that:

(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;

(g) 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. Save where this Defence distinguishes between Group Members and deceased Group

Members, the Fourth Respondent does not plead to paragraph 3 as the Applicant makes no allegations against it.

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 admits paragraph 14.

B. 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 know and therefore cannot admit 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 know and therefore cannot admit 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(a)-(b) and 16(a) above;

(b) admits that the Third Respondent (that is, 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:

(i) in relation to sub-paragraph 17(a)(ii) it does not know and therefore cannot admit sub-paragraph 17(a)(ii);

(ii) in relation to sub-paragraph 17(a)(iii) it does not know and therefore cannot admit sub-paragraph 17(a)(iii);

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

A. it says that from 1998, it supplied various Monsanto Roundup Products to the Scotts Company for distribution in Australia;

B. it otherwise does not know and therefore cannot admit the allegations in sub-paragraph 17(a)(iiia);

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

A. it says that it and the Second Respondent had agreements, from time-to-time, with various entities concerning the distribution and sale of Roundup Products;

B. it says that in 1998, it appointed the Scotts Company as its exclusive agent for the marketing and distribution of various Monsanto Roundup Products in Australia; and

C. it otherwise does not know and therefore cannot admit sub-paragraph 17(a)(iiib);

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

A. it says that:

(1) in or around early 2000, pursuant to a Distribution Agreement between it (that is, Monsanto Company US (Old)) and Solutia, Inc. dated 1 September 1997 and Plan of Merger dated 19 December 1999 by and among it, MP Sub, Incorporated (**Merger Sub**) and Pharmacia & Upjohn, Inc. (**PNU**), a pharmaceuticals company, Merger Sub was merged with and into PNU with PNU surviving as a wholly owned subsidiary of Monsanto Company US (Old) in the merger (the **Merger**);

(2) during the Merger, the Third Respondent (that is, Monsanto Company US (New)) was created and was incorporated under the laws of the State of Delaware within the United States of America on 9 February 2000 as a wholly owned subsidiary of Monsanto Company US (Old);

(3) upon completion of the Merger, it changed its name from 'Monsanto Company' to 'Pharmacia Corporation';

B. says further that, prior to the Merger referred to in paragraph 17(c)(v)A(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);

C. says further that, following the Merger between Pharmacia &

UpJohn, Inc and Monsanto Company US (Old) referred to in paragraph 17(c)(v)A(1) above and by reason of Monsanto Company US (Old)'s name change to 'Pharmacia Corporation' referred to in paragraph 17(c)(v)A(3) above, the Monsanto Trademark and the Roundup Trademark were registered to it;

D. says further that, on or around 1 September 2000, it and Monsanto Company US (New) executed an 'Intellectual Property Transfer Agreement' which provided that 'Monsanto Trademarks', defined as "all trade names, and unregistered trademarks, service marks, service trade styles, which belong to Pharmacia and are primarily applicable to the Monsanto Business", shall be delivered to Monsanto Company US (New) as soon as is reasonably practicable on or after the Separation Date;

E. says further that, on 4 February 2002, a full assignment from it 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.

F. it otherwise does not know and therefore cannot admit sub-paragraph 17(a)(iv);

(vi) in relation to sub-paragraph 17(a)(v), it says that does not know and therefore cannot admit sub-paragraph 17(a)(v);

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

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

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

(e) in relation to sub-paragraph 17(c), it says that:

(i) refers to and repeats paragraph 17(c)(v)(A) above;

(ii) says further that:

A. it entered into an agreement with the Third Respondent that was effective 1 September 2000 (**Separation Agreement**);

B. the Separation Agreement related to the transfer to the Third Respondent of the operations, assets and liabilities of the agricultural business it previously conducted, as described in the Separation Agreement;

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

D. Pursuant to the Amended Separation Agreement, the Third Respondent agreed to retain, assume and pay, discharge, perform and satisfy in full, and to indemnify, defend and hold harmless it for liabilities primarily related to the agricultural business it previously conducted, including any claims against it relating to glyphosate or any liability attributable to it related to glyphosate;

PARTICULARS

Clause 3.03(b) of the Separation Agreement effective 1 September 2000 and clause (f) of the Amended Separation Agreement dated 1 July 2002.

(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';

B1. in relation to sub-paragraph 17(c)(iib), it refers to and repeats paragraph 17(c)(iv)B above;

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

(1) says that from about 1983 to 2000, it supplied to Monsanto Australia (Old) and/or Monsanto Australia (New) Glyphosate Intermediate and/or Glyphosate for importation into Australia; and

(2) otherwise denies the allegations in sub-paragraph 17(c)(iii);

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

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

(1) in respect of the Monsanto Roundup Products from at least July 1976 until 2000:

i. it permitted Monsanto Australia (New) to use the words "Roundup" and "Monsanto" on product labels, including for Roundup Herbicide manufactured by Monsanto Australia (New) in Australia from 1988 to 2000 and Roundup Biactive manufactured by Monsanto Australia (New) in Australia from 1996 to 2000; 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;

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

(f) in relation to sub-paragraph 17(d), it does not know and therefore cannot admit sub-paragraph 17(d); and

(g) otherwise does not know and therefore cannot admit paragraph 17.

C. 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 in paragraph 18.

19. In answer to paragraph 19, it:

(a) refers to and repeats paragraphs 1 and 17 above and paragraphs 109 and 110 below;

(b) otherwise denies the allegations in paragraph 19.

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 the allegations contained in paragraph 21;

(b) says that it refers to and repeats paragraph 17 above and paragraphs 109 and 110 below;

(c) says further that since 24 March 1987, at least some of the Monsanto

Roundup Products have (when supplied), been supplied in Australia in a variety of formulations, with a variety of concentrations of glyphosate; and with glyphosate in the form of salts, with one salt form being glyphosate isopropyl amine salt; and

(d) 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.

22. In answer to paragraph 22, it:

(a) refers to and repeats paragraph 17 above and paragraphs 109 and 110 below;

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

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

C.1 Labels and Marketing Material

23. As to paragraph 23 it:

(a) says that written instructions were attached to Monsanto Roundup Products and that such instructions contained directions to be read and followed by users of Monsanto Roundup Products concerning the risks of skin and ocular irritation, measures that should be adopted by users to minimize those risks and to minimize the risk of exposure to Monsanto Roundup Products;

(b) otherwise denies the allegations.

24. As to paragraph 24, it:

(a) refers to and repeats paragraph 23(a) above;

(b) it says that in relation to Roundup Herbicide and Roundup Biactive:

(i) labels for those products were attached to the products;

(ii) those labels were approved by the APVMA, or prior to the establishment of the APVMA, by regulators for various state or territories;

(iii) the labels contained safety directions; and

(iv) the exact content of those labels in the relevant periods is a matter for

evidence;

(c) otherwise denies the allegations.

25. As to paragraph 25 it:

(a) refers to and repeats paragraph 17 and 19 above and paragraphs 109 and 110 below; and

(b) otherwise does not know and therefore cannot admit the allegations in paragraph 25.

D. PROPERTIES OF ROUNDUP

26. It denies the allegations in paragraph 26 and refers to and repeats paragraphs 30, 32 and 40 below.

27. It denies the allegations in paragraph 27 and refers to and repeats paragraphs 30, 32 and 40 below.

28. In answer to paragraph 28, it:

(a) says that, depending on the manner in which Roundup Products are used, it is possible but not inevitable that users of Roundup Products or individuals exposed to Roundup Products whilst being used may come into contact with Roundup Products; and

(b) otherwise denies the allegations.

29. In answer to paragraph 29, 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 paragraphs 30 and 40 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 29.

30. As to paragraph 30, it:

(a) refers to and repeats paragraph 40 below;

(b) otherwise denies the allegations contained in paragraph 30;

(c) says further and alternatively, that when Roundup Products are 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 32 and 40 below; and

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

PARTICULARS

1. the Fourth Respondent relies upon matters including the matters referred to in paragraphs 32 and 40 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 or Group

Members include:

A. age;

B. personal medical history;

C. history of cancer;

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

E. body weight (including history of obesity);

F. diet;

G. alcohol consumption;

H. smoking;

I. inherited genetic defects;

J. autoimmune diseases or condition or immune deficiency affecting the immune system including Hashimoto thyroiditis, hemolytic anemia, myasthenia gravis, pernicious anemia, rheumatoid arthritis, Sjögren's syndrome/disease, and systemic lupus erythematosus, celiac disease, immune thrombocytopenic purpura, inflammatory bowel disorder (including Crohn's disease, ulcerative colitis), multiple sclerosis, polymyositis or dermatomyositis, psoriasis, sarcoidosis, systemic sclerosis or scleroderma, and type 1 diabetes;

K. atopic (an exaggerated immune response) disorders including asthma, eczema, and hay fever;

L. infections including Glandular Fever (also known as Epstein-Barr virus (EBV)) or Hepatitis A, Hepatitis C, Human Herpes Virus 8, Human Immunodeficiency Virus (HIV), human T-cell leukemia/lymphoma virus, human T-cell lymphotropic virus, or any other viruses not otherwise listed;

M. stomach inflammation or gastritis or gastric ulcers;

N. hereditary conditions carrying a risk of blood abnormality, such as Wiskott-Aldrich Syndrome;

O. congenital or acquired immunodeficiency disorders such as AIDS or Common Variable Immunodeficiency (CVID);

P. exposure to medications and treatment, including chemotherapy, radiotherapy, other forms of cancer treatment, radiation (including solar and ultraviolet radiation and ionizing radiation), rheumatoid arthritis medications, immunosuppressant medication, blood transfusion, allergen immunotherapy/de-sensitisation injections, and hormone therapy;

Q. gender;

R. race/ethnicity;

S. exposure to external mutagens including chemicals (including benzene), outdoor pollution, engine exhaust and diesel and combustion of biomass fuels;

T. exposure to herbicides, insecticides, fungicides and pesticides other than glyphosate, Roundup Products and Monsanto Roundup Products; and

U. 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 30;

(e) says further that an increased risk of developing NHL for an individual:

(i) is not actionable damage in the tort of negligence; and

(ii) in the absence of actual damage is insufficient to establish the tort of negligence.

E. INJURIES

31. In answer to paragraph 31, it:

(a) does not know and therefore cannot admit the allegations in paragraph 31; and

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

32. In answer to paragraph 32, it:

(a) refers to and repeats paragraphs 26 to 30 above and paragraph 40 below;

(b) otherwise denies the allegations contained in paragraph 32; 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 30 above;

(iii) interaction of gene mutations;

(iv) random chance;

(v) the aetiology of NHL;

(vi) the number of sub-types of NHL; and

(d) says further that in the event the Applicant establishes that his use of or exposure to Roundup Products as pleaded in paragraphs 4 – 14 of the 4FASOC was a cause of his NHL (which the Fourth Respondent denies), then:

(i) the relevant use of or exposure to Roundup Products which was causative

of his NHL occurred in the course of his employment with PL & CV McNickle Pty Ltd and Kim Perkins Earthmoving & Clearing Contractor;

(ii) he contracted the NHL in the course of employment;

(iii) employment was the main contributing factor to him contracting NHL, within the meaning of s.4(b)(i) of the *Workers Compensation Act* 1987 (NSW);

(iv) such employment was connected with New South Wales, within the meaning of s.9AA(1) of the *Workers Compensation Act* 1987 (NSW);

(v) by operation of s.3(1AA) of the *Workers Compensation Act* 1987 (NSW) and s.4(1) of the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW), the Applicant was, with respect to the aforementioned employment, a "worker";

(vi) by operation of s.9(1) of the *Workers Compensation Act* 1987 (NSW) he has received an injury and is entitled receive to compensation under that Act.

F. DEFECTIVE GOODS/SAFETY DEFECT

33. It does not plead to paragraph 33 as it makes no allegations against it.

34. In answer to paragraph 34, it:

(a) refers to and repeats paragraphs 15 to 17 above and paragraphs 109 and 110 below; and

(b) otherwise denies the allegations in paragraph 34.

35. In answer to paragraph 35, it:

(a) refers to and repeats paragraphs 1(b), 15, 16, 17 above and paragraphs 109 and 110 below; and

(b) says further that in the absence of specification of the identities of the Third Parties, it does not know and cannot admit the allegations;

(c) otherwise denies the allegations contained in paragraph 35.

36. In response to paragraph 36, it:

(a) refers to and repeats paragraphs 15 to 17 above and paragraph 109 and 110 below;

(b) says that in the absence of specification of the identities of the Third Parties,

it does not know and cannot admit the allegations;

(c) otherwise denies the allegations in paragraph 36.

37. In answer to paragraph 37, it:

(a) refers to and repeats paragraph 15 to 17 above and paragraphs 109 and 110 below;

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

(c) says further that in the absence of specification of the identities of the Third Parties, it does not know and cannot admit the allegations;

(d) otherwise denies the allegations in paragraph 37.

38. In answer to paragraph 38, it:

(a) refers to and repeats paragraphs 15 to 17 and 35 to 37 above and paragraphs 109 and 110 below;

(b) says further that in the absence of specification of the identities of the Third Parties, it does not know and cannot admit the allegations;

(c) otherwise does not know and therefore cannot admit to the allegations contained in paragraph 38.

39. In answer to paragraph 39, it:

(a) refers to and repeats paragraphs 23 to 30 and 32 above and paragraph 40 below;

(b) otherwise denies the allegations contained in paragraph 39;

40. In answer to paragraph 40, it:

(a) denies the allegations in paragraph 40;

(b) refers to and repeats paragraphs 17 and 23 to 30 and 32 above and paragraph 110 below;

(c) says further that:

(i) 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;

(ii) the Monsanto Roundup Products were registered for use in Australia

according to the following general registration process 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:

(i) numerous companies other than the Third Respondent have conducted, or engaged contract research laboratories to conduct on their behalf, their own toxicology studies with glyphosate, surfactants, glyphosate-based formulations and/or metabolites of glyphosate (including long-term rodent carcinogenicity studies on glyphosate), in respect of which the vast majority of study reports were provided (either individually or as part of a joint taskforce) to one or more regulators and/or international organisations, either in the form of copies of study reports or summaries of study reports.

PARTICULARS

Those companies include: Adama, Agrichem, Agro Trade, Albaugh, Alkaloida, Arysta Life Sciences, Barclay Chemicals, Cheminova, Ciba-Geigy, Dow AgroSciences, DuPont, Excel Industries, Feinchemie Schwebda, Helm, Herbex Produtos Quimicos, Industrias Prodotti, Luxan, Nufarm, Sanachem, Sankyo/Mitsui Chemical, Sinon, Sumisho Agro, Syngenta, Zeneca.

(ii) the results of the toxicology studies conducted by or on behalf of companies other than the Third Respondent with glyphosate, surfactants, glyphosate-based formulations or metabolites of glyphosate, that were provided to regulators and/or international organisations are consistent with the results of studies undertaken by or on behalf of the Third Respondent in that, taken together, they demonstrate that neither glyphosate nor glyphosate-based formulations are carcinogenic.

PARTICULARS

Reregistration Eligibility Decision – Glyphosate (United States Environmental Protection Agency, September 1993.

EU Monograph of Glyphosate, 2001.

European Commission Review Report for Glyphosate, 21 January 2002.

2004 JMPR and Toxicological Evaluations of the 2004 JMPR.

Annex I Renewal Dossier, submitted to EFSA on 25 May 2012 by the European Union Glyphosate Task Force, of which the Third Respondent was a member.

Renewal Assessment Report of the EU Rapporteur Member States, Volume 1 – Report and Proposed Decision, and Volume 3 Section B.6 – Toxicology and Metabolism, dated 18 December 2013 (revised on 29 January 2015 and 31 March 2015).

Proposed Re-evaluation Decision of the Pest Management Regulatory Agency, Canada, 13 April 2015.

Final Addendum to the Renewal Assessment Report of the EU Rapporteur Member States, October 2015.

2016 JMPR and Toxicological Evaluations of the 2016 JMPR.

Report of the Food Safety Commission of Japan Regarding Glyphosate, July 2016.

Opinion of the Risk Assessment Committee of the European Chemicals Agency, 15 March 2017.

Re-evaluation Decision of the Pest Management Regulatory Agency, Canada, 28 April 2017.

Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, of the US EPA's Office of Pesticide Programs, 12 December 2017.

Glyphosate Proposed Interim Registration Review Decision of the US EPA, 23 April 2019.

Annex I Renewal Dossier, submitted to the Rapporteur Member States for the European Union on 8 June 2020 by the Glyphosate Renewal Group, of which the Third Respondent was a member.

Summary of the procedure and outcome of the draft Renewal

Assessment Report on glyphosate of the Assessment Group on Glyphosate, 15 June 2021.

(e) 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 evidence at trial.

(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 Fourth 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 Fourth 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 30 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 paragraphs 30(c)(iii) and 32 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;

(f) by reason of the matters referred to in sub-paragraphs 40(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;

(g) says further that, in the premises referred to in sub-paragraphs 40(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;

(h) 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

(i) 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 evidence at trial.

41. In answer to paragraph 41, it:

(a) refers to and repeats paragraphs 23 to 30, 32 and 40 above;

(b) otherwise denies the allegations contained in paragraph 41;

(c) says that to the extent that the Applicant and/or Group Members have suffered loss and damage, because NHL cannot be causatively linked to the Roundup Products or the Monsanto Roundup Products, it 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 40; and

(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.

42. In answer to paragraph 42, it:

(a) denies the allegations in paragraph 42;

(b) says further that:

(i) by operation of s.146 of the ACL, it has no liability in respect of a loss or damage in respect of which an amount could be recovered under a law of the Commonwealth or a State or Territory that relates to workers' compensation;

(ii) by reason of the matters pleaded in paragraph 32(d) above, the Applicant's loss or damage is of a kind in respect of which an amount could be recovered under a law of a State that relates to workers' compensation;

(iii) in the premises:

A. the Applicant has no right to compensation under s.138 or s.139 of the ACL;

B. those Group Members whose loss or damage is of a kind in respect of which an amount could be recovered under a law of the Commonwealth, or a State or Territory that relates to workers compensation have no right to compensation under s.138 or s.139 of the ACL;

(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) says further or alternatively that 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) says further or alternatively that 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) says further that 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) says further and alternatively that, 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

(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.

43. In answer to paragraph 43, it:

(a) denies the allegations contained in paragraph 43;

(b) says further that:

(i) by operation of s.75AI of the TPA, it has no liability in respect of a loss or damage in respect of which an amount could be recovered under a law of the Commonwealth or a State or Territory that relates to workers' compensation;

(ii) by reason of the matters pleaded in paragraph 32(d) above, the Applicant's loss or damage is of a kind in respect of which an amount could be recovered under a law of a State that relates to workers' compensation;

(iii) in the premises:

A. the Applicant has no right to compensation under s.75AD or s.75AE of the TPA;

B. those Group Members whose loss or damage is of a kind in respect of which an amount could be recovered under a law of the Commonwealth, or a State or Territory that relates to

workers compensation have no right to compensation under s.75AD or s.75AE of the TPA;

(b) says further that:

(i) any award of damages is subject to s 75AD 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

44. It does not plead to paragraph 44 as it makes no allegations against it.

45. It does not know and therefore cannot admit the allegations in paragraph 45.

46. In answer to paragraph 46, it:

(a) says that in respect of products intended to be used for lawn and garden, such products were goods acquired for domestic and household use; and

(b) it otherwise does not know and therefore cannot admit the allegations in paragraph 46.

47. It does not know and therefore cannot admit the allegations in paragraph 47.

48. It does not know and therefore cannot admit the allegations in paragraph 48.

49. It does not know and therefore cannot admit the allegations in paragraph 49.

50. In answer to paragraph 50, it:

(a) refers to and repeats the matters pleaded in paragraphs 1, 36 and 40 above; and

(b) otherwise denies the allegations in paragraph 50.

51. In answer to paragraph 51, it:

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

(b) refers to and repeats paragraphs 1, 15 to 17, 36 and 37 above and paragraphs 109 and 110 below;

(c) otherwise denies the allegations in paragraph 51.

52. In answer to paragraph 52, it:

(a) denies the allegations contained in paragraph 52;

(b) says further that it refers to and repeats the matters set out in paragraphs 23 to 30 and paragraphs 32 and 40 above; 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 risk described in paragraph 30 of the 4FASOC (if it existed, which is denied), 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.

53. In answer to paragraph 53, it:

(a) denies the allegations in paragraph 53;

(b) says further that it refers to and repeats the matters set out in paragraphs 23 to 30 and paragraphs 32 and 40 above;

(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 evidence at trial.

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 Respondents 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 evidence at trial.

(ii) the matters set out in paragraph 53(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.

54. In answer to paragraph 54, it:

(a) refers to and repeats paragraphs 23 to 30, 32, 40, 52 and 53 above;

(b) otherwise denies the allegations in paragraph 54; 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.

55. In answer to paragraph 55, it:

(a) refers to and repeats paragraphs 52 to 54 above;

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

56. In answer to paragraph 56, it:

(a) refers to and repeats paragraphs 52 to 54 above;

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

(c) otherwise denies the allegations in paragraph 56; 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.

H. NEGLIGENCE

57. In answer to paragraph 57, it:

(a) refers to and repeats paragraph 17 above and paragraphs 109 and 110 below;

(b) save that it says that it owed the Applicant and Group Members a duty to exercise reasonable care to avoid physical injury as a result of the use of Roundup Products, glyphosate and/or glyphosate intermediate used in the manufacture of Roundup Products:

(i) which it manufactured, distributed or supplied; and

(ii) when used in accordance with the directions for use;

it otherwise denies the allegations contained in paragraph 57.

58. In answer to paragraph 58, it denies the allegations and says further as follows:

(a) as to sub-paragraph 58(a):

(i) one of the studies that had been conducted by IBT was a mouse oncogenicity study, by MS Reyna and DE Gordon called "18-Month Carcinogenic Study with CP67573 in Swiss White Mice", 1973 (**Reyna & Gordon 1973**);

(ii) following its investigation into IBT, the US EPA determined that Reyna & Gordon 1973 was not a valid study;

(iii) the Third Respondent replaced Reyna & Gordon 1973 with a two-year mouse study by AL Knezevich and GK Hogan called "A chronic feeding study of glyphosate in mice", 1983 (**Knezevich & Hogan 1983**);

(iv) the conclusion of Knezevich & Hogan 1983 was that despite a slight increased incidence of renal tubule adenomas observed, this was unrelated to glyphosate;

(b) as to sub-paragraph 58(b), animal studies have not demonstrated evidence of carcinogenicity in rodents;

(c) as to sub-paragraph 58(c):

(i) the weight of epidemiological evidence as made available from time to time did not expose a relationship between glyphosate and NHL or that there was a real and significant risk that there was such a relationship;

Particulars

The Agricultural Health Study (**AHS**), a large and sophisticated cohort study, is the most reliable of the epidemiological studies that have evaluated the existence of a link between exposure to glyphosate-based formulations and the risk of NHL;

(ii) the Third Respondent examined each of the epidemiological studies set out in the particulars to paragraph 58(c) of the 4FASOC that purported to demonstrate a relationship between use of and/or exposure to glyphosate and/or glyphosate-based formulations and an increased risk of NHL, from time-to-time as such studies became available to the Third Respondent or appeared in the epidemiological literature;

(iii) each of the epidemiological studies relied on in the particulars subjoined to paragraph 58(c) of 4FASOC as purportedly demonstrating a

relationship between use of and/or exposure to glyphosate and/or glyphosate-based formulations and an increased risk of NHL suffered from significant bias and other methodological flaws such that the studies do not provide valid or reliable indications of the relationship between exposure to glyphosate-based formulations and the risk of NHL;

(iv) the AHS study publications have repeatedly concluded that exposure to glyphosate-based formulations does not result in an increased risk of NHL;

(d) as to sub-paragraph 58(d):

(i) on 15 February 2001, the Third Respondent presented Professor Parry with the results of further assays that the Third Respondent had conducted with the formulation MON35050 in order to understand studies that purported to show a genotoxic effect of glyphosate and/or glyphosate-based formulations;

Particulars

The assays were subsequently written up in the following reports:

- Hotz K, "A Study of the Short-Term Effects of MON 35050 in Male CD-1 Mice", dated 8 May 2001 (Monsanto Study Number ML-99-170).
- Hotz K, "A Study of the Acute Effects of MON 35050 in Male CD-1 Mice Following Either a Single Intraperitoneal or Oral Dose Administration", dated 8 May 2001 (Monsanto Study Number ML-99-307)

(ii) as a consequence of the results of these further assays, Professor Parry concluded that neither glyphosate nor glyphosate-based formulations were genotoxic;

Particulars

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(iii) on 15 February 2001, Professor Parry suggested that the Third Respondent conduct a further study, in which the formulation MON35050 without glyphosate was to be administered by intraperitoneal injection, to ascertain whether the absence of the glyphosate made a

difference to the result;

(iv) the Third Respondent conducted the further study which Professor Parry had suggested on 15 February 2001.

(v) the conclusion of that further study was that the liver and kidney toxicity observed was present when the formulation MON35050 with and without glyphosate was administered to mice by intraperitoneal injection and therefore that the glyphosate was not the cause of the observed toxicity, which was a product of the unusual form of administration of the test material.

Particulars

This was written up as a summary report, Hotz K "A Study of the Acute Effects of MON 35050 and MON 35050 (Minus Glyphosate) in Male CD-1 Mice Following Single Intraperitoneal Administration" dated 19 July 2002 (Monsanto Study Number ML-2001-98).

(e) as to sub-paragraph 58(e): the extent of personal contact of Roundup Products is dependent on a variety of factors, including the nature of the product, the use of personal protective equipment, the quality of the tools used to apply the Roundup Products and the care taken by the person applying or exposed to the Roundup Products to minimize personal contact;

(f) as to sub-paragraph 58(f):

(i) the assays conducted by TNO were compromised such that the results could not be relied upon;

(ii) a final report was issued by TNO, issued on 29 July 2003;

(iii) the final draft of the report by TNO, issued on 29 July 2003, concluded that:

A. because of the high variation in dermal penetration within the test groups and the poor recoveries, the data in the report were not acceptable for regulatory use and risk assessment; and

B. the poor recoveries combined with the high variation within the glyphosate test groups make the data generated by the study unsuitable for risk assessment;

(g) as to sub-paragraph 58(g):

(i) the IARC working group that examined glyphosate met for one week, between 3 March 2015 and 10 March 2015, in Lyon, France;

(ii) in addition to examining glyphosate, the IARC working group also examined four other substances in the same week as glyphosate;

(iii) the IARC working group that examined glyphosate did not examine all scientific studies, assays or data concerning glyphosate and glyphosate-based formulations, but rather:

A. for epidemiological studies, cancer bioassays and mechanistic data, the IARC working group only considered reports that had been published or accepted for publication in the openly available scientific literature;

B. the IARC working group did not examine, or request to examine, the study reports of any of the toxicology studies referred to in its Monograph concerning glyphosate;

C. to the extent that the IARC working group derived information about toxicology studies performed concerning glyphosate, glyphosate-based formulations and surfactants, it derived that information solely from secondary sources, such as summaries of studies that appeared in documents prepared by national regulators or international organisations concerning glyphosate, and did not review or examine the underlying study reports or raw data from the studies;

D. the IARC working group gave limited consideration to documents prepared by national regulators or international organisations concerning glyphosate;

(iv) the IARC working group, in its Monograph concerning glyphosate, examined only a small proportion of the toxicology studies that are summarised in the documents prepared by regulators and international organisations concerning glyphosate;

(v) in its assessment of glyphosate, the IARC working group:

A. did not perform, or attempt to perform, a human health risk

assessment of glyphosate;

B. did not evaluate, nor did it attempt or purport to evaluate, the risk to humans of developing cancer from exposure to or use of glyphosate;

C. when considering studies that purported to show a carcinogenic effect of glyphosate, did not consider the distinction between an apparent effect that arises by virtue of any intrinsic carcinogenic potential of glyphosate and an effect that arises as a secondary effect of particular test conditions, such as excessive dosage levels or unusual administration mechanisms;

D. after the publication by IARC of its Monograph concerning glyphosate, numerous regulators and international organisations and bodies specifically examined the IARC Monograph and concluded that exposure to glyphosate does not pose a carcinogenic risk to humans.

Particulars

Australian Pesticides and Veterinary Medicines Authority:

- Regulatory position: consideration of the evidence for a formal reconsideration of glyphosate, September 2016.
- Review of IARC Monograph 112 (Glyphosate): Tier 1, 2016.
- Review of IARC Monograph 112 (Glyphosate): Tier 2, 2016.
- Final regulatory position: consideration of the evidence for a formal reconsideration of glyphosate, March 2017.

Canadian Pest Management Regulatory Authority, Proposed Re-evaluation Decision, April 2015.

European Chemicals Agency, Committee for Risk Assessment's Opinion proposing harmonised classification and labelling at EU level of glyphosate, March 2017.

European Food Safety Authority, Conclusion on the peer review of the pesticide risk assessment of the active substance glyphosate, October 2015.

German Federal Institute for Occupational Safety and Health (BAuA),

CLH Report for Glyphosate: Proposal for Harmonised Classification and Labelling, May 2016.

German Federal Institute for Risk Assessment (BfR)

- Renewal Assessment Report – Glyphosate Addendum 1 to Renewal Assessment Report – Assessment of IARC Monographs Volume 112, 31 August 2015.

New Zealand Environmental Protection Agency, Review of the Evidence Relating to Glyphosate and Carcinogenicity, August 2016.

United States Environmental Protection Agency (**US EPA**):

- Glyphosate: Report of the Cancer Assessment Review Committee, October 2015.
- Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, September 2016.
- Transmission of Meeting Minutes and Final Report of the December 13-16, 2016 FIFRA SAP Meeting Held to Consider and Review Scientific Issues Associated with EPA's Evaluation of the Carcinogenic Potential of Glyphosate, March 2017.
- Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, December 2017.
- Glyphosate: Response to Comments on the Human Health Draft Risk Assessment, April 2018.
- Glyphosate: Response to Comments on the Proposed Interim Decision Regarding the Human Health Risk Assessment, January 2019.
- Glyphosate: Proposed Interim Registration Review Decision Case Number 0178, April 2019.

(h) as to sub-paragraph 58(h):

(i) the Third Respondent has conducted the testing of glyphosate and glyphosate-based formulations in compliance with the requirements of regulators;

(ii) long term animal carcinogenicity studies of glyphosate-based formulations have not been required, and are not required, by regulators

such as the US EPA;

(iii) long term animal carcinogenicity studies of glyphosate-based formulations would be of no, or very limited, utility in contributing to the state of scientific knowledge concerning the carcinogenic potential of glyphosate or glyphosate-based formulations because:

A. the most appropriate animals to be used in long term carcinogenicity studies are rodents and such studies typically last for 18 months (in the case of mice) or 24 months (in the case of rats);

B. administering a glyphosate-based formulation reflecting the limit dose level to rodents over the period of a long-term study would result in severe damage to the gastro-intestinal tract of the rodents, by reason of the surfactant, such that the rodents would in all likelihood die as a consequence before the end of the study such that the study could not be completed;

C. administering a glyphosate-based formulation reflecting the limit dose level to rodents would require the administration of an excessive volume of test material to the rodents such that their stomachs would likely rupture, causing them to die before the end of the study such that the study could not be completed;

(i) refers to and repeats the matters in paragraphs 30, 32 and 40 above.

59. In answer to paragraph 59, it:

(a) denies the allegations contained in paragraph 59; and

(b) refers to and repeats paragraphs 26 to 30, 40 and 58 above.

60. In answer to paragraph 60, it:

(a) refers to and repeats paragraphs 17, 26 to 30, 40, 57 and 58 above and paragraphs 109 and 110 below;

(b) save that it says that it owed the Applicant and Group Members a duty to exercise reasonable care to avoid physical injury as a result of the use of Roundup Products, glyphosate and/or glyphosate intermediate used in the manufacture of Roundup Products:

(i) which it manufactured, supplied or distributed; and

(ii) which used in accordance with the directions for use;

it otherwise denies the allegations contained in paragraph 60.

I. STANDARD OF CARE

61. In answer to paragraph 61, it:

(a) denies the allegations in paragraph 61; and

(b) refers to and repeats paragraphs 26 to 30, 40 and 58 above.

62. In answer to paragraph 62, it:

(a) refers to and repeats paragraphs 26 to 30, 40, 58 and 61 above; and

(b) otherwise denies the allegations in paragraph 62.

63. It denies the allegations in paragraph 63.

64. In answer to paragraph 64, it:

(a) refers to and repeats paragraph 23 to 30, 40 and 58 above;

(b) says further that:

(i) the Third Respondent has conducted comprehensive testing and evaluation of the alleged carcinogenic potential of glyphosate and glyphosate-based formulations;

(ii) the allegations made in by the Applicant in this proceeding concerning the alleged carcinogenic potential of glyphosate and glyphosate-based formulations are known to the APVMA;

(iii) by reason of the large volume of litigation in the USA concerning the alleged carcinogenic potential of glyphosate and glyphosate-based formulations, allegations of that nature are, and for several years have been, well known to regulators such as the US EPA;

(c) otherwise denies the allegations in paragraph 64.

J. BREACH OF DUTY

65. In answer to paragraph 65, it:

(a) refers to and repeats paragraph 17 above and paragraphs 109 and 110 below; and

(b) otherwise denies the allegations in paragraph 65.

66. In answer to paragraph 66, it:

(a) refers to and repeats paragraphs 23 to 30, 40 and 58 above;

(b) denies the allegations in paragraph 66;

(c) says that if the Monsanto Roundup Products are found to present the risk pleaded in paragraph 30 (which is denied), the state of scientific knowledge was not such as to enable it to discover 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 evidence at trial.

K. CAUSATION

67. In answer to paragraph 67:

(a) it denies the allegations in paragraph 67;

(b) it refers to and repeats paragraphs 32, 40 and 58 above; and

(c) says further that:

(i) there is no causal connection between use of or exposure to Roundup Products, glyphosate and/or glyphosate intermediate used in the manufacture of Roundup Products and NHL; and

(ii) any use of or exposure to Roundup Products by the Applicant and Group Members had no effect on their development of NHL.

68. In answer to paragraph 68:

(a) it denies the allegations in paragraph 68;

(b) it refers to and repeats paragraphs 32, 40, 58 and 64 above;

(c) it says further that the matters alleged in paragraphs 26 to 27, 26 to 29 and 30 of 4FASOC do not represent the true position.

69. In answer to paragraph 69:

(a) it denies the allegations in paragraph 69;

(b) it refers to and repeats paragraph 68 above;

(c) it says further that after the publication by IARC of its Monograph concerning glyphosate in 2015, numerous regulators and international organisations and bodies specifically examined the IARC Monograph and have again concluded that exposure to glyphosate does not pose a carcinogenic risk to humans.

Particulars

Australian Pesticides and Veterinary Medicines Authority:

- Regulatory position: consideration of the evidence for a formal reconsideration of glyphosate, September 2016.
- Review of IARC Monograph 112 (Glyphosate): Tier 1, 2016.
- Review of IARC Monograph 112 (Glyphosate): Tier 2, 2016.
- Final regulatory position: consideration of the evidence for a formal reconsideration of glyphosate, March 2017.

Canadian Pest Management Regulatory Authority, Proposed Re-evaluation Decision, April 2015.

European Chemicals Agency, Committee for Risk Assessment's Opinion proposing harmonised classification and labelling at EU level of glyphosate, March 2017.

European Food Safety Authority, Conclusion on the peer review of the pesticide risk assessment of the active substance glyphosate, October 2015.

German Federal Institute for Occupational Safety and Health (BAuA), CLH Report for Glyphosate: Proposal for Harmonised Classification and Labelling, May 2016,

German Federal Institute for Risk Assessment (BfR)

- Renewal Assessment Report – Glyphosate Addendum 1 to Renewal Assessment Report – Assessment of IARC Monographs Volume 112, 31 August 2015.

New Zealand Environmental Protection Agency, Review of the Evidence Relating to Glyphosate and Carcinogenicity, August 2016.

United States Environmental Protection Agency (**US EPA**):

- Glyphosate: Report of the Cancer Assessment Review Committee, October 2015.
- Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, September 2016.
- Transmission of Meeting Minutes and Final Report of the December 13-16, 2016 FIFRA SAP Meeting Held to Consider and Review

Scientific Issues Associated with EPA's Evaluation of the Carcinogenic Potential of Glyphosate, March 2017.

- Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential, December 2017.
- Glyphosate: Response to Comments on the Human Health Draft Risk Assessment, April 2018.
- Glyphosate: Response to Comments on the Proposed Interim Decision Regarding the Human Health Risk Assessment, January 2019.
- Glyphosate: Proposed Interim Registration Review Decision Case Number 0178, April 2019.

70. In answer to paragraph 70:

(a) it denies the allegations in paragraph 70; and

(b) it refers to and repeats paragraphs 64, 68 and 69 above.

71. In answer to paragraph 71:

(a) it denies the allegations in paragraph 71; and

(b) it refers to and repeats paragraphs 23-30. 64, 66, 68 and 69 above; and

(c) says further that:

(i) there is no causal connection between use of or exposure to Roundup Products and NHL;

(ii) any use of or exposure to Roundup Products or Pre-1988 Monsanto Roundup Products by the Applicant and Group Members had no effect on their development of NHL.

L. LOSS AND DAMAGE

72. In answer to paragraph 72, it:

(a) denies the allegations contained in paragraph 72;

(b) says further that the 4FASOC fails to plead what dose is said by the Applicant to have been necessary to have caused and did cause his NHL or the NHL of Group Members;

(c) says further that in the event the Applicant establishes that his use of or exposure to Roundup Products was a cause of his NHL (which the Fourth Respondent denies), then:

(i) compensation is payable under the *Workers Compensation Act* 1987 (NSW) in respect of the Applicant's NHL (whether or not a claim for compensation is or has been duly made);

(ii) the Applicant's claim for damages is subject to s.151Z(2) of the *Workers Compensation Act* 1987 (NSW);

(iii) by operation of s.151Z(2)(c), the damages that the Applicant may recover against the Fourth Respondent are to be reduced;

(iv) the amount of the reduction is the amount by which the contribution which the Fourth Respondent would, but for Part 5 of the *Workers Compensation Act* 1987 (NSW), be entitled to recover from PL & CV McNickle Pty Ltd and/or Kim Perkins Earthmoving & Clearing Contractor as a joint tortfeasor or otherwise exceeds the amount of contribution recoverable;

(v) by operation of s.151Z(2)(d), the amount of the contribution that the Fourth Respondent is entitled to recover from PL & CV McNickle Pty Ltd and/or Kim Perkins Earthmoving & Clearing Contractor as a joint tortfeasor or otherwise is to be determined as if the whole of the damages were assessed in accordance with the provisions of Division 3 of Part 5 of the *Workers Compensation Act* 1987 (NSW) as to the award of damages;

(d) 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);

(e) 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);

(f) 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);

(g) 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;

(h) 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;

(i) 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.

M. DECEIT

73. In answer to paragraph 73:

(a) it denies the allegations in paragraph 73;

(b) it says further that it did not conceal information concerning the alleged carcinogenic potential or risk of Roundup Products, glyphosate and/or glyphosate-based formulations, including any risk of an individual developing NHL;

(c) it refers to and repeats paragraph 58 above;

(d) it refers to and repeats the allegations made in the First, Second and Third Respondent's Rejoinders to the Applicant's Amended Replies (**Rejoinder**).

74. In answer to paragraph 74:

(a) it denies the allegations in paragraph 74;

(b) it refers to and repeats paragraphs 17, 40, 58, 64, 68 and 69 above and paragraphs 109 and 110 below;

(c) it refers to and repeats the allegations made in the Rejoinder.

75. In answer to paragraph 75:

(a) it denies the allegations in paragraph 75; and

(b) it refers to and repeats paragraphs 26 to 30, 40, 58, 64, 68 and 69 above.

76. In answer to paragraph 76:

(a) it denies the allegations in paragraph 76; and

(b) it refers to and repeats paragraphs 26 to 30, 40, 58, 64, 68 and 69 above.

77. In answer to paragraph 77:

(a) it denies the allegations in paragraph 77;

(b) it refers to and repeats paragraphs 58, 64, 68(d) and 69(b) above.

78. It denies the allegations in paragraph 78.

79. In answer to paragraph 79:

(a) it denies the allegations in paragraph 79; and

(b) refers to and repeats paragraphs 40, 41, 58, 68(d) and 69(b) above

80. In answer to paragraph 80:

(a) it denies the allegations in paragraph 80;

(b) it refers to and repeats 17, 26 to 30, 58, 64, 68 and 69 above and paragraphs 109

and 110 below;

(c) it refers to and repeats the allegations made in the Rejoinder.

81. In answer to paragraph 81:

(a) it admits that it did not tell regulatory authorities, consumers or potential consumers of the Roundup Products, that the Roundup Products were carcinogenic and/or that the use of or exposure to Roundup Products increased an individual's risk of developing NHL;

(b) it says further that it did not do the matters in paragraph 81(a) because:

(i) Roundup Products are not carcinogenic nor is there a real and significant risk that they are or were carcinogenic;

(ii) the use of and/or exposure to Roundup Products does not increase an individual's risk of developing NHL;

(iii) the Third Respondent has conducted comprehensive testing and evaluation of the alleged carcinogenic potential of glyphosate and glyphosate-based formulations;

(iv) the allegations made in by the Applicant in this proceeding concerning the alleged carcinogenic potential of glyphosate and glyphosate-based formulations are known to APVMA;

(v) by reason of the large volume of litigation in the USA concerning the alleged carcinogenic potential of glyphosate and glyphosate-based formulations, allegations of that nature are, and for several years have been, well known to regulators such as the US EPA.

82. It denies the allegations in paragraph 82.

83. In answer to paragraph 83:

(a) it denies the allegations in paragraph 83;

(b) it says further that:

(i) Roundup Products are not carcinogenic, nor is there a real and significant risk that they are or were carcinogenic;

(ii) neither use of nor exposure to Roundup Products increases an individual's risk of NHL.

84. In answer to paragraph 84:

(a) it denies the allegations in paragraph 84;

(b) it says further that:

(i) Roundup Products are not carcinogenic, nor is there a real and significant risk that they are or were carcinogenic;

(ii) neither use of nor exposure to Roundup Products increases an individual's risk of NHL.

85. In answer to paragraph 85:

(a) it denies the allegations in paragraph 85;

(b) it refers to and repeats paragraphs 40, 41, 58, 68 and 69 above; and

(c) says further that:

(i) there is no causal connection between use of or exposure to Roundup Products and NHL;

(ii) there is no causal connection between the matters alleged in paragraphs 74 to 79 of 4FASOC and NHL;

(iii) any use of or exposure to Roundup Products by the Applicant and Group Members had no effect on their development of NHL.

N. EXEMPLARY AND AGGRAVATED DAMAGES

86. In answer to paragraph 86:

(a) it denies the allegations in paragraph 86;

(b) it refers to and repeats paragraphs 17, 26 to 30, 32, 40, 58, 64, 68 and 69 above and paragraphs 109 and 110 below;

(c) it refers to and repeats the allegations made in the Rejoinder;

(d) it says further that:

(i) by operation of s.87ZB(1) of the *Trade Practices Act* 1974 (Cth), the court cannot award exemplary damages or aggravated damages in respect of death or personal injury;

(ii) by operation of s.87ZB(1) of the *Consumer and Competition Act* 2010 (Cth), the court cannot award exemplary damages or aggravated damages in respect of death or personal injury;

(iii) by operation of sections 11A and 21 of the *Civil Liability Act* 2002 (NSW), the court cannot award aggravated, exemplary or punitive

damages where the act or omission that caused the injury or death was negligence;

(iv) by operation of s.52(1) of the *Civil Liability Act* 2003 (Qld), the court cannot award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages;

(v) by operation of s.19 of the *Personal Injuries (Liabilities and Damages) Act* 2003 (NT), the court must not award aggravated damages or exemplary damages in respect of a personal injury;

(e) it says further that 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 and that:

(i) by operation of section 2(2) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages;

(ii) by operation of section 66(2)(d) of the *Succession Act* 1981 (Qld), the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages;

(iii) by operation of section 29(2)(c) of the *Administration and Probate Act* 1958 (Vic), the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages;

(iv) by operation of section 4(2)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1941 (WA), the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages;

(v) by operation of s.16(2) of the *Civil Law (Wrongs) Act* 2002 (ACT), the damages recoverable for the benefit of the estate of a deceased person do not include exemplary damages;

(vi) by operation of section 27(3)(c) of the *Administration and Probate Act* 1935 (Tas), the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages;

(vii) by operation of section 3(1)(d) of the *Survival of Causes of Action Act* 1940 (SA), the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages;

(viii) by operation of section 6(1)(a) of the *Law Reform (Miscellaneous Provision) Act* 1956 (NT), the damages recoverable for the benefit of the estate of a deceased person shall not include exemplary damages.

87. In answer to paragraph 87:

(a) it denies the allegations in paragraph 87; and

(b) it refers to and repeats paragraph 86 above.

88. In answer to paragraph 88:

(a) it denies the allegations in paragraph 88; and

(b) it refers to and repeats paragraph 86 above.

O. COMMON QUESTIONS OF LAW OR FACT

89. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 89 as it makes no allegations against it.

90. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 90 as it makes no allegations against it.

91. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 91 as it makes no allegations against it.

92. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 92 as it makes no allegations against it.

93. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 93 as it makes no allegations against it.

94. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 94 as it makes no allegations against it.

95. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 95 as it makes no allegations against it.

96. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 96 as it makes no allegations against it.

97. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 97 as it makes no allegations against it.

98. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 98 as it makes no allegations against it.

99. Save to say that it does not agree with the formulation of all common questions, it

otherwise does not plead to paragraph 99 as it makes no allegations against it.

100. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 100 as it makes no allegations against it.

101. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 101 as it makes no allegations against it.

102. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 102 as it makes no allegations against it.

103. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 103 as it makes no allegations against it.

104. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 104 as it makes no allegations against it.

105. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 105 as it makes no allegations against it.

106. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 106 as it makes no allegations against it.

107. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 107 as it makes no allegations against it.

108. Save to say that it does not agree with the formulation of all common questions, it otherwise does not plead to paragraph 108 as it makes no allegations against it.

P. MONSANTO COMPANY US (OLD)

109. In answer to paragraph 109, it

(a) admits that it was incorporated under the laws of the State of Delaware within the United States of America in 1933; and

(b) refers to and repeats paragraphs 15(a)-(b), 16(a), 17(a) and 17(e) above.

110. In answer to paragraph 110, it refers to and repeats paragraph 17(e) above.

Q. GROUP MEMBER CLAIMS

111. 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.

112. 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.

113. Further, to the extent that use of or exposure to Roundup Products is established as a cause of a Group Member's NHL or a deceased NHL Group Member's NHL (which is denied):

(a) where the circumstances of such use or exposure are such that compensation is payable under the *Workers Compensation Act* 1987 (NSW) in respect of their NHL (whether or not a claim for compensation is or has been duly made), then s.151Z(2)(c) of that Act applies to the assessment of common law damages;

(b) where the circumstances of such use or exposure give rise, or would (in the case of deceased Group Members) have given rise, to an entitlement to compensation under the *Accident Compensation Act* 1985 (Vic) and/or the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic) for injury arising out of, or in the course of, or due to the nature of, employment, claims for common law damages are subject to the provisions of those Acts as in force from time-to-time, and in particular:

(i) where the injury arose before 12 November 1997:

A. any action for damages in respect of that injury is subject to s.135A and s.135AC of the *Accident Compensation Act* 1985 (Vic);

B. by operation of s.135A, any right of action to recover damages for that injury has been contingently extinguished;

C. in the absence of compliance with s.135A and s.135AC of the *Accident Compensation Act* 1985 (Vic), any right of action remains extinguished, such that no action to recover damages can be maintained; and

D. where a Group Member has died, no cause of action and no right to apply for leave to commence proceedings pursuant to s.135A(4)(b), vested in his or her legal personal representative for the benefit of the estate upon his or her death;

(ii) where the injury arose on or after 12 November 1997 and before 20 October 1999, any right of action to recover damages for that injury has been abolished by s.134A(1) of the *Accident Compensation Act* 1985 (Vic), such that:

A. no action to recover damages can be maintained; and

B. where a Group Member has died, no cause of action vested in his or her legal personal representative for the benefit of the estate upon his or her death;

(iii) where the injury arose on or after 20 October 1999:

A. any action for damages in respect of that injury is subject to sections 134AA and 134AB of the *Accident Compensation Act* 1985 (Vic) or (in the case of injury arising on or after 1 July 2014) Part 7 of the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic);

B. by operation of s.134AA and s.134AB of the *Accident Compensation Act* 1985 (Vic), and (in the case of injury arising on or after 1 July 2014) s.326 of the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic), any right of action to recover damages for that injury has been contingently extinguished;

C. in the absence of compliance with s.134AA and s.134AB of the *Accident Compensation Act* 1985 (Vic), or (in the case of injury arising on or after 1 July 2014) Part 7 of the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic), any right of action remains extinguished, such that no action to recover damages can be maintained;

D. where a Group Member has died, no cause of action and no right to apply for leave to commence proceedings pursuant to s.134AB(16)(b) of the *Accident Compensation Act* 1985 (Vic) or (in the case of injury arising on or after 1 July 2014) s.335(2)(d) of the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic), vested in his or her legal personal representative for the benefit of the estate upon his

or her death;

(c) where the circumstances of such use or exposure are such that compensation has been paid under the *Workers Rehabilitation and Compensation Act* 1988 (Tas), the damages which may be recovered from the Fourth Respondent at common law shall be reduced by the payment of compensation pursuant to s.133(1) of that Act.

114. Further, to the extent that use of or exposure to Roundup Products is established as a cause of the NHL of any deceased NHL Group Members (which is denied), where the circumstances of such use or exposure give rise, or would give rise, to an entitlement to compensation under the *Accident Compensation Act* 1985 (Vic) and/or the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic) for injury arising out of, or in the course of, or due to the nature of, employment:

(a) a claim for damages under Part III of the *Wrongs Act* 1958 (Vic) in respect of injury arising before 12 November 1997 is subject to s.135A(8) and s.135A(9) of the *Accident Compensation Act* 1985 (Vic);

(b) a claim for damages under Part III of the *Wrongs Act* 1958 (Vic) in respect of injury arising on or after 12 November 1997 and before 1 July 2014 is subject to s.135C of the *Accident Compensation Act* 1985 (Vic);

(c) a claim for damages under Part III of the *Wrongs Act* 1958 (Vic) in respect of injury arising on or after 1 July 2014 is subject to s.366 of the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic).

Date: 26 August 2022

Herbert Smith Freehills
Solicitors for the Fourth Respondent

This pleading was settled by Robert Craig QC, Kateena O'Gorman and Raph Ajzensztat, counsel for the Fourth Respondent.

Certificate of lawyer

I **Peter Holloway**, Australian legal practitioner and partner of Herbert Smith Freehills, the solicitors for the Fourth Respondent in this proceeding, certify to the Court that, in relation to the Amended Defence filed on behalf of the Fourth 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: 26 August 2022

Peter Holloway
Partner
Herbert Smith Freehills
Solicitors for the Fourth Respondent

Federal Court of Australia 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 Fourth Respondent

Product name	Registration date
Concentrate Advance Roundup Weedkiller	2000-08-11
Roundup Biactive Herbicide	1996-05-29
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 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)
Roundup Spot Weed Killer Sure Shot Foam	1998-09-25

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)