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Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	VID243/2020
File Title:	KELVIN MCNICKLE v HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD & ORS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 26/08/2022 3:03:29 PM AEST Registrar

Important Information

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Points of Defence

VID 243 of 2020

Federal Court of Australia District Registry: Victoria Division: General

KELVIN MCNICKLE

Applicant and

HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD & ORS

Respondents

Notes:

i. Where the Respondents adopt the defined terms or headings used in the Applicant's Second Further Amended Points of Claim (**A2FAPC**), they do so for convenience only, and by doing so, do not admit any factual assertions contained in, or in any way implied by, any defined term used in the A2FAPC.

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

In answer to the A2FAPC, the First, Second, ~~and~~ Third and Fourth Respondents (**the Respondents**) state as follows:

Part A. The Respondents

A.1 The First Respondent

1. In answer to paragraph 1 of the A2FAPC, the Respondents say as follows:

   (a) in relation to sub-paragraph 1(a) of the A2FAPC:

      (i) they admit that the First Respondent had the name Monsanto Australia Limited between 29 July 1976 and 17 April 1988;

      (ii) they say further that:

         A. on 31 March 1988, Monsanto Australia (Old) was sold by the Third Respondent to Panimo Pty Ltd pursuant to a Share Sale Agreement;

         B. on 18 April 1988, Monsanto Australia (Old) was re-named Chemplex Australia Limited;

         C. in around June 1993, Chemplex Australia Limited was re- named Huntsman Chemical Company Australia Limited;

         D. in around April 1996, the First Respondent was re-named Huntsman Chemical Company Australia Pty Ltd;

(b) in relation to sub-paragraph 1(b) of the A2FAPC:

(i) they deny the importation of Roundup Herbicide by the First Respondent, as alleged;

(ii) they say further that ~~at various times~~ between 1983 to April 1988, the First Respondent manufactured Roundup Herbicide which contained glyphosate;

(iii) they say further that the manufacture of Roundup Products (as defined in the A2FAPC) 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 Roundup Products; and

(iv) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(b) of the A2FAPC;

(c) in relation to sub-paragraph 1(c) of the A2FAPC:

(i) they say that ~~at various times~~ between 1983 and 1988 the First Respondent distributed Roundup Herbicide via a network of re- sellers, including:

(1) Ciba-Geigy Australia Limited ~~at various times in~~ from 1983 to 1985;

(2) Elders Pastoral ~~at various times in~~ from 1983 to April 1988;

(3) Bayer Australia Limited ~~at various times in~~ from 1985 and 1986;

(4) a Nufarm entity ~~at various times in~~ from 1986 and 1987; and

(ii) they say further that in the absence of specification of the identities of the "Intermediary Suppliers" or "Third Parties", the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(c) of the A2FAPC;

(d) in relation to sub-paragraph 1(d) of the A2FAPC:

(i) they refer to and repeat sub-paragraph 1(b)(iii) above;

(ii) they say further that between 1 April 1988 and November 1993, the First Respondent produced Glyphosate for the Second Respondent pursuant to an operating agreement between Legis No 20 Ltd and the First Respondent dated 31 March 1988; and

(iii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(d) of the A2FAPC;

(e) in relation to sub-paragraph 1(e) of the A2FAPC:

(i) they refer to and repeat sub-paragraphs 1(b)(ii) and 1(b)(iii) above; and

(ii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(e) of the A2FAPC;

(f) in relation sub-paragraph 1(f) of the A2FAPC:

(i) they refer to and repeat sub-paragraph 1(c)(i) above; and

(ii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(f) of the A2FAPC;

(g) in relation to sub-paragraph 1(g) of the A2FAPC:

(i) they admit that from 1979 to 1987, the First Respondent promoted and marketed Roundup Herbicide in Australia and engaged in activities related to marketing; and

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The promotion and marketing activities included conducting promotions, educational publications and programs, product demonstration programs and print advertisements.

(ii) say further that, insofar as the First Respondent, or affiliates or related entities of the First Respondent, provided Roundup Herbicide to Ciba-Geigy Australia Limited, Bayer Australia Limited and Elders Pastoral for distribution, such entities marketed and promoted Roundup Herbicide in Australia; and

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The promotion and marketing activities carried out by Ciba-Geigy Australia Limited included print advertisements. The promotion and marketing activities carried out by Elders Pastoral included providing selling aids and promotional materials and organising farmers' nights and field days to advertise Roundup Herbicide.

(iii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(g) of the A2FAPC;

(h) in relation to sub-paragraph 1(h) of the A2FAPC:

(i) they admit that the First Respondent's name was used in some informational booklets, technical newsletters and flyers related to Roundup Herbicide between 1979 and 1987; and

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The First Respondent published informational booklets and distributed technical newsletters and flyers referring to its own name which was

Monsanto Australia Limited between 29 July 1976 and 17 April 1988.

(ii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(h) of the A2FAPC;

(i) in relation to sub-paragraph 1(i) of the A2FAPC:

(i) they admit that from 1979 to 1987, the First Respondent used "Monsanto" and "Roundup" trademarks registered to Monsanto Company US (Old) in promotion and marketing materials for Roundup Herbicide in Australia; and

(ii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(i) of the A2FAPC;

(j) in relation to sub-paragraph 1(j) of the A2FAPC:

(i) they admit that the First Respondent was a wholly owned subsidiary of Monsanto Company US (Old) between 1974 and 1987; and

(ii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 1(j) of the A2FAPC.

2. In answer to paragraph 2 of the A2FAPC, the Respondents refer to and repeat sub-paragraph 1(d)(ii).

3. In answer to paragraph 3 of the A2FAPC, the Respondents:

(a) refer to and repeat paragraphs 1 and 2 above;

(b) say that the allegations in paragraph 3 of the A2FAPC do not specify any time period in which it is alleged that the First Respondent manufactured Roundup Herbicide within the meaning of s 74A of the *Trade Practices Act 1974* (Cth) (**TPA**); and

(c) otherwise say further that the allegations raise a matter of law and the Respondents do not know and therefore cannot admit the allegations in paragraph 3 of the A2FAPC.

A.2 The Second Respondent

4. In answer to paragraph 4 of the A2FAPC, the Respondents say as follows:

(a) in relation to sub-paragraph 4(a) of the A2FAPC:

(i) they say that the Second Respondent was known as Monsanto Australia Limited from 19 April 1988 to 23 August 2018; and

(ii) the Second Respondent is now known as Monsanto Australia Pty Ltd;

(b) in relation to sub-paragraph 4(b) of the A2FAPC:

(i) they say that the Second Respondent imported or caused to be imported into Australia Roundup Herbicide from various international Monsanto affiliates

or related entities as follows:

A. between 1 October 1999 and 2018, for distribution by Scotts Australia Pty Ltd;

B. between 1 March 2013 and 2019, for distribution by Sinochem International Crop Care (Overseas) Pte. Ltd or its affiliates/related entities; and

(ii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 4(b) of the A2FAPC;

(c) in relation to sub-paragraph 4(c) of the A2FAPC:

(i) they say that the Second Respondent imported or caused to be imported into Australia Roundup Biactive from various international Monsanto affiliates or related entities ~~at various times~~ between 1 March 2013 and 2019, for distribution by Sinochem International Crop Care (Overseas) Pte. Ltd or its affiliates/related entities; and

(ii) they say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 4(c) of the A2FAPC;

(d) in relation to sub-paragraph 4(d) of the A2FAPC:

(i) they say that from April 1988 until around 2002, the Second Respondent imported or caused to be imported into Australia one or other of Glyphosate Intermediate and/or Glyphosate;

(ii) they say further that the Second Respondent manufactured Roundup Herbicide from 1988 to 2002, and Roundup Biactive from 1996 to 2002;

(iii) they refer to and repeat paragraphs 8 and 12 below; and

(iv) they further say that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 4(d) of the A2FAPC;

(e) in relation to sub-paragraph 4(e) of the A2FAPC, the Respondents:

(i) refer to and repeat subparagraph 4(d)(ii) above;

(ii) refer to and repeat paragraphs 8 and 12 below; and

(iii) say further that they otherwise do not know and are currently unable to admit the allegations in sub-paragraph 4(e) of the A2FAPC;

(ea) in relation to sub-paragraph 4(ea) of the A2FAPC, the Respondents refer to and repeat paragraph 1(d)(ii) above;

(f) in relation to sub-paragraph 4(f) of the A2FAPC, the Respondents:

(i) say that ~~at various times~~ from 1988 to 2002, the Second Respondent distributed Roundup Herbicide via a network of resellers;

(ii) say further that ~~at various times~~ from 1996 to 2002, the Second Respondent distributed Roundup Biactive via a network of resellers;

(iii) say further that from 1999 to 2020, the Second Respondent, or affiliates or related entities of the Second Respondent, appointed Evergreen Garden Care Australia Pty Ltd as a distributor of Roundup Herbicide through which Roundup Herbicide was distributed via a network of re-sellers ~~at various times~~; and

(iv) say further that in the absence of specification of the identities of the "Intermediary Suppliers" or "Third Parties", they otherwise do not know and cannot admit the allegations in paragraph 4(f) of the A2FAPC;

(fa) in relation to sub-paragraph 4(fa) of the A2FAPC, the Respondents:

(i) refer to and repeat paragraph 4(f) above;

(ii) say further that from 2002 to 2010~~3~~, the Second Respondent, or affiliates or related entities of the Second Respondent, appointed Nufarm Australia Limited as a distributor of Roundup Herbicide and Roundup Biactive through which Roundup Herbicide and Roundup Biactive were distributed via a network of resellers ~~at various times~~;

(iii) say further that they otherwise do not know and therefore cannot admit the allegations in sub-paragraph 4(fa) of the A2FAPC;

(fb) in relation to sub-paragraph 4(fb) of the A2FAPC, the Respondents:

(i) say that from December 2002 until around 2011, the Second Respondent or affiliates or related entities of the Second Respondent appointed Nufarm Australia Limited to manufacture Roundup Herbicide and Roundup Biactive;

(ii) say further that from around August 2011, the Second Respondent or affiliates or related entities of the Second Respondent appointed Intec Industries Pty Ltd to manufacture Roundup Herbicide and Roundup Biactive; and

(iii) say further that they otherwise do not know and therefore cannot admit the allegations in sub-paragraph 4(fb) of the A2FAPC;

(fc) in relation to sub-paragraph 4(fc) of the A2FAPC, the Respondents:

(i) say that from around August 2011, pursuant to the agreement between the

Second Respondent and Intec Industries Pty Ltd, the Second Respondent was responsible for supplying the raw materials, including Glyphosate to Intec Industries Pty Ltd; and

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Manufacturing agreement between Monsanto Australia Limited and Intec Industries Pty Ltd, clause 4.1

(ii) say further that they otherwise do not know and therefore cannot admit the allegations in sub-paragraph 4(fc) of the A2FAPC;

(g) in relation to sub-paragraph 4(g) of the A2FAPC, the Respondents:

(i) refer to and repeat sub-paragraph 4(f) above; and

(ii) say that they otherwise do not know and therefore cannot admit the allegations in sub-paragraph 4(g) of the A2FAPC.

(h) in relation to sub-paragraph 4(h) of the A2FAPC, the Respondents:

(i) admit that, ~~at various times~~ from 1988 to 3 May 2002, the Second Respondent promoted and marketed in Australia Roundup Herbicide and engaged in activities related to marketing;

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The promotion and marketing activities included preparation of marketing programs and marketing strategies; conducting promotions; preparation of media schedules.

(ii) say further that insofar as the Second Respondent, or affiliates or related entities of the Second Respondent, provided Roundup Herbicide to Evergreen Garden Care Australia Pty Ltd (formerly known as Scotts Australia Pty Ltd) or its affiliates/related entities or to Nufarm Australia Limited, such entities marketed and promoted in Australia Roundup Herbicide; and

(iii) say further that they otherwise do not know, and therefore cannot admit, the allegations in sub-paragraph 4(h) of the A2FAPC;

(i) in relation to sub-paragraph 4(i) of the A2FAPC, the Respondents:

(i) admit that, ~~at various times~~ from 1996 to 3 May 2002, the Second Respondent promoted and marketed in Australia Roundup Biactive and engaged in activities related to marketing;

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The promotion and marketing activities included preparation of marketing programs and marketing strategies; conducting promotions; preparation of media schedules.

(ii) say further that insofar as the Second Respondent, or affiliates or related entities of the Second Respondent, provided Roundup Biactive to Nufarm Australia Limited, that entity marketed and promoted in Australia Roundup Biactive; and

(iii) say further that the Respondents otherwise do not know, and therefore cannot admit the allegations in sub-paragraph 4(i) of the A2FAPC;

(j) in relation to sub-paragraph 4(j) of the A2FAPC, the Respondents:

(i) say that the Second Respondent's name was used in some information sheets, FAQ sheets, letters, flyers and labels related to Roundup Herbicide between 1988 to 2002 and Roundup Biactive between 1996 and 2002;

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The Second Respondent published information sheets and FAQ sheets, and distributed marketing letters and flyers and labels referring to its name (Monsanto Australia Limited) ~~at various times~~.

(ii) say further that the Second Respondent permitted the words 'Roundup' and 'Monsanto' and a US Monsanto vine design logo to be used on product labels for Roundup Herbicide manufactured by it in Australia from 1988 to 2002 and Roundup Biactive manufactured by it in Australia from 1996 to 2002;

(iii) say further that Monsanto Company US (Old) and after 2000, the Third Respondent permitted the Second Respondent to use the words "Roundup" and "Monsanto" on product labels for Roundup Herbicide manufactured by it in Australia from 1988 to 2002 and Roundup Biactive manufactured by it in Australia from 1996 to 2002; and

(iv) say further that the Respondents otherwise do not know whether the Second Respondent caused or permitted its name (Monsanto Australia Limited up to 24 August 2018 and thereafter Monsanto Australia Pty Ltd) to be used in other marketing materials related to Roundup Herbicide or Roundup Biactive and therefore cannot admit further the allegations in sub-paragraph 4(j) of the A2FAPC;

(k) in relation to sub-paragraph 4(k) of the A2FAPC, the Respondents admit that the Second Respondent used 'Monsanto' and 'Roundup' trademarks from 1988 to 2015,

owned in accordance with sub-paragraph 6(g)(ii)E below;

(l) in relation to sub-paragraph 4(l) of the A2FAPC, the Respondents:

(i) admit that, until 7 June 2018, the Second Respondent was an indirect wholly owned subsidiary of Monsanto Company US (Old) and Monsanto Company US (New) and, thereafter, of Bayer Aktiengesellschaft (AG); and

(ii) say further that the Respondents otherwise do not know and cannot admit the allegations in sub-paragraph 4(l) of the A2FAPC.

5. In answer to paragraph 5 of the A2FAPC, the Respondents:

(a) refer to and repeat paragraph 4 above;

(b) say that the allegations in paragraph 5 of the A2FAPC do not specify any time period in which it is alleged that the Second Respondent manufactured Roundup Herbicide and Roundup Biactive within the meaning of s 74A of the TPA or was a manufacturer of Roundup Herbicide and Roundup Biactive within the meaning of s 7 of the Australian Consumer Law (**ACL**) being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**); and

(c) otherwise say further that the allegations raise a matter of law and the Respondents do not know and cannot admit the allegations in paragraph 5 of the A2FAPC.

A.3 The Third Respondent

6. In answer to paragraph 6 of the A2FAPC, the Respondents say as follows:

(a) in relation to sub-paragraph 6(a)(i) of the A2FAPC, the Respondents:

(i) admit that, ~~at various times~~ from 2000, the Third Respondent manufactured one or other of Glyphosate Intermediate and/or Glyphosate;

(ii) refer and repeat sub-paragraph 1(b)(iii) above;

(iii) deny that the Third Respondent manufactured Roundup Herbicide or Roundup Biactive; and

(iv) say further that they otherwise do not know and cannot admit the allegations in sub-paragraph 6(a)(i) of the A2FAPC.

(b) in relation to sub-paragraph 6(a)(ii) of the A2FAPC, the Respondents:

(i) say that from about 2000 to 2002, the Third Respondent supplied to the Second Respondent Glyphosate Intermediate and/or Glyphosate for importation into Australia;

(ii) refer and repeat sub-paragraph 6(a) above;

(iii) deny that the Third Respondent supplied to the Second Respondent for

importation into Australia Roundup Herbicide and/or Roundup Biactive; and

(iv) say further that they otherwise do not know and therefore cannot admit the allegations in sub-paragraph 6(a)(ii) of the A2FAPC;

(c) in relation to sub-paragraph 6(a)(iia) of the A2FAPC, the Respondents:

(i) refer to and repeat paragraph 6(b) above;

(ii) say that from 1998, Monsanto Company US (Old) and after 2000 to 2019, the Third Respondent supplied Roundup Herbicide to the Scotts Company for distribution in Australia;

(iii) say further that from June 2002 to 2011, the Third Respondent supplied Glyphosate and/or Glyphosate Intermediate to Nufarm Australia Limited pursuant to the Agreement for Supply of Glyphosate Products in Australia, New Zealand and Certain Pacific Islands dated 14 June 2002 between Monsanto Company (New) and Nufarm Australia Limited;

(iv) otherwise do not know and therefore cannot admit the allegations;

(d) in relation to sub-paragraph 6(iib) of the A2FAPC, the Respondents:

(i) say that the Second Respondent and Third Respondent had agreements, from time-to-time, with various entities concerning the distribution and sale of Roundup Herbicide and Roundup Biactive;

(ii) say further that from 1998, Monsanto Company US (Old) and after 2000, the Third Respondent appointed the Scotts Company as its exclusive agent for the marketing and distribution of Roundup Herbicide in Australia until 2019;

(iii) say further that from 201002, the Third Respondent appointed Nufarm Australia Limited as its exclusive distributor of Roundup Herbicide and Roundup Biactive in Australia until 2013;

(iv) say further that from 2013, the Third Respondent appointed Sinochem International Crop Care (Overseas) Pte Ltd as distributor of Roundup Herbicide and Roundup Biactive in Australia until 2019;

(v) otherwise deny the allegations;

(e) in relation to sub-paragraph 6(a)(iii) and (iv) of the A2FAPC, the Respondents:

(i) say that from 2000 to 4 February 2002, the Third Respondent permitted the words ‘Roundup’ and ‘Monsanto’ and the Monsanto vine design logo to be used on product labels for Roundup Herbicide manufactured by the Second Respondent in Australia from 2000 to 2002 and Roundup Biactive

manufactured by the Second Respondent in Australia from 2000 to 2002; and

(ii) say further that the Respondents do not otherwise currently know and therefore cannot admit whether the Third Respondent permitted the words 'Roundup' and 'Monsanto' and any Monsanto logo to be used in marketing and other materials in Australia until around 2002.

(f) in relation to sub-paragraph 6(b) of the A2FAPC, the Respondents:

(i) refer to and repeat paragraphs 6(a)-(e) above;

(ii) say that the allegations in paragraph 6(b) of the A2FAPC do not specify any time period in which it is alleged that the Third Respondent manufactured Roundup Herbicide and Roundup Biactive within the meaning of s 74A of the TPA or was a manufacturer of Roundup Herbicide and Roundup Biactive within the meaning of s 7 of the ACL; and

(iii) otherwise say further that the allegations raise a matter of law and the Respondents do not know and cannot admit the allegations in paragraph 6(b) of the A2FAPC.

(g) in relation to sub-paragraph 6(c) of the A2FAPC, the Respondents:

(i) say that:

A. in or around early 2000, pursuant to a Distribution Agreement between the Fourth Respondent (that is, Monsanto Company (Old)) and Solutia, Inc. dated 1 September 1997 and Plan of Merger dated 19 December 1999 by and among the Fourth Respondent, 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**)~~Monsanto Company US (Old) merged with Pharmacia & UpJohn Inc., a publicly owned pharmaceuticals company, with Monsanto Company US (Old) being the surviving corporation~~;

B. during the Merger~~merger~~ referred to above, 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);

C. upon completion of the Merger~~merger~~ referred to above, Monsanto

Company US (Old) changed its name from 'Monsanto Company' to 'Pharmacia Corporation';

D. Monsanto Company US (New) entered into an agreement with the Fourth Respondent ~~Pharmacia Corporation~~ that was effective 1 September 2000 (**Separation Agreement**);

E. the Separation Agreement related to the transfer to Monsanto Company US (New) of the operations, assets and liabilities of the agricultural business previously conducted by the Fourth Respondent~~Pharmacia Corporation~~, as described in the Separation Agreement;

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

G. pursuant to the Amended Separation Agreement, Monsanto Company US (New) agreed to retain, assume and pay, discharge, perform and satisfy in full, and to indemnify, defend and hold harmless the Fourth Respondent~~indemnify Pharmacia Corporation~~ for liabilities primarily related to the agricultural business previously conducted by the Fourth Respondent~~Pharmacia Corporation~~, including any claims against the Fourth Respondent~~Pharmacia Corporation~~ relating to glyphosate or any liability attributable to the Fourth Respondent~~Pharmacia Corporation~~ related to glyphosate;

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

(ii) say further that:

A. in relation to sub-paragraph 6(c)(i) of the A2FAPC, the Respondents:

(1) admit that Monsanto Company US (Old) did manufacture one or other of Glyphosate Intermediate, Glyphosate or glyphosate salts from July 1976 to 2000; and

(2) otherwise deny the allegations in sub-paragraph 6(c)(i) of the A2FAPC.

B. in relation to sub-paragraph 6(c)(ii) of the A2FAPC, the Respondents deny that, from approximately 1976 until 2000, Monsanto Company US (Old) supplied Roundup Herbicide or Roundup Biactive to

Monsanto Australia (Old) and Monsanto Australia (New) for the importation, sale and distribution in Australia;

C. in relation to sub-paragraph 6(c)(iii) of the A2FAPC, the Respondents:

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

(2) otherwise deny the allegations in sub-paragraph 6(c)(iii) of the A2FAPC.

D. in relation to sub-paragraph 6(c)(iiia) of the A2FAPC, the Respondents refer to and repeat paragraph 6(d) above;

E. in relation to sub-paragraph 6(c)(iv) of the A2FAPC, the Respondents admit that:

(1) prior to the Mergermerger referred to in paragraph 6(g)(i)A 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);

(2) following the Mergermerger between Pharmacia & UpJohn, Inc and Monsanto Company US (Old) referred to in paragraph 6(g)(i)A above and by reason of Monsanto Company US (Old)'s name change to 'Pharmacia Corporation' referred to in paragraph 6(g)(i)C above, the Monsanto Trademark and the Roundup Trademark were registered to the Fourth Respondent Pharmacia Corporation; and

(3) on or around 1 September 2000, Pharmacia Corporationthe Fourth Respondent (that is, Monsanto Company US (Old)) 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;

(4) on 4 February 2002, a full assignment from the Fourth

RespondentPharmacia Corporation to Monsanto Technology LLC in respect of the Monsanto Trademark and the Roundup Trademark was registered with IP Australia (IP Australia Trademark Register Extracts for Australian Trademark Numbers 77856 and 227919).

F. in relation to sub-paragraphs 6(c)(v), (vi) and (vii) of the A2FAPC, the Respondents say that, in respect of Roundup Herbicide from 1976 until 2000 and Roundup Biactive from 1996 to 2000:

(1) Monsanto Company US (Old) permitted the Second Respondent to use the words "Roundup" and "Monsanto" on product labels for Roundup Herbicide manufactured by the Second Respondent in Australia from 1988 to 2000 and Roundup Biactive manufactured by the Second Respondent in Australia from 1996 to 2000; and

(2) the Respondents otherwise do not know, and therefore cannot admit, whether Monsanto Company US (Old) permitted the words "Roundup", "Monsanto" and any Monsanto logo to be used in marketing and other materials in Australia;

G. in relation to sub-paragraph 6(c)(viii) of the A2FAPC, the Respondents deny the allegations.

7. In answer to paragraph 7 of the A2FAPC the Respondents:

(a) say that Bayer AG acquired Monsanto Company US (New) in a transaction that closed on 1 June 2018 (subject to the fulfilment of certain conditions, which were fulfilled as of August 2018);

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

(c) otherwise deny the allegations in paragraph 7 of the A2FAPC.

Part B. Monsanto Roundup Products

B.1 Roundup Herbicide

8. In answer to paragraph 8 of the A2FAPC the Respondents:

(a) in relation to sub-paragraph 8(a) of the A2FAPC:

(i) admit that Roundup Herbicide is formulated using Glyphosate Intermediate;

(ii) for the period 1987 to 2018, admit that the glyphosate was present as

glyphosate isopropylamine salt; and

(iii) otherwise deny the allegations in the sub-paragraph;

(b) admit the allegations in sub-paragraph 8(b) of the A2FAPC;

(c) in relation to sub-paragraph 8(c) of the A2FAPC, admit that Roundup Herbicide is a herbicide product which presently includes 'Roundup' in the product name registered with the APVMA but otherwise deny the sub-paragraph; and

(d) admit the allegations in sub-paragraph 8(d) of the A2FAPC.

9. The Respondents admit the allegations in paragraph 9 of the A2FAPC.

10. In answer to paragraph 10 of the A2FAPC, the Respondents:

(a) for the period 1987 to 2018, admit that the active or main active ingredient in Roundup Herbicide was glyphosate;

(b) for the period 1987 to 2018, admit that the glyphosate was present as glyphosate isopropylamine salt;

(c) otherwise deny the allegations.

11. In answer to paragraph 11 of the A2FAPC the Respondents:

(a) for the period 1997 to 2018, admit that Roundup Herbicide, when it was sold in Australia, contained surfactants;

(b) for the period 1987 to 1996, do not currently know and therefore cannot admit that Roundup Herbicide, when it was sold in Australia, contained surfactants;

(c) say that there is the potential for impurities to be present (although this is not always the case) in the technical active or other non-active components of Roundup Herbicide as a by-product of the anterior manufacturing of those separate constituent components which themselves are subject to regulation; and

(d) otherwise deny the allegations in paragraph 11 of the A2FAPC.

B.2 Roundup Biactive

12. In answer to paragraph 12 of the A2FAPC the Respondents:

(a) in relation to sub-paragraph 12(a) of the A2FAPC:

(i) admit that Roundup Biactive contains glyphosate which is and was present as glyphosate isopropylamine salt; and

(ii) otherwise deny the allegations in the sub-paragraph.

(b) admit the allegations in sub-paragraph 12(b) of the A2FAPC;

(c) in relation to sub-paragraph 12(c) of the A2FAPC, admit that Roundup Biactive is a herbicide product which presently includes 'Roundup' in the product name

registered with the APVMA but otherwise deny the allegations in sub- paragraph 12(c) of the A2FAPC; and

(d) admit the allegations in sub-paragraph 12(d) of the A2FAPC.

13. The Respondents admit the allegations in paragraph 13 of the A2FAPC.

14. The Respondents admit the allegations in paragraph 14 of the A2FAPC.

15. In answer to paragraph 15 of the A2FAPC, the Respondents:

(a) for the period 1996 to 2018, admit that Roundup Biactive, when it was sold in Australia, contained surfactants; and

(b) say that there is the potential for impurities to be present (although this is not always the case) in the technical active or other non-active components of Roundup Biactive as a by-product of the anterior manufacturing of those separate constituent components which themselves are subject to regulation; and

(c) otherwise deny the allegations.

Part C. Properties of Roundup

16. The Respondents deny the allegations in paragraph 16 and refer to and repeat paragraph 17 below. ~~and say further that in relation to paragraphs 26 and 27 of the Third Fourth Further Amended Statement of Claim (**34FASOC**), those paragraphs:~~

~~(a) do not plead the material facts supporting the pleaded conclusion that glyphosate, glyphosate-based formulations or Roundup Products are carcinogenic;~~

~~(b) do not plead material facts to establish what is meant by carcinogenic and in particular:~~

~~(i) whether what is meant by carcinogenic is capable of causing cancers generally, or just NHL;~~

~~(ii) whether what is meant by carcinogenic is in the sense of a hazard, or in the sense of a risk to humans;~~

~~(iii) whether what is meant by carcinogenic is capable of causing cancer in humans, and which particular cancers in humans;~~

~~(iv) the circumstances in which it is alleged that glyphosate and glyphosate- based formulations can cause cancer in humans (including the types of cancer);~~

~~(c) as a consequence of the preceding two sub-paragraphs, the allegations:~~

~~(i) plead conclusions from unstated facts;~~

~~(ii) are ambiguous; and~~

~~(iii) are likely to cause embarrassment and a delay in the proceeding;~~

~~(d) in the premises, the allegations in paragraphs 26 and 27 should be struck out.~~

17. In answer to paragraph 17, the Respondents say that:

(a) the Roundup Products were not carcinogenic, whether because of any of the matters referred to in paragraphs 27 to 30 of the ~~3~~4FASOC or at all;

(b) 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;

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

(c) say further 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) say further that the allegations in paragraph 30:~~

~~(i) do not plead the material facts supporting the pleaded conclusions that:~~

~~A. Roundup Products are carcinogenic; or~~

~~B. use of and/or exposure to Roundup Products increased an individual's risk of developing NHL;~~

~~(ii) do not plead material facts establishing what is meant by carcinogenic and in particular:~~

~~A. whether what is meant by carcinogenic is capable of causing cancers generally, or just NHL;~~

~~B. whether what is meant by carcinogenic is in the sense of a hazard, or in the sense of a risk to humans;~~

~~C. whether what is meant by carcinogenic is capable of causing cancer in humans, and which particular cancers in humans;~~

~~D. the circumstances in which it is alleged that glyphosate and glyphosate-~~

~~based formulations can cause cancer in humans (including the types of cancer);~~

~~(iii) as a consequence of the preceding two sub-paragraphs, the allegations:~~

~~A. plead a conclusion from unstated facts;~~

~~B. are ambiguous; and~~

~~C. are likely to cause embarrassment and a delay in the proceeding;~~

~~(iv) in the premises, the allegations in paragraph 30 should be struck out;~~

(d) ~~(e)~~it 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 EPA's Office of Pesticide Programs, 12 December 2017.

Glyphosate Proposed Interim Registration Review Decision of the 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) ~~(f)~~further and alternatively, even if Roundup Products or the Monsanto Roundup Products are carcinogenic (which is denied), when used as intended they do not increase an individual's risk of developing, nor cause, NHL, having regard to:

(i) the matters referred to in sub-paragraph~~s~~ 17(f) ~~and 17(g)~~ below;

(ii) the many objective factors which impact upon whether NHL will develop;

PARTICULARS

A. the Respondents rely upon the expert and lay evidence to be adduced at trial;

B. the types of objective factors include:

(1) methods of application of the Roundup Products;

(2) the location where the glyphosate was sourced and quality of the product;

(3) interactions between adjuvants and organic material within the environment;

(4) water quality and quantity; and

(5) metabolism and rates of excretion of glyphosate from the human body;

(iii) the numerous reasons why the Applicant may have developed NHL other than by reason of use of, or exposure to, Roundup Products or the Monsanto Roundup Products include:

C. genetic predisposition;

D. gene changes and DNA mutations caused by factors unrelated to Roundup Products including:

(1) abnormal cell division;

(2) biological or internal factors such as age, gender, inherited genetic defects;

(3) environmental exposure including through radiation and smoke;

(4) occupational risk factors;

(5) life-style factors including obesity, lack of exercise, diet;

(6) personal and family medical history including viruses, hormones, chronic inflammation;

(7) interaction of gene mutations;

(8) random chance;

(9) the aetiology of NHL; and

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

(f) ~~(g)~~further, and alternatively, even if Roundup Products are carcinogenic (which is denied):

(i) Roundup Herbicide was marketed for lawn and garden, agricultural, commercial and/or industrial uses respectively in Australia while Roundup Biactive was marketed for agricultural, commercial and/or industrial uses respectively in Australia;

PARTICULARS

The Roundup Products were marketed via preparation of marketing programs and marketing strategies; conducting promotions; preparation of media schedules.

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

(iii) the 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:

E. 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* (Cth) 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 the Record;

F. the 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;

(iv) at the point in time when the Roundup Products were supplied in Australia, they were supplied with available information, including labels and warnings which complied with the applicable laws, which included information with respect to relevant poisons scheduling, first aid, safety directions detailing personal protective equipment required to be used when handling and/or using products containing glyphosate;

PARTICULARS

Information, including warnings, is included in the label directions and in product summaries included on the APVMA website and material safety data sheets published in various locations including on Monsanto Company US (New)'s website, on the website https://www.crop.bayer.com.au, and on the website www.roundup.com.au.

(v) it was reasonable for the Respondents to expect that:

G. prior to use of any of the Roundup Products, the Applicant would review all information, including warnings, and appreciate for himself a variety of pertinent matters including that:

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

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

(3) there was a need when using and/or being exposed to Roundup Products, to follow all safety directions including requirements to

use personal protective equipment and to ensure that the application equipment is not faulty and used correctly;

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

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

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

(3) there was a need when using and/or being exposed to Roundup Products, to follow all safety directions including requirements to use personal protective equipment and to ensure that the application equipment is not faulty and used correctly; and

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

Part D. The Applicant and his alleged injuries

18. The Respondents do not know and cannot admit the allegations in paragraph 18.

19. The Respondents do not know and cannot admit the allegations in paragraph 19.

20. The Respondents do not know and cannot admit the allegations in paragraph 20.

21. The Respondents do not know and cannot admit the allegations in paragraph 21.

22. In answer to paragraph 22, the Respondents:

(a) deny the allegations contained therein;

(b) refer to and repeat paragraphs 16 and 17 above; and

(c) say 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 used glyphosate sourced from other suppliers, and consequently suffered loss and damage, such loss and damage did not arise by reason of the Roundup Products having a safety defect.

Part E. Loss and Damage

23. In answer to paragraph 23, the Respondents:

(a) deny the allegations contained therein;

(b) say that Mr McNickle did not, by reason of the matters pleaded in paragraphs 40, 53, 65 and 66(aa), (ab), (a) ~~and~~ (b) and (c) of the ~~34~~FASOC, suffer loss and damage as a result of his use of or exposure to Roundup Products, glyphosate and/or glyphosate intermediate used in the manufacture of Roundup Products, nor will he continue to do so;

(c) says further that they deny the extent of loss and damage claimed to have arisen as a consequence of Mr McNickle's diagnosis of NHL;

(d) say 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 Roundup Products and glyphosate in Australia and elsewhere throughout the world;

PARTICULARS

Regulatory approvals given for use of the Roundup Products within Australia and elsewhere throughout the world will be the subject of evidence at trial. The Respondents rely upon regulatory approvals given for use of the 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 Respondents rely 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 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 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 sub-paragraph 17(e)(ii) and the matters referred to in

paragraph 17(e)(iii) above;

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

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

(e) say further, by reason of the matters referred to in paragraphs 40 and 41 of the Third Respondent's Defence to the ~~3~~4FASOC, pursuant to s 75AC(1) of the TPA the safety of the Roundup Products was such as persons using such products in the manner intended were generally entitled to expect;

(f) say further, in the premises referred to in paragraphs 40 and 41 of the Third Respondent's Defence to the ~~3~~4FASOC, the Roundup Products did not have a defect within the meaning of s 75AC of the TPA or a safety defect within the meaning of s 9 of the ACL;

(g) say 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 Roundup Products were supplied by the actual manufacturer; and

(h) say 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 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.

(i) says further that an increased risk of developing NHL for an individual~~; (i)~~ is not actionable damage in the tort of negligence; and

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

(k) say further that, pursuant to s 74D(3) of the TPA, the 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 Roundup Products by the Second Respondent;

(ii) the price received by the Second Respondent 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 Roundup Products have been marketed;

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

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

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

(l) say further that if the Roundup Products were not of merchantable quality (which is denied), this occurred after the Roundup Products left the control of the Respondents and occurred by reason of:

(i) the manner of use of, or exposure to, the Roundup Products by the Applicant, or an act or default of the Applicant or a servant or agent of him; and/or

(ii) a cause independent of human control, and accordingly, by reason of s 74D(2) of the TPA, the First, Second and Third Respondents are not liable to compensate the Applicant for any loss and damage pursuant to s 74D(1) of the TPA;

(m) say further that the 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; and

(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;

(n) say further that, in the premises, pursuant to s 54(2) of the ACL, the 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 23(d) above;

(o) say further and alternatively, if the Roundup Products were not of acceptable quality (which is denied), they did not become of unacceptable quality because of anything inherent in the Roundup Products and accordingly, pursuant to s 54(6) of the ACL, the Roundup Products did not fail to be of acceptable quality;

(p) say that if the Roundup Products are found to present the risk pleaded in paragraph 30 of the ~~3~~4FASOC (which is denied), the state of scientific knowledge was not such as to enable the Respondents to discover that risk and accordingly the Respondents did not breach any duty of care owed at common law;

PARTICULARS

The scientific knowledge will be the subject of evidence at trial.

(q) say 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);

(r) say 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);

(s) say 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);

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

(u) say 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;

(v) say further and alternatively, that if the Respondents (or any of them) were 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;

(w) say 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 ~~3~~4FASOC was a cause of his NHL (which the Respondents deny), 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;

(vii) 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), as defined in s.149(2) of the *Workers Compensation Act* 1987 (NSW);

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

(ix) by operation of s.151Z(2)(c), the damages that the Applicant may recover against the First, Second, ~~and~~ Third and Fourth Respondents are to be reduced;

(x) the amount of the reduction is the amount by which the contribution which the First, Second, ~~and~~ Third and Fourth Respondents 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;

(xi) by operation of s.151Z(2)(d), the amount of the contribution that the First, Second, ~~and~~ Third and Fourth Respondents are 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.

(x) say further that:

(i) by operation of s.146 of the ACL and/or s.75AI of the TPA, the First, Second, ~~and~~ Third and Fourth Respondents have 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 23(w)(i)-(vi) 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 the Applicant has no right to compensation under s.138 or s.139 of the ACL or s.75AD or s.75AE of the TPA.

~~(y) say further that:~~

~~(iv) by operation of s.146 of the ACL and/or s.75AI of the TPA, the First, Second, and Third and Fourth Respondents have 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;~~

~~(v) by reason of the matters pleaded in paragraph 23(w)(i)-(vi) 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;~~

~~(vi) in the premises the Applicant has no right to compensation under s.138 or s.139 of the ACL or s.75AD or s.75AE of the TPA;~~

(y) ~~(z)~~says further that:

(i) none of the Respondents breached any duty of care owed to the Applicant;

(ii) says further that the Points of Claim and ~~34~~FASOC each fails to plead what dose is said by the Applicant to have been necessary to have caused and did cause his NHL;

(iii) there is no causal connection between the Applicant's use of or exposure to Roundup Products and his NHL;

(iv) any use of or exposure to Roundup Products by the Applicant had no effect on his development of NHL;

(v) 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.

The Respondents refer to and repeat as if pleaded herein the details of their respective defences set out in the First Respondent's Defence to the ~~3~~4FASOC, the Second Respondent's Defence to the ~~3~~4FASOC~~,~~ ~~and~~ the Third Respondent's Defence to the ~~3~~4FASOC~~.~~ and the Fourth Respondent's Defence to the 4FASOC.

Date: 26 August 2022

Herbert Smith Freehills
Solicitors for the Respondents

These Points of Defence were prepared by Robert Craig QC, Kateena O'Gorman and Raph Ajzensztat ~~and Daniel Habashy~~, counsel for the Respondents and settled by Robert Craig QC.

Certificate of lawyer

I **Peter Holloway**, Australian Legal Practitioner and Partner of Herbert Smith Freehills, certify to the Court that in relation to these Amended Points of Defence filed on behalf of the First, Second, ~~and~~ Third and Fourth Respondents, 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 Respondents