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Details of Filing

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

Dated: 4/07/2022 8:11:27 PM AEST

Registrar

Important Information

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

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Form 17
Rule 8.05(1)(a)

Fourth ~~Third~~ Further Amended Statement of claim

Amended on 4 July 2022 and filed pursuant to an order made on 20 June 2022

No. VID 243 of 2020

Federal Court of Australia

District Registry: Victoria

Division: General

KELVIN MCNICKLE

Applicant

HUNTSMAN CHEMICAL COMPANY AUSTRALIA PTY LTD (ACN 004 146 338) and others named in the Schedule

First Respondent and others according to the Schedule

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A. THE APPLICANT AND GROUP MEMBERS

Group Members

1. The Applicant brings this proceeding as a representative proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth) on his own behalf and on behalf of all persons who:

   (a) have been diagnosed with non-Hodgkin Lymphoma (**NHL**) by reason of the use of and/or exposure to, at any time between July 1976 and the date this fourth ~~third~~ further amended statement of claim is filed (the **Relevant Period**), the herbicide product or products which contained glyphosate and were branded as 'Roundup' or which contained glyphosate and were otherwise branded with the name 'Monsanto' (**Roundup Products**), within Australia (**NHL Group Members**); or

   (b) are:

      (i) the executors or administrators of, or beneficiaries of or persons with an interest in, the estates of deceased persons who would be NHL Group Members had they not died prior to the date this fourth ~~third~~ further amended statement of claim is filed (**deceased NHL Group Members**); or

      (ii) the dependents (howsoever described or referred to in the legislation set out in Schedule A) of NHL Group Members or deceased NHL Group Members;

   where, by reason of the matters pleaded below, a cause of action had vested in or may be brought by that person (together the **Estate and Dependency Group Members**).

2. At the commencement of this proceeding there are more than seven group members who make the claims set out in this fourth ~~third~~ further amended statement of claim against the Respondents.

3. All allegations made in respect of NHL Group Members in this fourth ~~third~~ further amended statement of claim are to be taken to include deceased NHL Group Members.

The Applicant – Mr Kelvin McNickle

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. THE RESPONDENTS

15. The First Respondent (**Monsanto Australia (Old)**):

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

    (b) between July 1976 and around April 1988, had the company name Monsanto Australia Ltd and is now called Huntsman Chemical Company Australia Pty Ltd;

    (c) between July 1976 and around November 1993:

(i) imported or caused to be imported into Australia Roundup Products for distribution;

(ii) from around 1983 onwards:

1. imported or caused to be imported into Australia, glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products; and

2. manufactured Roundup Products using that glyphosate and/or glyphosate intermediate;

(iia) from 1988 until about November 1993 produced glyphosate for the Second Respondent (**Monsanto Australia (New)**) for use in Roundup Products;

(iii) distributed Roundup Products in Australia;

(iv) promoted and marketed Roundup Products in Australia;

(v) used the "Monsanto" and "Roundup" trademarks, owned in accordance with paragraph 17(c)(iv) below;

(vi) caused or permitted its name (Monsanto Australia Ltd) to be used in marketing and other materials related to the Roundup Products; and

(vii) was until around 17 April 1987 a wholly owned subsidiary of Monsanto Company US (Old) (as defined in paragraph 17(c) below);

(d) by reason of the matters alleged in the preceding subparagraph, manufactured Roundup Products within the meaning of section 74A of the Trade Practices Act 1974 (Cth) (**Trade Practices Act**).

16. Monsanto Australia (New):

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

(b) from around April 1988 until 23 August 2018, had the same company name as Monsanto Australia (Old) prior to April 1988, being Monsanto Australia Ltd;

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

(d) from:

(i) around 1996 to 2020, imported or caused to be imported into Australia for distribution Roundup Products;

(ii) around April 1988 to around 2002:

1. imported or caused to be imported into Australia, glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products; and

2. manufactured Roundup Products using that glyphosate and/or glyphosate intermediate;

(iia) around April 1988 to November 1993, had Monsanto Australia (Old) produce glyphosate for it (that is, Monsanto Australia (New)) for use in the manufacture of Roundup Products;

(iii) around 1988 to 2002, distributed Roundup Products in Australia;

(iiia) no later than 1999, appointed distributors to distribute the Roundup Products in Australia;

Particulars

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

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

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

(iiib) no later than 2002, engaged third parties including Nufarm to manufacture and distribute Roundup Products and glyphosate and/or glyphosate intermediate on Monsanto Australia (New)'s behalf in accordance with specifications and quality assurance manuals provided by Monsanto Australia (New) and/or Monsanto Company US (New);

Particulars

(iv) Manufacturing Agreement between Monsanto Australia Limited and Nufarm Australia Limited dated 23 December 2002, cl 2 (a) and (c).

(v) Further particulars may be provided.

(iiic) no later than 2011, supplied third parties such as Intec Industries Pty Ltd (**Intec**) with glyphosate and/or glyphosate intermediate and surfactants for the manufacture and distribution of Roundup Products in accordance with specifications and quality assurance manuals provided by Monsanto Australia (New) and/or Monsanto Company US (New);

Particulars

(i) Manufacturing Agreement between Monsanto Australia (New) and Intec dated c. August 2011 cll 4, 5.3.

(ii) Further particulars may be provided.

(iv) around 1988 promoted and marketed Roundup Products in Australia or caused Roundup Products to be promoted and marketed in Australia;

(v) around 1988 caused or permitted or licenced its name (Monsanto Australia Ltd and from 24 August 2018 Monsanto Australia Pty Ltd) to be used in marketing and other materials related to the Roundup Products;

(vi) around 1988 until 7 June 2018, was an indirect wholly owned subsidiary of Monsanto Company US (Old) and Monsanto Company US (New) (as defined in paragraph 17 below) and thereafter of Bayer Aktiengesellschaft (AG) (**Bayer AG**);

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

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

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

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

(a) since 2000:

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

(ii) manufactured:

1. the Roundup Products; and/or

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

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

1. Roundup Products; and/or

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

(iiia) supplied to third parties:

1. Roundup Products for distribution in Australia; and

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

Particulars

(i) An Agreement for the Supply of Glyphosate Products between Monsanto Company and Nufarm dated 14 June 2002 cll. 3.1, 7.1.

(ii) Supply and Distribution Agreement between Monsanto Company and Sinochem dated 1 March 2013 cl 5.1.

(iiib) appointed exclusive distributors in Australia to promote the sale and distribution and product image of Roundup Products in Australia;

Particulars

(i) Amended and Restated Exclusive Agency and Marketing Agreement between Monsanto Company US (Old) and the Scotts Company dated 30 September 1998, and as amended and restated from

time to time including on 31 August 2017 and 1 August 2019.

(ii) Exclusive Distribution Agreement between Monsanto Company, Monsanto Australia Limited and Nufarm dated 31 August 2010 cll 3.1 and 5.1.

(iii) Supply and Distribution Agreement between Monsanto Company and Sinochem dated 1 March 2013 recitals and cl 2.1.

(iv) Further particulars may be provided.

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

(v) until at least 4 February 2002, caused or permitted the name "Monsanto", the brand name Roundup and the Monsanto logo to be used in marketing and other materials related to the Roundup Products in Australia;

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

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

(ii) was a manufacturer of the Roundup Products within the meaning of section 7 of the Australian Consumer Law;

(c) by an agreement effective 1 September 2000, assumed all liability for Roundup Products, glyphosate and/or glyphosate intermediate from the Fourth Respondent (Pharmacia LLC; ~~Corporation~~ (previously called the Monsanto Company) (**Monsanto Company US (Old)**) which:

(i) from at least July 1976 until 2000, manufactured the Roundup Products;

(ii) from at least July 1976 until 2000, supplied to Monsanto Australia (Old) and/or Monsanto Australia (New) and/or third parties Roundup Products for importation and distribution into Australia;

(iib) by no later than 1998, appointed the Scotts Company (an Ohio corporation) as its exclusive agent for the marketing and distribution of certain Roundup Products in Australia;

Particulars

(i) Amended and Restated Exclusive Agency and Marketing Agreement between Monsanto Company US (Old) and the Scotts Company dated 30 September 1998, and as amended and restated from time to time.

(iii) from about 1983, supplied to Monsanto Australia (Old) and/or Monsanto Australia (New) and/or third parties for importation into Australia glyphosate and/or glyphosate intermediate for use in the manufacture of Roundup Products;

(iv) from at least July 1976 until 2000, held trademarks in Australia for the name "Monsanto" and "Roundup";

(v) from at least July 1976 until 2000, caused or permitted the name "Monsanto", the brand-name Roundup and the Monsanto logo to be used in marketing and other materials related to the Roundup Products in Australia; and

(vi) by reason of the matters alleged in the preceding subparagraphs, manufactured the Roundup Products within the meaning of section 74A of the Trade Practices Act;

(d) by an agreement effective 7 June 2018:

(i) Monsanto Company US (New) underwent a merger with a wholly owned subsidiary of Bayer AG; and

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

C. ROUNDUP PRODUCTS

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

Particulars

Roundup Products were registered in:

(i) in Victoria by January 1976;

(ii) in South Australia by 11 November 1976;

(iii) in New South Wales by 1978;

(iv) in the Australian Capital Territory by 1980;

(v) in the Northern Territory by January 1988;

(vi) in Queensland by June 1988; and

(vii) from at least March 1995 with the Australian Pesticides Veterinary Medicines Authority (**APVMA**).

19. At all material times, Roundup Products were marketed and used as a herbicide.

20. At all material times, the active ingredient or main active ingredient which acted as a herbicide in Roundup Products was glyphosate.

Particulars

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

21. At all material times, Roundup Products were supplied in Australia:

(a) in a variety of formulations;

(b) with a variety of concentrations of glyphosate; and

(c) with glyphosate as a free acid or in the form of a salt, with the most common salt form being glyphosate isopropylamine salt.

Particulars

(i) The formulations of Roundup Products supplied in Australia included aqueous concentrate, soluble concentrate, emulsifiable concentrate, granular formulation, water dispersible granule, aerosol, liquid and wettable powder.

(ii) The concentrations of glyphosate in Roundup Products supplied in Australia ranged from 3.6g/L to 570g/L and 15.2g/kg to 850g/kg.

(iii) The other salt forms of glyphosate were glyphosate mono-ammonium salt, glyphosate mono-ethanolamine salt and glyphosate potassium salt.

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

Particulars

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

C.1 LABELS AND MARKETING MATERIAL

23. At all material times, information concerning the safe use of the Roundup Products, including Roundup Herbicide and Roundup Biactive, was communicated to consumers and users of the products on the labels (Labels), including the 'Directions for Use' booklet.

Particulars

The Labels, including the 'Directions for Use' booklet, were affixed to the container of the products.

24. From at least approximately 1987, the Labels for Roundup Herbicide, and from 1996, the Labels for Roundup Biactive, included a section titled 'Safety Directions' which stated as follows:

(a) the products would irritate the eyes and skin;

(b) after use and before eating, drinking or smoking, wash hands, arms and face thoroughly with soap and water;

(c) after each day's use, wash contaminated clothing, gloves and face shield or goggles;

(d) elbow-length PVC gloves and face shield or goggles should be worn when preparing the products for use; and

(e) when using controlled droplet applicator, wear protective waterproof clothing and impervious footwear.

25. Throughout the Relevant Period, Monsanto Australia (Old), Monsanto Australia (New), Monsanto Company US (Old) and/or Monsanto Company US (New) published, or caused to be published, or held themselves out as responsible for, marketing material (the **Marketing Material**) relating to the Roundup Products that was directed at consumers and users of the products.

Particulars

The Marketing Material was comprised of:

(i) Newspaper and other advertisements;

(ii) Information sheets, including answers to frequently asked questions, which included statements such as that '[b]ased on the results of short and long term testing, it can be concluded that [Roundup Herbicide and Roundup Biactive] pose] no

danger to human health when used according to label directions" and "[i]n long term exposure studies of animals, Roundup did not cause cancer … at dose levels far in excess of likely exposure"; and

(iii) Information on websites, including a website operated by Scotts Company or an affiliate or related entity of Scotts Company which stated in the period from 2007 to 2012 "[i]n long term exposure studies of animals, Roundup did not cause cancer … at dose levels far in excess of likely exposure", in circumstances where Scotts Company was appointed as agent of Monsanto Company US (Old) and Monsanto Company US (New) in accordance with the agreement alleged at sub-paragraphs 17(a)(iiib) and (c)(iib) and pursuant to that agreement was required to provide "Customers or potential customers with detailed information concerning the characteristics, uses and availability of Roundup Products as shall be supplied by [employees of Monsanto Company]" (section 2.2(a)(6)) and provide customers "with detailed information concerning the advertising and promotional programs of Roundup Products and facilitate the use by its Customers of such programs to the fullest extent possible (as set forth in the Annual Business Plan)" (section 2.2(a)(8)).

D. CARCINOGENIC PROPERTIES OF ROUNDUP

26. At all material times:

(a) glyphosate; and

(b) glyphosate-based formulations;

were carcinogenic.

Particulars

(i) Mr McNickle refers to scientific literature and other information and material which identifies glyphosate and/or glyphosate-based formulations as being carcinogenic, including:

a. studies and literature which show the development of cancer in experimental animals;

b. mechanistic data or evidence, including which shows that glyphosate is genotoxic and induces oxidative stress;

c. toxicokinetic data or evidence, including exposure and absorption data or evidence; and

d. epidemiological data or evidence.

(ii) Impurities which are present in glyphosate-based formulations, including formaldehyde and N-nitrosoglyphosate (**NNG**), are carcinogenic.

(iii) Mr McNickle refers to the following expert reports filed in this proceeding and the scientific studies referred to therein:

a. Expert report of Professor Smith dated 11 August 2021 (**Smith Report**);

b. Expert report of Dr Sawyer dated 21 September 2021 (**Sawyer Report**);

c. Expert report of Professor Weisenburger dated 8 September 2021 (**Weisenburger Report**);

d. Expert report of Professor Gordon dated 29 September 2021 (**Gordon Report**); and

e. Expert report of Professor Armstrong dated 7 October 2021 (**Armstrong Report**).

(iv) Further particulars may be provided following receipt of the report of Mr McNickle's animal studies expert.

27. By reason of the matters alleged in the preceding paragraph, at all material times Roundup Products were carcinogenic.

28. At all material times, the Roundup Products would, or would likely, come into personal contact with users of the Roundup Products or individuals who were exposed to the Roundup Products whilst they were being used, including direct contact with an individual's skin by reason of their skin being exposed and/or by penetrating through permeable clothing.

Particulars

Personal contact, including direct contact with the skin, may occur as a result of, inter alia, inadvertent spills, splashes, leaks and/or spray or mist drift.

29. At all material times, when Roundup Products contacted the skin, surfactant present increased absorption into the bloodstream by way of:

(a) removing lipids from the skin by surfactant action;

(b) increasing the hydration of the skin;

(c) increasing contact with the skin by spreading water droplets by surfactant action;

(d) increasing contact time with the skin due to the decrease of evaporation of water from the droplets containing surfactant;

(e) increasing blood flow to the skin due to irritant action of the surfactant; and

(f) intercellular water accumulation due to the irritant action of the surfactant.

30. ~~By reason of:~~

(a) ~~Roundup Products being carcinogenic, as alleged in paragraphs 26 and 27; further~~

(b) ~~Roundup Products being carcinogenic, the likelihood of personal contact and the presence or use of surfactants, as alleged in paragraphs 26 to 29,~~

At all material times use of and/or exposure to glyphosate and/or glyphosate-based formulations and/or Roundup Products increased an individual's risk of developing NHL.

E. INJURIES

31. In the period from July 1976 until the commencement of these proceedings, Mr McNickle and NHL Group Members purchased and used or were exposed to Roundup Products.

32. By reason of the matters alleged at paragraphs 26 to 30, Mr McNickle and NHL Group Members developed NHL as a result of their use of or exposure to Roundup Products.

Particulars

(i) Mr McNickle refers to:

a. paragraphs 5 to 13 above in relation to his use of and exposure to Roundup Products;

b. paragraph 14 above in relation to his development of NHL.

(ii) Particulars for NHL Group Members will be provided following the trial of the common issues.

F. SAFETY DEFECT

33. The allegations at paragraphs 34 to 43 are pleaded at all material times from 9 July 1992 unless otherwise stated.

34. Monsanto Company US (New) and/or Monsanto Company US (Old) supplied:

(a) the Roundup Products; and/or

(b) glyphosate and/or glyphosate intermediate;

to:

(i) Monsanto Australia (New); and

(ii) Monsanto Australia (Old);

for importation into and distribution in Australia.

35. Further, Monsanto Company US (New) and/or Monsanto Company US (Old) supplied:

(a) the Roundup Products to third parties (**Third Parties**) for distribution; and/or

(b) glyphosate and/or glyphosate intermediate to Third Parties for use in the manufacture of Roundup Products.

36. The supply of Roundup Products, glyphosate and/or glyphosate intermediate by Monsanto Company US (New) and/or Monsanto Company US (Old) to Monsanto Australia (New), Monsanto Australia (Old) and Third Parties was:

(a) for supply or resupply; and

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

Particulars

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

37. From:

(a) July 1976 until around ~~April 1988~~ November 1993, Monsanto Australia (Old);

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

A. manufactured and/or imported into Australia:

(i) the Roundup Products; and/or

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

and supplied the Roundup Products to:

(iii) other distributors (the **Intermediary Suppliers**) for resupply to

consumers; and

(iv) Third Parties.

38. The supply by Monsanto Australia (New) and/or Monsanto Australia (Old) to the Intermediary Suppliers and Third Parties was in trade or commerce within Australia.

39. The safety of the Roundup Products was not such as persons generally are entitled to expect.

Particulars

The safety of Roundup Products were not such as persons are generally entitled to expect in all the circumstances, including because of:

(i) ~~by reason of~~ the matters alleged in paragraphs 26 and ~~to~~ 27, ~~further, paragraphs 26 to 29, further, paragraph 30~~; and/or

(ii) the matters alleged in paragraphs 26 and 27 combined with the matters alleged in paragraphs 28 and/or 29; and/or

(iii) the matters alleged in paragraph 30; and/or

(iv) the matters alleged in paragraph 30 combined with the matters alleged in paragraphs 28 and/or 29; and/or

(v) the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material referred to in paragraphs 23, 24 and 25; and/or

(vi) the failure of the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material to:-

a. provide a warning that the Roundup Products were carcinogenic; and/or

b. provide a warning that use of and/or exposure to Roundup Products increased an individual's risk of developing NHL; and/or

c. provide a warning that use of and/or exposure to Roundup Products in accordance with the Safety Directions on the Labels increased an individual's risk of developing NHL; and/or

d. include a direction that any person using the Roundup Products only do so whilst wearing personal protective equipment that was so extensive and impermeable that it excluded any possibility of the user being exposed to the Roundup Products dermally, or by inhalation, or by any other possible route of exposure.

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

41. Mr McNickle and group members have suffered loss and damage by reason of the Roundup Products having a defect and/or a safety defect as alleged in paragraph 40.

Particulars

(i) Mr McNickle refers to paragraphs 14 and 32 in relation to his injury.

(ii) Mr McNickle has suffered loss and damage as follows:

a. Health care expenses.
b. Additional out of pocket expenses.
c. The need for gratuitous and/or commercial care.
d. Non-economic loss.
e. Economic loss.
f. Additional particulars may be provided following the service of evidence.

(iii) Particulars for group members will be provided following the trial of the common issues.

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

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

(b) Monsanto Australia (New),

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

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

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

(b) Monsanto Australia (New); ~~and/or~~

(c) Monsanto Australia (Old); and/or

(d) Monsanto Company US (Old),

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

G. NOT OF ACCEPTABLE QUALITY

44. The allegations at paragraphs 45 to 56 are pleaded at all material times from 6 December 1978 unless otherwise stated.

45. The Roundup Products used by Mr McNickle and NHL Group Members or to which Mr McNickle and NHL Group Members were exposed:

(a) prior to 13 May 1986, were acquired for a price and/or had a market value of less than $15,000; and

(b) from 13 May 1986, were or could have been acquired for a price less than $40,000.

46. Further and alternatively to the preceding paragraph, by reason of the Roundup Products being marketed and used as herbicide as alleged in paragraph 19 they were goods ordinarily acquired for personal, domestic or household use.

47. The Roundup Products used by Mr McNickle and some NHL Group Members or to which Mr McNickle and some NHL Group Members were exposed were acquired for a purpose other than using up the Roundup Products in trade or commerce in the course of treating other goods or fixtures on land within the meaning of section 4B(1) of the Trade Practices Act and section 3(2) of the Australian Consumer Law.

48. By reason of the matters alleged in paragraphs 45 to 47 above, Monsanto Australia (New), Monsanto Australia (Old), the Intermediary Suppliers and/or the Third Parties supplied Roundup Products:

(a) to Mr McNickle and some NHL Group Members as consumers; and

(b) to other persons who were consumers, where Mr McNickle and some NHL Group Members acquired the Roundup Products from the consumer or used or were exposed to those Roundup Products,

within the meaning of section 4B of the Trade Practices Act and section 3 of the Australian Consumer Law.

49. The supply by the Intermediary Suppliers, Monsanto Australia (New), Monsanto Australia (Old) and/or the Third Parties to the persons identified in the preceding paragraph was in trade or commerce within Australia.

50. Mr McNickle refers to and repeats the matters alleged at paragraph 36 above relating to the supply of Roundup Products, glyphosate and/or glyphosate intermediate by Monsanto Company US (New) and/or Monsanto Company US (Old) to Monsanto Australia (New), Monsanto Australia (Old) and Third Parties being:

(a) for supply or resupply; and

(b) in trade and commerce.

51. From:

(a) July 1976 until around ~~April 1988~~ November 1993, Monsanto Australia (Old);

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

acquired Roundup Products, glyphosate and/or glyphosate intermediate from Monsanto Company US (New) and/or Monsanto Company US (Old) for supply or resupply.

52. The Roundup Products:

(a) were not as fit for the purpose that herbicide is commonly supplied;

(b) were not as free from defects; and

(c) were not as safe,

as would be expected by a reasonable consumer.

Particulars

The Roundup Products were not as fit for the purpose that herbicide is commonly supplied, as free from defects or as safe as would be expected by a reasonable consumer in all the circumstances relating to the supply of the products, including because of:

(i) ~~by reason of~~ the matters alleged in paragraphs 26 and ~~to~~ 27, ~~further, paragraphs 26 to 29, further, paragraph 30~~; and/or

(ii) the matters alleged in paragraphs 26 and 27 combined with the

matters alleged in paragraphs 28 and/or 29; and/or

(iii) the matters alleged in paragraph 30; and/or

(iv) the matters alleged in paragraph 30 combined with the matters alleged in paragraphs 28 and/or 29; and/or

(v) the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material referred to in paragraphs 23, 24 and 25; and/or

(vi) the failure of the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material to:-

a. provide a warning that the Roundup Products were carcinogenic; and/or

b. provide a warning that use of and/or exposure to Roundup Products increased an individual's risk of developing NHL; and/or

c. provide a warning that use of and/or exposure to Roundup Products in accordance with the Safety Directions on the Labels increased an individual's risk of developing NHL; and/or

d. include a direction that any person using the Roundup Products only do so whilst wearing personal protective equipment that was so extensive and impermeable that it excluded any possibility of the user being exposed to the Roundup Products dermally, or by inhalation, or by any other possible route of exposure.

53. By reason of the matters alleged in the preceding paragraph, the Roundup Products:

(a) were not of merchantable quality within the meaning of sections 74D(1) and 74D(3) of the Trade Practices Act; and/or

(b) were not of acceptable quality within the meaning of section 54 of the Australian Consumer Law.

54. Mr McNickle and those NHL Group Members who acquired the Roundup Products from the consumer or used or were exposed to Roundup Products in accordance with paragraph 48 above, and some Estate and Dependency Group Members, (**Consumer Guarantee Group Members**) suffered loss and damage by reason of the Roundup Products not being of merchantable quality and/or acceptable quality as alleged in paragraph 53.

Particulars

Mr McNickle refers to and repeats the particulars to the paragraph 41.

55. In the premises:

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

(b) Monsanto Australia (New); ~~and/or~~

(c) Monsanto Australia (Old), and/or

(d) Monsanto Company US (Old),

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

56. In the premises:

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

(b) Monsanto Australia (New),

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

Particulars

As to the reasonable foreseeability of the loss and damage suffered by Mr McNickle and the Consumer Guarantee Group Members as and from 1 January 2011, Mr McNickle refers to the particulars to paragraph 58 below.

H. NEGLIGENCE

Duty of care

57. At all material times from:

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

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

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

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

owed Mr McNickle and NHL Group Members a duty to exercise reasonable care to prevent harm arising from the Roundup Products and/or the glyphosate and/or glyphosate intermediate which was used in the manufacture of the Roundup Products.

Particulars

Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) owed the duty as manufacturer and/or supplier and/or distributor and/or promoter and/or marketer of the Roundup Products and/or manufacturer, supplier and/or distributor of the glyphosate or glyphosate intermediate which was used in the manufacture of the Roundup Products in the time periods set out above.

58. Further, at all material times from July 1976 to 2000, Monsanto Company US (Old); July 1976 until April 1988, Monsanto Australia (Old); April 1988 onwards, Monsanto Australia (New); and/or 2000 onwards, Monsanto Company US (New) knew or ought to have known:-

A. that glyphosate and glyphosate-based formulations and the Roundup Products were carcinogenic and/or that there was a real and significant risk that glyphosate and glyphosate-based formulations and the Roundup Products were carcinogenic;

B. about the matters alleged in paragraphs 28 and 29; and

C. from 1997 at the latest, that use of and/or exposure to glyphosate and/or glyphosate-based formulations and/or the Roundup Products increased an individual's risk of developing NHL and/or that there was a real and significant risk that use of and/or exposure to glyphosate and/or glyphosate-based formulations and/or the Roundup Products increased an individual's risk of developing NHL;

~~about the matters alleged in paragraphs 26 to 27, further, paragraphs 26 to 29, further, paragraph 30~~ by reason that:

(a) mutagenicity and carcinogenicity studies undertaken on behalf of Monsanto Company US (Old) by Industrial Bio-Test Laboratory (**IBT**) of glyphosate in or around 1970-1974, which did not identify glyphosate as having mutagenic or carcinogenic properties and on which the registration of glyphosate with the Environmental Protection Agency (US) (**EPA**) was based, were invalid based on falsified data. Monsanto Company US (Old) was on notice that the IBT had generated false data in studies from July 1976;

Particulars

(i) In or around April to July 1976, deficiencies in the studies undertaken by IBT were identified by the US Food and Drug Administration and were reported publicly in July 1976. It can be inferred therefore that by at least July 1976 Monsanto Company US (Old) and Monsanto Australia (Old) were aware of those deficiencies and that reporting, and that there had been no adequate testing of the carcinogenicity of glyphosate and/or Roundup Products.

(ii) In 1977, the EPA placed a moratorium on registration actions involving data developed at IBT and notified registrants that they were required to audit raw data and validate the IBT studies pivotal to registered pesticides. In March 1978, the EPA required registrants to submit to EPA the raw data for the IBT studies [McNickleProdVolThree00020017].

(iii) In August 1978, EPA internal correspondence [McNickleProdVolNine00006370] concluded that the oncogenic aspect of the "2-year chronic oral toxicity study with CP67573 in Albino Rats" was "inadequate and [did] not support the registration [of glyphosate]". The correspondence further stated that the oncogenic potential of glyphosate needed to be repeated. Sometime before July 1985, the EPA had concluded that IBT Study No. B569 titled "18-Month Carcinogenicity Study with CP67579 in Swiss White Mice" was invalid [McNickleProdVolTwentyTwo00004349].

(iv) In July 1980, the EPA lifted the moratorium on registration action and required registrants to fill data gaps resulting from invalid IBT studies [McNickleProdVolThree00020017].

(v) As at March 1981, Monsanto Company US (Old) recognised in internal communication addressed to F Johannsen (Toxicologist) (**Johannsen**), R Street (Manager, Product Health and Safety Information) and others [McNickleProdVolNine00012572] that the IBT carcinogenicity studies "[were] not currently in compliance with the [Good Laboratory Practice] and protocol and thus potentially in jeopardy".

(b) from at least 1981, animal studies demonstrated evidence of carcinogenicity in rodents;

Particulars

(i) Mr McNickle refers to the fact that:

a. In 1981, Monsanto Company US (Old) commissioned two carcinogenicity studies to replace the IBT studies which were invalidated. One study was a mouse study and the other a rat study.

b. In or around December 1981, the rat study commissioned by Monsanto Company US (Old), Lankas, G, P. (1981). *A Lifetime Study of Glyphosate in Rats*. Report No. 77-2062, was completed (**1981 Rat Study**). The 1981 Rat Study was

a chronic oncogenicity study and showed a positive result for testes interstitial cell tumours in male rats and a positive response for thyroid c-cell carcinomas in female rats. Nonetheless, it was concluded by the authors of the study and a pathologist retained by Monsanto Company US (Old) that the tumours were not treatment related. In March 1985, the EPA identified that the doses used in the 1981 Rat Study were only 1/100 of those used in the mouse study and that a toxic or maximally tolerated dose (**MTD**) level had not been reached. The EPA concluded that "at toxic levels at or close to a MTD, tumors might have been induced" [McNickleProdVolNine00012560].

c. In July 1983, the carcinogenicity study on mice identified that glyphosate caused kidney tumours (called renal tubule adenomas) in male mice (**the 1983 Mouse Study**).

d. In 1984, Dr W.G. Dykstra (**Dykstra**), toxicologist in the Hazard Evaluation Division of the EPA, reviewed the 1983 Mouse Study and concluded that glyphosate was oncogenic. The review described the kidney tumours in male mice as "rare, dose related and considered [glyphosate]-related". The review also stated that "[d]ose-related non-neoplastic lesions occurred in both" male and female mice.

e. In March 1984, Monsanto Company US (Old) was informed by Mr Robert Taylor in the Registration Division of the EPA that glyphosate was expected to be identified in the review by Dykstra as an oncogene.

f. Between around March 1984 and February 1985, Monsanto Company US (Old) actively sought to persuade the EPA that the kidney tumours were "unrelated to treatment" (i.e. unrelated to glyphosate administration to the mice), such that glyphosate was not oncogenic or carcinogenic, by way of letters and at meetings between the two bodies.

g. In February 1985, Lyle Gingerich (Toxicologist) (**Gingerich**), Johannsen and Mr Serdy (Manager, Federal and State Registration Affairs) (**Serdy**) of Monsanto Company US (Old) met with the EPA and discussed the proposed classification of glyphosate as a "Category C" oncogene. An internal Monsanto Company US (Old) memorandum [McNickleProdVolNine00012564] records that at that meeting, Johannsen asked the EPA "what can we do to get this thing off of group "c"". One of Monsanto Company US (Old)'s objectives at the meeting was to "see if [Monsanto] could respond to [the EPA's] concerns before any unnecessary comments became a part of the Roundup permanent file".

h. In February 1985, based upon the 1983 Mouse Study, the EPA's Toxicology Branch determined to classify glyphosate as a 'Category C' oncogene, being a substance that is possibly carcinogenic to humans

[McNickleProdVolNine00012694].

i. In March 1985, the EPA formally classified glyphosate as a 'Category C' oncogene.

j. In April 1985, Monsanto Company US (Old) retained Dr Marvin Kuschner (**Kuschner**), a pathologist, to review slides from the kidneys of mice from the 1983 Mouse Study "in an effort to persuade the [EPA] that the observed tumours … are not related to glyphosate" [McNickleProdVolNine00012843]. Kuschner was sent the 422 slides from 399 animals on 3 April 1985.

k. On 21 May 1985, Monsanto Company US (Old) provided Kuschner's analysis to the EPA [McNickleProdVolEleven00002491]. Kuschner had purportedly identified an additional tumour in the control group, which was relied upon by Monsanto Company (US) to try to persuade the EPA to revise its classification of glyphosate as a 'Category C' oncogene.

l. Following the receipt of Kuschner's analysis, on or around December 1985, a pathologist in the EPA's Toxicology Branch, Dr Louis Kasza (**Kasza**), reanalysed the purported additional tumour identified by Kuschner. The EPA's pathologist did not agree with the conclusions expressed by Kuschner. Kasza concluded that the presence of a tumour could not definitely be established and that there was no "pathophysiologically significant change". Kasza also re-cut kidney sections in male mice and no additional tumours were identified.

m. In or around August 1985, Monsanto Company US (Old) began to plan for a review of the EPA's decision by the Federal Insecticide, Fungicide, and Rodenticide Act (**FIFRA**) Scientific Advisory Panel (**SAP**). An internal Monsanto Company US (Old) memorandum from Gingerich dated 20 August 1985 [McNickleProdVolNine00012554] stated, inter alia, that "[t]here is a tendency to "count the votes" at [SAP] meetings. We can make a difference by lining up a large number of experts on our side."

n. From around August 1985 until February 1986, Monsanto Company US (Old) actively sought to persuade the SAP that glyphosate was not oncogenic or carcinogenic, including by way of letters, information packs, oral testimony and submissions.

o. In or around February 1986, the SAP recommended the classification of glyphosate by the EPA as "Category C" be downgraded to 'Category D', being a substance that is not classifiable as to human carcinogenicity. However, the SAP concluded that the occurrence of neoplasms in high glyphosate dose male mice in the study leading to the earlier "Category C'" classification was "unusual". The SAP also stated:

> Under these circumstances, the Panel does not believe

that it is possible to categorise Glyphosate clearly into Group C (possible human carcinogen) or Group E (no evidence of carcinogenicity for humans). The Panel proposes that Glyphosate be categorised as Group D (not classified) and that there be a data call-in for further studies in rats and/or mice to clarify unresolved questions.

p. On 11 August 1986, the EPA issued Monsanto Company US (Old) with a copy of the Guidance for Registration of Pesticide Products Containing Glyphosate as Active Ingredient dated 30 June 1986 (**Guidance Document**) [McNickleProdVolNine00005705] which stated that "the oncogenic potential is not fully defined at this time" and "[r]epeat oncogenic studies are required in mice and rats". The Guidance Document further stated that:

    i. the EPA "agree[d] [with the SAP] that the available data are not sufficient to adequately address the question of whether the apparent effects noted in the mouse study are biologically relevant";

    ii. "in view of the large difference in doses between the rat and mouse studies, the Toxicology Branch Oncogenicity Review Committee speculated that 'a toxic or MTD [Maximally Tolerated Dose], was not reached in [the 1981 Rat Study]' and that at doses "close to an MTD, tumors might have been induced" and that "a repeat rat study is required in which the highest dose tested is an MTD."

q. As at August 1986, Monsanto Company US (Old) recognised in internal documentation prepared by T J Hoogheem (Environmental Stewardship Lead) for A Barnett (Manager, Environmental Practices) and copied to T Long (Senior Product Toxicologist), Serdy (Registration Manager) and other Monsanto Company US (Old) employees [McNickleProdVolFive00475130] that it was required to repeat the chronic mouse and rat studies, but that "continued use of glyphosate products" would be challenged by "activist groups" based on that requirement and that "oncogenicity would be a key issue over the next 3 – 5 years until the tests are completed".

r. In November 1986, T Armstrong (Registration Manager), Monsanto Company US (Old) responded to the EPA's Guidance Document [McNickleProdVolNineteen00053983] by advising that a repeat glyphosate mouse oncogenicity study was "not required", although Monsanto would comply with the requirement to submit a new chronic rat study. Gingerich was copied into that correspondence.

s. From November 1986 to June 1989, Monsanto Company US (Old) repeatedly lobbied the EPA to waive the requirement for it to repeat the glyphosate mouse oncogenicity study, including through letters and at

meetings between the two bodies.

t. In May 1989, Elaine Dorward-King, (Senior Registration Specialist), Monsanto Company US (Old) wrote to the EPA [McNickleProdVolNineteen00053983] that "there is no scientific or regulatory justification for repeating [the mouse oncogenicity] study" and that the repeat rat study was "currently ongoing and the in-life portion of the study is scheduled to terminate in July 1989."

u. In June 1989, the EPA concluded that a repeat of the mouse oncogenicity study was not required "at this time", but that the EPA would reconsider its position after the results of the new 2-year rat chronic toxicity and oncogenicity study were reviewed.

v. At no stage did Monsanto Company US (Old) or Monsanto Company US (New) repeat the mouse oncogenicity study.

w. On or around 26 September 1990, Monsanto Company US (Old) published the results from the 2-year rat chronic toxicity study (**1990 Rat Study**).

x. On or around 18 June 1991, William Heydens (Toxicologist) (**Heydens**) of Monsanto Company US (Old) received a copy of the EPA's review of the 1990 Rat Study [McNickleProdVolEleven00003006]. The EPA review showed an increased incidence of pancreatic islet tumours in male rats, thyroid tumours in both male and female rats and liver tumours in male rats, however the EPA did not consider these tumours to be related to the administration of glyphosate. The EPA review concluded that "[d]ue to the high incidences of pancreatic islet cell tumors in each of the treated male groups…in comparison to the concurrent controls, Toxicology Branch I (sic) has recommended that the carcinogenic potential of glyphosate be addressed by the Peer Review Committee."

y. On 18 June 1991, an internal Monsanto Company US (Old) memorandum sent to Heydens and others [McNickleProdVolEleven00003006] stated "as we were aware, the Toxicology Branch [of the EPA] has recommended that the carcinogenic potential of glyphosate be addressed by the Peer Review Committee, based on the high incidences of pancreatic islet cell tumors in each of the treated male groups. Keep your fingers crossed tomorrow!"

z. In or around October 1991, the EPA downgraded the classification of glyphosate to 'Group E', being one that shows evidence of non-carcinogenicity for humans. However, the EPA stated "[i]t should be emphasized, however, that the designation of an agent in Group E is based on the available evidence at the time of evaluation and should not be interpreted as a definitive conclusion that the agent will not be a carcinogen under any circumstances".

(ii) Mr McNickle also refers to the fact that:

a. In around 1983, California's Department of Food and Agriculture (**CDFA**) identified gaps in the available safety data for glyphosate.

b. Between 1983 and 1986, Monsanto Company US (Old) sought to persuade the CDFA that glyphosate was "registered based on an adequate data base", including by way of letters and the provision of documents provided by Monsanto Company US (Old) to the EPA, including Kuschner's analysis [McNickleProdVolTwentytwo0004432].

c. In around December 1986, the CDFA considered that there were possible adverse oncogenic effects with glyphosate based on the 1983 Mouse Study.

d. Between around April 1987 and 1990, Monsanto Company US (Old) actively sought to persuade the CDFA to reconsider its evaluation of the 1983 Mouse Study and find there was "no treatment related oncogenic effect" [McNickleProdVolNine00012844], including by way of letters, petitions and the submission of data and the SAP decision.

e. In March 1992, the CDFA found that the 1983 Mouse Study was "acceptable" but maintained that it indicated "possible oncogenic effect". The CDFA also found the 1990 Rat Study "acceptable" but noted it showed "a modest incidence of relatively uncommon tumour type (adrenal cortical carcinomas) was found" in certain females and was considered a "possible adverse effect" [McNickleProdVolTwentyTwo00002817].

f. As at November 1992, Chuck Hastings (Toxicologist) at Monsanto Company US (Old) recognised in internal correspondence addressed to Stephen Adams (Chemistry Regulatory Affairs Manager) (**Adams**) and others [McNickleProdVolTwentyTwo00026645] that the CDFA reviewer had "concluded there was a possible treatment-related increase in adrenal cortical carcinomas in high dose females" and the CDFA had "maintain[ed] there is a possible oncogenic effect in the [1983 Mouse Study]…based on renal tubular adenomas and carcinomas."

(iii) Mr McNickle also refers to other animal carcinogenicity studies in respect of glyphosate published over the Relevant Period which were available to Monsanto Company US (Old), Monsanto Company US (New), Monsanto Australia (New) and Monsanto Australia (Old).. Further particulars may be provided following receipt of the report of Mr McNickle's animal studies expert.

(c) from at least 1999, epidemiological studies demonstrated a relationship between use of and/or exposure to glyphosate and/or glyphosate-based formulations and an increased risk of NHL and/or from at least 1997 epidemiological studies demonstrated that there was a real and significant risk that there was such a relationship;

Particulars

(i) Mr McNickle refers to the fact that:

a. In 1999, Hardell et al. published an epidemiological study which identified a link between use of, or exposure to, glyphosate and/or glyphosate-based formulations and an increased risk of NHL (**Hardell Study**). From April 1999 until at least 2004, Monsanto Company US (Old), and most notably employees Donna Farmer (Toxicologist) (**Farmer**) and John Acquavella (Epidemiologist) (**Acquavella**) of Monsanto Company, took active steps to criticise and rebut the Hardell Study, including by way of seeking assistance from third parties, preparing internal responses, background documents, sending letters to the editor and "scientific outreach". Those steps included (but were not limited to):

A. In April 1999, Farmer and Acquavella reviewed the Hardell Study [McNickleProdVolNine00010118]. They concluded, inter alia, that the study reported "weak to moderate associations for glyphosate" and NHL and that it was clear that "the widespread use of glyphosate and concerns about pesticide related health effects for farmers and their families will raise the "index of concern" for glyphosate in future agricultural epidemiological studies".

B. In June 1999, Farmer sent an internal email [McNickleProdVolEight00044292] stating that she and Acquavella had been doing the "technical work" on the "issue" of the Hardell Study, including "sending around" a summary of the study in response to information requests which heavily critiqued both Hardell and his study. The summary stated, inter alia, that Hardell "hated Monsanto" and was "arrogant", and that there were "obvious weaknesses" in the paper.

C. In August 1999 a letter to the editor written by Farmer and Acquavella criticising the Hardell Study was published in Cancer journal [McNickleProdVolSeven00000451].

D. In September 1999, Acquavella gave a presentation which outlined the steps that Monsanto Company US (Old) had taken to address the Hardell Study, including letters to the editor, peer reviews,

message maps and scientific outreach [McNickleProdVolSeven00000440].

E. In January 2000, Farmer, Acquavella and J. Cowell (Scientist) of Monsanto Company US (Old) attended a 'Glyphosate Epidemiology Scientific Outreach' meeting whereby agreement was obtained from external experts to "minimise the misuse of epidemiological data" and speak with a television program preparing to "run an anti-glyphosate program featuring Hardell" [McNickleProdVolEleven00014575].

F. An internal Monsanto Company US (New) presentation from 2006 [McNickleProdVolNine00005132] referred to the fact that "unfavourable [epidemiological] publications / evaluations exists, and more will probably come", including the Hardell Study and outlined various action plans, including an expert panel meeting and engaging expert consultants.

b. by reason of the matters set out in the preceding subparagraph, from at least 1999, Monsanto Company US (Old) and Monsanto Company US (New) were aware that there was epidemiological evidence of a relationship between glyphosate and/or glyphosate-based formulations and the development of NHL. Further, it can be inferred that Monsanto Australia (New) was aware of such evidence from the fact of the publication of Hardell study.

c. from at least 1997, a number of other epidemiological studies were proposed to be published, or were published, which were recognised by Monsanto Company US (Old) or Monsanto Company US (New) as potentially identifying, or which identified, a relationship between use of and/or exposure to glyphosate and/or glyphosate-based formulations and the development of NHL. Monsanto Company US (Old) and Monsanto Company US (New) took active steps to address the studies:

A. From at least 1997 until 2004, Monsanto Company US (Old) and Monsanto Company US (New) took steps to address the possibility that the Agricultural Health Study would find an epidemiolocal link between glyphosate exposure and health effects. In July 1997, Acquavella prepared a communications document criticising the study [McNickleProdVolTwo00002569] and in September 1997 gave an internal presentation [McNickleProdVolSeven00000440] where he referred to the study as a "major concern" and outlined the internal "strategy" to address it. In May 1999, Farmer expressed concern in an email [McNickleProdVolTwo00002529] that the ongoing Agricultural Health Study would identify associations between "glyphosate use and some

health effects" and referred to the study as "junk science".

B. In July 2004, Heydens stated in an email that work done by Acquavella criticising the study represented "great progress" [McNickleProdVolNine00009573].

C. In 2001, McDuffie et al. published an epidemiological study which identified a relationship between glyphosate exposure and an increased risk of NHL. Prior to the publication of the study, by email dated 12 May 2000 [McNickleProdVolTwo00003014], Acquavella provided Farmer, Heydens and others at Monsanto Company US (New) with a copy abstract of the study and stated that he was intending to "talk to the author". He further stated that Monsanto Company US (New) might want to consider including the authors in a "scientific outreach meeting". In around December 2001, the word "glyphosate" was removed from the abstract of the study, which Acquavella described in an email to Heydens and Farmer as a "good result" as it would "not be picked up by most of the usual suspects" [McNickleProdVolTwo00002433].

D. In 2003, De Roos et al. published an epidemiological study which identified a link between glyphosate exposure and an increased risk of NHL. On 2 September 2003, Acquavella sent an email to Farmer, Heydens and others at Monsanto Company US (New) [McNickleProdVolTwo00002431] stating of the paper "[s]trangely, glyphosate looks to be one of the pesticides most associated with NHL in this analysis…I'm afraid this could add more fuel to the fire for Hardell et al…It looks like NHL and other lymphopoietic cancers continue to be the main cancer epidemiology issues…for glyphosate".

E. In 2008, Eriksson et al. published an epidemiological study which identified a link between glyphosate exposure and an increased risk to NHL. In an email dated 14 October 2008 [McNickleProdVolNine00008873], Farmer stated "we have been aware of this paper for awhile and knew it would only be a matter of time before the activists picked it up. I have some epi experts reviewing it. As soon as I have that review we will pull together a backgrounder to use in response. Here is their bottom line…how do we combat this?".

F. In 2009, Orsi et al. in 2009 published an epidemiological study, which was available to Monsanto Company US (New) and Monsanto Australia (New).

G. In 2014, Schinasi et al. published a meta-analysis of a number of epidemiological studies. By email dated 16 June 2014, John Swarthout (Scientific Outreach and Issues Management) of Monsanto Company US (New) advised that the 'write up' of Schinasi et al. was complete in response to an email from Tracy Reynolds (Regulatory Policy and Scientific Lead) of Monsanto Company US (New) that stated that the analysis "summarize[d] six studies on glyphosate and NHL, 3 or 4 of which report significant increases in the risk ratio…the strongest evidence…is reported for glyphosate and B cell lymphoma" [McNickleProdVolNine00010508].

(ii) Mr McNickle also refers to the matters set out in paragraphs 28 to 77 of the Armstrong Report.

(d) from at least 1999, mechanistic studies showed that glyphosate and/or glyphosate-based formulations were or were potentially carcinogenic, including by reason of genotoxicity;

Particulars

(i) Commencing in 1993, a number of studies identified that glyphosate and/or glyphosate-based formulations may be genotoxic, including studies by Rank et al. (1993), Bolognesi et al. (1997), Clements et al. (1997), Lioi et al. (1998) and Peluso et al. (1998).

a. In late 1998, Heydens, Farmer, Larry Kier (Toxicologist) (**Kier**), and Alan Wilson (Toxicologist) (**Wilson**), of Monsanto Company US (Old) sought to "[d]evelop an external global network of experts to manage allegations of potential genotoxicity" of glyphosate [McNickleProdVolSeventeen00000197].

b. In or around January 1999, Professor Parry (**Parry**) was engaged by Monsanto Company US (Old) to conduct a review of published genotoxicity studies.

(ii) Mr McNickle refers to and repeats paragraphs 41 to 47 of the Amended Reply and the particulars thereto in respect of the three separate reports produced by Parry for Monsanto Company (US) over the course of 1999 regarding the potential genotoxicity of glyphosate.

(iii) By February 1999, William Graham (International Regulatory Affairs Lead) (**Graham**), Farmer, Heydens, Kier and Stephen Wratten (Registration Manager) (**Wratten**) of Monsanto Company US (Old) were aware of the First Parry Report dated 11 February 1999, which found evidence that glyphosate was "capable of producing genotoxicity" [McNickleProdVolNine00007835;

McNickleProdVolTwentytwo00076406].

a. In April 1999, Farmer noted that Parry had concluded glyphosate was capable of producing genotoxicity and that "in order to move Dr Parry from his position we will need to provide him with the additional information" [McNickleProdVolEleven00027860].

b. In May 1999, Graham commented of the need to "persuade [Parry] that nothing to do with Glyphosate is mutagenic" [McNickleProdVolNine00009246].

(iv) By September 1999, Farmer, Heydens, Kier, Wratten, Graham and Wilson were aware of the contents of the Second Parry Report dated 18 August 1999 [McNickleProdVolNine00007835] which recommended that further work be done to "clarify the remaining problems" concerning the possible genotoxicity of glyphosate". That month:

a. Farmer referred to the need for "someone else to interface with Perry [sic]…right now the only person I think that can dig us out of this 'genotox hole' is the Good Dr Kier" [McNickleProdVolNine00009250].

b. Heydens referred to Parry not being a person who was "comfortable with the genetox profile of glyphosate/Roundup and who [could] be influential with regulators and Scientific Outreach operations when genotox issues arise" and that it would "take quite a lot of time and $$$ to get him there. We simply aren't going to do the studies Parry suggests" [McNickleProdVolNine00009253].

(v) On 28 October 1999, Farmer was provided with a copy of the Third Parry Report dated 28 October 1999, which concluded, inter alia, that glyphosate was a "potential clastogenic in vitro" and recommended that repeat studies be undertaken [McNickleProdVolTwentytwo00232171; McNickleProdVolNine00007851]. Clastogenic means that a substance has the ability to cause chromosome breakage.

(vi) In October 2001, Farmer referred to Parry's reports in an internal email [McNickleProdVolNine00010094] and stated that the relationship with Parry had not been managed well which "almost landed us with Parry calling glyphosate genotoxic…so we had to do all these additional studies to make him happy and if it had not been for Larry Kier we would be in dog….".

(vii) Mr McNickle also refers to paragraph 31 and 156 to 159 of the Smith Report in relation to the Parry Reports and to the balance of the Smith Report in relation to what mechanistic studies show about the carcinogenicity of glyphosate and glyphosate-based formulations.

(e) at all material times, personal contact with Roundup Products would, or would likely, occur whilst they were being used, including direct contact with an individual's skin, including as a result of inadvertent spills, splashes, leaks and/or spray or mist drift; and

(f) at all material times, the dermal absorption of the Roundup Products, which include surfactants, was higher than the dermal absorption of glyphosate alone;

Particulars

Mr McNickle refers to the fact that:

(i) Surfactants are chemical compounds designed to reduce surface tension between a liquid and semi-solid substance, such as plant leaves or skin. At all material times, surfactants used in the Roundup Products increased the penetration of glyphosate through animal cell membranes including skin.

(ii) In around 2002, TNO Nutrition Food and Research (**TNO**) provided a draft report commissioned by Monsanto Europe SA which disclosed that the dermal absorption of glyphosate in the presence of a surfactant was as high as 10.3%. Mr McNickle also refers to and repeats paragraphs 48 to 55 of the Amended Reply and the particulars thereto. The Australian Pesticides and Veterinary Medicines Authority (**APVMA**) and other regulatory authorities rely on a dermal absorption rate of 3% for glyphosate.

(iii) From at least March 2002, employees of Monsanto Company US (New) had knowledge of the results of the TNO draft report:

a. On 29 March 2002, Heydens and Farmer received an email stating that the TNO's "preliminary results with rat skin are not acceptable" and it could be concluded that the invitro dermal penetration of glyphosate through rat skin was up to 10%. It further stated that the TNO "proposed to repeat the study". In response to that email, on 2 April 2002, Heydens advised that his "primary concern is with the glyphosate in terms of the potential for this work to blow Roundup risk evaluations (getting a much higher dermal penetration than we have seen before." [McNickleProdVolNine00009832].

b. On 2 April 2002, Heydens and Farmer and others were copied into an email from Fabrice Broeckaert (Toxicologist), Monsanto Europe SA (**Broeckaert**), attaching the TNO results [McNickleProdVolTwentyTwo00228608]. On 4 April 2002, Heydens and Farmer were advised in a further email from Broeckaert that a decision had been made to instruct TNO to stop the repeat invitro dermal penetration study with rat skin on the basis that "the penetration of glyphosate would have been [probably] greater than the 3% imposed by the German authorities" [McNickleProdVolNine00009290].

c. On 2 July 2002, Farmer received, for her comment, a copy of the draft TNO Report in an email from Broeckaert [McNickleProdVolEleven00011844].

d. On 15 July 2002, Farmer and Heydens instructed Broeckart that the TNO study should be terminated and no report finalised [McNickleProdVolEleven00011843].

(g) by 2015, the International Agency for Research on Cancer (**IARC**) monograph had found that glyphosate was a probable human carcinogen; and

Particulars

(i) On 24 March 2015, IARC classified glyphosate as a Group 2A carcinogen, being a substance that is a probable carcinogen to humans.

(h) at no time throughout the Relevant Period did Monsanto Company US (Old), Monsanto Company US (New), Monsanto Australia (Old) or Monsanto Australia (New) test or adequately test the formulated Roundup Products for carcinogenicity.

Particulars

(i) In September 2003, Farmer instructed via email "you cannot say that Roundup is not a carcinogen…we have not done the necessary testing on the formulation to make that statement. The testing on the formulations are not anywhere near the level of the active ingredient. We can make that statement about glyphosate and can infer that there is no reason to believe that Roundup would cause cancer" [McNickleProdVolNine00010109].

(ii) In September 2009, Farmer instructed via email that "you cannot say that Roundup does not cause cancer…we have not done carcinogenicity studies with "Roundup"" [McNickleProdVolNine00008404].

(iii) In December 2010, Adams, Chemistry Regulatory Affairs Manager, Monsanto Company US (New) sent an email to Farmer, Heydens and other employees of Monsanto Company US (New) stating "with regards to the carcinogenicity of our formulations we don't have such testing on them directly but we do have such testing on glyphosate and some extensive tox testing on the surfactant" [McNickleProdVolNine00005063].

59. Further, at all material times from:

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

(b) July 1976 until April 1988, Monsanto Australia (Old);

(c) April 1988 onwards, Monsanto Australia (New); and/or

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

it was reasonably foreseeable to those companies that individuals:

(i) who may use or be exposed to Roundup Products may suffer harm arising from the Roundup Products if they were not warned or not adequately warned about the matters alleged in ~~paragraphs 26 to 27, further, paragraphs 26 to 29,~~ paragraphs 26 and/or 27 and/or the matters alleged in paragraphs 26 and/or 27 combined with the matters alleged in paragraphs 28 and/or 29, ~~further, paragraph 30~~; and

(ii) who had already used or been exposed to Roundup Products may suffer harm or further harm arising from the Roundup Products if information disclosing the matters alleged in ~~paragraphs 26 to 27, further, paragraphs 26 to 29~~ paragraphs 26 and/or 27 and/or the matters alleged in paragraphs 26 and/or 27 combined with the matters alleged in paragraphs 28 and/or 29 ~~further, paragraph 30~~ was not made available to those individuals;

and;

(e) from 1997 at the latest to 2000, Monsanto Company US (Old); and from 1997 at the latest onwards, Monsanto Australia (New); and from 2000 Monsanto Company US (New); it was reasonably foreseeable to those companies that individuals:-

(i) who may use or be exposed to Roundup Products may suffer harm arising from the Roundup Products if they were not warned or not adequately warned about the matters alleged in paragraph 30 and/or the matters alleged in paragraph 30 combined with the matters alleged in paragraphs 28 and/or 29; and

(ii) who had already used or been exposed to Roundup Products may suffer harm or further harm arising from the Roundup Products if information disclosing the matters alleged in paragraph 30 and/or the matters alleged in paragraph 30 combined with the matters alleged in paragraphs 28 and/or 29 was not made available to those individuals.

60. In the premises, from

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

(b) July 1976 until April 1988, Monsanto Australia (Old);

(c) April 1988 onwards, Monsanto Australia (New); and/or

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

owed Mr McNickle and NHL Group Members a duty to inform them of the matters alleged in paragraphs 26 and/or 27 and/or the matters alleged in paragraphs 26 and/or 27 combined with the matters alleged in paragraphs 28 and/or 29~~paragraphs 26 to 27, furtherfurther, paragraph 30~~ to prevent harm or further harm arising from the Roundup Products;

(e) from 1997 at the latest to 2000, Monsanto Company US (Old); and from 1997 at the latest onwards, Monsanto Australia (New) and Monsanto Company US (New); owed Mr McNickle and NHL Group Members a duty to inform them of the matters alleged in paragraph 30 and/or the matters alleged in paragraph 30 combined with the matters alleged in paragraphs 28 and/or 29 to prevent harm or further harm arising from the Roundup Products.

Standard of care

61. At all material times, the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29~~, ~~further~~, ~~paragraph 30~~ were or gave rise to risks of harm which were foreseeable and not insignificant.

Particulars

(i) Mr McNickle refers to and repeats the matters alleged in paragraph 58 and the particulars referred to therein.

(ii) The risks of harm were that a person who used and/or was exposed to glyphosate and/or glyphosate-based formulations and/or the Roundup Products would develop NHL, or some other kind of cancer, of which no further particulars can be provided, given scientific evidence proves that glyphosate, glyphosate-based formulations and the Roundup Products are carcinogenic, in the generic sense that they can cause cancer in humans, and scientific evidence also proves that use of them, or exposure to them, increases an individual's risk of developing NHL. Mr McNickle refers to and repeats the matters

alleged in paragraphs 26 to 30 and also the matters alleged in paragraph 58 and the particulars referred to therein.

62. At all material times:

(a) the probability of harm resulting from the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~ if care was not taken was not insignificant; and

(b) the likely seriousness of harm resulting from the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~ was significant.

Particulars

(i) Mr McNickle refers to and repeats the particulars to paragraph 58 and the particulars to paragraph 61.

63. By reason of the matters alleged in paragraphs 61 and 62, a reasonable person in the position of Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) would not have:

(a) manufactured the Roundup Products and/or glyphosate or glyphosate intermediate which was used in the manufacture of the Roundup Products; and/or

(b) distributed or supplied for sale in Australia the Roundup Products and/or supplied or distributed glyphosate and/or glyphosate intermediate which was used in the manufacture of the Roundup Products which would be sold in Australia.

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

(aa) adequate testing and/or evaluation of the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30,~~ was undertaken;

(ab) information evidencing or disclosing the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~ which was available to any of Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New), was made available to regulatory authorities;

(a) the Roundup Products were promoted or marketed to potential purchasers and users with warnings or adequate warnings about the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~; and/or

Particulars

(i) Any information relating to the Roundup Products, including any website, should have clearly and prominently disclosed the matters alleged in paragraphs 26 to 30 as well as the importance of wearing personal protective equipment and/or adequate personal protective equipment at all times when using the Roundup Products.

(b) information disclosing the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~ was made available to persons who had already purchased, used or been exposed to Roundup Products; and/or

Particulars

(i) Mr McNickle refers to and repeats the particulars to the preceding subparagraph.

(c) the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material referred to in paragraphs 23, 24 and 25 contained warnings or adequate warnings:-

i. about the matters alleged in paragraphs 26 to 30;

ii. that the Roundup Products were carcinogenic;

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

iv. that use of and/or exposure to Roundup Products in accordance with the Safety Directions on the Labels increased an individual's risk of developing NHL;

v. that any person using the Roundup Products only do so whilst wearing personal protective equipment that was so extensive and impermeable that it totally excluded any possibility of the user being exposed to the Roundup Products dermally, or by inhalation, or by any other possible route of exposure;

vi. or, alternatively, to ii. and iii., that there was a significant risk that the Roundup Products were carcinogenic and/or that use of, and/or exposure to, the Roundup Products increased an individual's risk of developing NHL;

vii. or alternatively, to iv., that there was a significant risk that use of and/or exposure to Roundup Products in accordance with the Safety

Directions on the Labels increased an individual's risk of developing NHL.

Breach of duty

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

(a) manufactured the Roundup Products and/or glyphosate or glyphosate intermediate which was used in the manufacture of the Roundup Products; and/or

(b) distributed or supplied for sale in Australia the Roundup Products and/or supplied or distributed glyphosate and/or glyphosate intermediate which was used in the manufacture of the Roundup Products which was sold in Australia,

in the circumstances alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~.

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

(aa) failed to ~~undertake~~ ensure that adequate scientific testing and/or evaluation of the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~ was undertaken;

Particulars

Mr McNickle refers to and repeats paragraphs 41 - 56 of the Amended Reply and the particulars thereto.

(ab) failed to make available to regulatory authorities information evidencing or disclosing the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~;

Particulars

Mr McNickle refers and repeats paragraphs 41 – 47, 48 – 55 and 58 - 59 of the Amended Reply and the particulars thereto.

(a) promoted or marketed, or facilitated the promotion or marketing of, the Roundup Products without warning or adequate warning about the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~; and/or

Particulars

(i) The information or material used for marketing or promoting the Roundup Products did not disclose the matters alleged in paragraphs 26 to 30, including the importance of wearing personal protective equipment or adequate personal protective equipment.

(b) failed to make available information disclosing the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~.

Particulars

(i) Mr McNickle refers to and repeats the particulars to the preceding sub-paragraph.

(c) failed to ensure that the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material referred to in paragraphs 23, 24 and 25 contained warnings or adequate warnings:-

(i) about the matters alleged in paragraphs 26 to 30;

(ii) that the Roundup Products were carcinogenic;

(iii) that use of and/or exposure to Roundup Products increased an individual's risk of developing NHL;

(iv) that use of and/or exposure to Roundup Products in accordance with the Safety Directions on the Labels increased an individual's risk of developing NHL;

(v) that any person using the Roundup Products only do so whilst wearing personal protective equipment that was so extensive and impermeable that it totally excluded any possibility of the user being exposed to the Roundup Products dermally, or by inhalation, or by any other possible route of exposure;

(vi) or, alternatively, to ii. and iii., that there was a significant risk that the Roundup Products were carcinogenic and/or that use of, and/or exposure to, the Roundup Products increased an individual's risk of developing NHL;

(vii) or alternatively, to iv., that there was a significant risk that use of and/or exposure to Roundup Products in accordance with the Safety Directions on the Labels increased an individual's risk of developing NHL.

Causation

67. Had Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) not manufactured and/or distributed or supplied for

sale in Australia the Roundup Products (as alleged in paragraph 65 ~~1~~ above) and/or not manufactured, supplied or distributed glyphosate or glyphosate intermediate which was used in the manufacture of the Roundup Products which were sold in Australia, then Mr McNickle and NHL Group Members would not have used or been exposed to, or would have ceased to use or be exposed to glyphosate and Roundup Products, and thereby would not have suffered and been diagnosed with NHL.

68. Had Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) ensured that ~~undertaken~~ adequate scientific testing and/or evaluation of the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~ (as alleged in paragraph 66(aa) above) was undertaken, then the true position (being the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~) (**True Position**):

    (a) would have become known to Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) (to the extent that it was not already known by those entities); and

    (b) would have been revealed to regulatory authorities and/or consumers or potential consumers of Roundup Products.

69. Had Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) revealed the True Position to regulatory authorities (as alleged in paragraphs 66(ab) and/or 68(b) above) then:

    (a) regulatory approvals given for use of glyphosate, glyphosate-based formulations, and/or Roundup Products would not have been given, or would have been cancelled or suspended; and/or

    (b) glyphosate, glyphosate-based formulations, and/or Roundup Products would not have been sold in, or would have been withdrawn or removed from, the Australian market.

70. By reason of the matters alleged in the preceding paragraph, Mr McNickle and NHL Group Members would not have used or been exposed to, or would have ceased to use or be exposed to, glyphosate, glyphosate-based formulations, and/or Roundup Products, and thereby would not have suffered and been diagnosed with NHL.

71. Had Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New)

and/or Monsanto Company US (New):

(a) promoted or marketed, or facilitated the promotion or marketing of, the Roundup Products with warning or adequate warning about the matters alleged in paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~, as alleged in paragraphs ~~2(a)~~ 64(a) and/or ~~4(b)~~ 66(a) above; and/or

(b) made available information disclosing the matters alleged in ~~paragraphs 23 to 24, further,~~ paragraphs 26 to ~~27~~ 30, ~~further, paragraphs 26 to 29, further, paragraph 30~~, as alleged in paragraphs 64(b) and 66(b) ~~and/or 68(b)~~ above; and/or

(ba) ensured that the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material referred to in paragraphs 23, 24 and 25 contained the warnings referred to in paragraphs 64(c) and 66(c) above;

(c) then Mr McNickle and NHL Group Members would not have used or been exposed to, or would have ceased to use or be exposed to, Roundup Products, and thereby would not have suffered and been diagnosed with NHL.

Loss and damage

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

Particulars

Mr McNickle refers to and repeats the particulars to the paragraph 41.

H.1 DECEIT

73. From around 1981 onwards, Monsanto Company US (Old) and Monsanto Company US (New) actively engaged in conduct in order to conceal that:-

(a) glyphosate and glyphosate-based formulations and the Roundup Products were carcinogenic;

(b) and/or that there was a real and significant risk that glyphosate and glyphosate-based formulations and the Roundup Products were carcinogenic;

(c) and/or that use of and/or exposure to glyphosate and glyphosate-based formulations and ~~to~~ Roundup Products increased an individual's risk of developing NHL;

(d) and/or that there was a real and significant risk that use of and/or exposure to glyphosate and glyphosate-based formulations and the Roundup Products increased an individual's risk of developing NHL

(the matters alleged in paragraph 73(a)-(d) are hereinafter referred to as the **Concealing Conduct**).

Particulars

Mr McNickle refers to and repeats the matters alleged in:

(i) subparagraphs (i) and (ii) of the particulars to subparagraph 58(b);

(ii) subparagraphs (i)(a), (i)(c)(A) to (i)(c)(E) and (i)(c)(G) of the particulars to subparagraph 58(c);

(iii) subparagraphs (i) to (vi) of the particulars to subparagraph 58(d); and

(iv) subparagraphs (ii) to (iii) of the particulars to subparagraph 58(f); and

(v) paragraphs 3 to 60 of the Amended Reply and the particulars thereto.

74. By engaging in the Concealing Conduct, in combination with the matters alleged at 17(a), 17(c)(i)-(v), 25, 34 and 35, Monsanto Company US (Old) and Monsanto Company US (New)'s conduct, including by silence, amounted to representations that:

(a) from at least 1981, Monsanto Company US (Old) and Monsanto Company US (New) were not knowingly concealing that the Roundup Products were carcinogenic or that there was a real and significant risk that they were carcinogenic (the **Not Carcinogenic Representation**); and

(b) from at least 1999, Monsanto Company US (Old) and Monsanto Company US (New) were not knowingly concealing that use of or exposure to the Roundup Products increased an individual's risk of developing NHL or that there was a real and significant risk that use of or exposure to the Roundup Products increased an individual's risk of developing NHL (the **Does Not Cause NHL Representation**).

75. By reason of the matters pleaded at paragraphs 26 to 30 above, the Not Carcinogenic Representation and the Does Not Cause NHL Representation were false.

76. Monsanto Company US (Old) and/or Monsanto Company US (New) knew that the Not Carcinogenic Representation and the Does Not Cause NHL Representation were false or alternatively, were reckless as to whether they were true or false.

Particulars

Mr McNickle refers to and repeats the matters alleged at paragraph 58 and the particulars referred to therein and paragraphs 3 to 60 in the Amended Reply and the particulars referred to therein.

77. Monsanto Company US (Old) and Monsanto Company US (New) intended that consumers of the Roundup Products, including Mr McNickle and the group members, would rely on the Not Carcinogenic Representation and/or the Does Not Cause NHL Representation in deciding whether to, and how to, consume and/or use the Roundup Products.

Particulars

Intention is to be inferred from the fact of the Concealing Conduct, the failure to disclose the Concealing Conduct to regulatory authorities or consumers or potential consumers of the Roundup Products, or any other disclosure that would result in the Concealing Conduct being publicly disclosed, and the matters alleged at paragraphs 17(a), 17(c)(i), 17(c)(v), 25, 34, 35 and 58(h) .

78. Mr McNickle and group members relied on the Not Carcinogenic Representation and/or the Does Not Cause NHL Representation in deciding whether to, and how to, use or be exposed to the Roundup Products.

Particulars

The Not Carcinogenic Representation and/or the Does Not Cause NHL Representation prevented Mr McNickle and the group members from discovering that the Roundup Products were carcinogenic and/or that there was a real and significant risk that they were carcinogenic and/or increased an individual's risk of developing NHL and/or that there was a real and significant risk that they increased an individual's risk of developing NHL. Had they been informed of the fact of the Concealing Conduct and/or that Roundup Products were carcinogenic and/or that there was a real and significant risk that they were carcinogenic and/or use of or exposure to Roundup Products increased an individual's risk of developing NHL and/or that there was a real and significant risk that they increased an individual's risk of developing NHL, Mr McNickle and group members would not have used or been exposed to the Roundup Products.

79. Mr McNickle and group members have suffered loss and damage by reason of their reliance on the Not Carcinogenic Representation and/or the Does Not Cause NHL Representation.

Particulars

Mr McNickle refers to and repeats the particulars to the paragraph 41.

80. Alternatively to paragraphs 74 to 79, Monsanto Company US (Old) and/or Monsanto Company US (New):

    (a) from at least 1981, knew that, alternatively were reckless as to whether, the Roundup Products were carcinogenic; and/or

    (b) from at least 1999, knew that, alternatively were reckless as to whether, the use of or exposure to Roundup Products increased an individual's risk of developing NHL.

81. Monsanto Company US (Old) and Monsanto Company US (New) did not disclose to regulatory authorities, consumers or potential consumers of the Roundup Products that the Roundup Products were carcinogenic or that there was a real and significant risk that they were carcinogenic and/or that use of or exposure to Roundup Products increased an individual's risk of developing NHL or that there was a real and significant risk that use of or exposure to the Roundup Products increased an individual's risk of developing NHL.

82. By reason of the matters alleged in paragraph 80 and 81 and by engaging in the Concealing Conduct, in combination with the matters alleged at 17(a), 17(c)(i)-17(c)(v), 25, 34, 35, Monsanto Company US (Old) and Monsanto Company US (New)'s conduct was deceitful.

83. The Concealing Conduct deprived Mr McNickle and the group members of the ability to discover that the Roundup Products were carcinogenic and/or that there was a real and significant risk that they were carcinogenic and/or that use of or exposure to the Roundup Products increased an individual's risk of developing NHL and/or that there was a real and significant risk that use of or exposure to the Roundup Products increased an individual's risk of developing NHL which would inform them as to whether to, and how to, use or be exposed to the Roundup Products.

84. If Mr McNickle and group members had been informed of the fact of the Concealing Conduct and/or that Roundup Products were carcinogenic and/or that there was a real and significant risk that they were carcinogenic and/or use of or exposure to Roundup Products increased an individual's risk of developing NHL and/or that there was a real and significant risk that use of or exposure to the Roundup Products increased an individual's risk of developing NHL, Mr McNickle and group members would not have used or been exposed to the Roundup Products.

85. By reason of the matters alleged in paragraphs 80 to 84, Mr McNickle and group members have suffered loss and damage.

Particulars

Mr McNickle refers to and repeats the particulars to the paragraph 41.

H.2 EXEMPLARY AND AGGRAVATED DAMAGES FOR THE TORTS OF NEGLIGENCE AND DECEIT

86. Monsanto Company US (Old) and Monsanto Company US (New) showed conscious and contumelious disregard for the rights of Mr McNickle and the group members, which conduct is deserving of punishment by an award of exemplary damages to:

(a) demonstrate the Court's disapprobation and denunciation of such conduct; and

(b) act as a deterrent and to bring home to Monsanto Company US (Old) and Monsanto Company US (New) that commercial interests and profits should not take precedence over the health of consumers.

87. Monsanto Company US (Old), Monsanto Company US (New), Monsanto Australia (Old) and Monsanto Australia (New) have aggravated Mr McNickle and the group members' suffering so as to warrant an award of aggravated damages.

Particulars

Mr McNickle refers to the repeat and ongoing nature of the conduct, which occurred over a period of decades and in a manner whereby the Roundup Products were communicated to consumers as safe subject only to the possibility of skin and eye irritation.

88. Mr McNickle and the group members rely on the following matters in respect of an award of exemplary and aggravated damages against Monsanto Company US (Old) and Monsanto Company US (New):

(a) From at least 1981 onwards, Monsanto Company US (Old) and Monsanto Company US (New) had knowledge, or were at least reckless, as to the risk that glyphosate and/or the Roundup Products were carcinogenic;

Particulars

Mr McNickle refers to and repeats the matters alleged in the particulars to paragraph 58.

(b) Monsanto Company US (Old) and Monsanto Company US (New) made decisions not

to undertake testing, or adequate testing, so as to avoid findings or possible findings which would or may have supported the conclusion that Roundup Products and/or glyphosate are carcinogenic or potentially carcinogenic;

Particulars

Mr McNickle refers to and repeats the matters alleged in:

(i) paragraphs 41 to 59 of the Amended Reply and the particulars thereto;

(ii) subparagraphs (i)(r) to (i)(v) of the particulars to subparagraph 58(b);

(iii) subparagraph (vi) of the particulars to paragraph 58(d);

(iv) subparagraph (iii)(d) of the particulars to paragraph 58(f); and

(v) paragraph 58(h) and the particulars thereto.

(c) At all material times, Monsanto Company US (Old) and Monsanto Company US (New) had knowledge that the dermal absorption of the Roundup Products, which include surfactants, was higher than the dermal absorption of glyphosate alone.

Particulars

Mr McNickle refers to and repeats the matters pleaded in paragraphs 48 to 55 of the Amended Reply and the particulars thereto and the particulars to paragraph 58(f) herein.

(d) Monsanto Company US (Old) and Monsanto Company US (New) engaged in conduct that sought to, and did, undermine and invalidate scientific research, scientific reviews, reviews of scientific studies, papers and/or articles, including by IARC, containing conclusions that:

(i) Roundup Products, glyphosate and/or glyphosate-based formulations are carcinogenic or potentially carcinogenic; and/or

(ii) use of and/or exposure to Roundup Products, glyphosate and/or glyphosate-based formulations increased an individual's risk of developing NHL.

Particulars

(i) Mr McNickle refers to and repeats the matters pleaded in paragraphs 32 to 40 of the Amended Reply and the particulars thereto.

(ii) Further, a letter dated 9 October 2015 was sent to Ms Esther

Barajas-Ochoa, of the Office of Environmental Health Hazard Assessment (**OEHHA**) from Dr Samuel M. Cohen of the University of Nebraska Medical Center (**OEHHA Letter**). The OEHHA Letter:

a. was critical of the IARC decision;

b. criticised IARC's consideration of the Séralini 2012 Paper;

c. was written in part by employees of Monsanto;

d. did not name the Monsanto employees as authors of the OEHHA Letter; and

e. did not disclose that Dr Cohen was writing at Monsanto's initiation or instigation.

(e) Monsanto Company US (Old) and Monsanto Company US (New) withheld information, data, studies and/or reports, including from regulatory authorities, which supported the conclusion that Roundup Products, glyphosate and/or glyphosate-based formulations are carcinogenic or potentially carcinogenic;

Particulars

Mr McNickle refers to and repeats paragraph 58 to 59 of the Amended Reply and the particulars thereto and the particulars to paragraph 58(d) and 58(f) herein.

(f) Monsanto Company US (Old) and Monsanto Company US (New) did not disclose or adequately disclose that it had (as the case may be) initiated, sponsored, authored, written, provided assistance to, contributed to amended and/or edited scientific research, studies, reviews of scientific studies, papers and articles and sent correspondence to or engaged in communications with scientific journals, publishers and government agencies or representatives which disputed or did not support:

a. that Roundup Products and/or glyphosate and/or glyphosate-based formulations are carcinogenic or potentially carcinogenic; and/or

b. the use of and/or exposure to Roundup Products, glyphosate and/or glyphosate-based formulations increased an individual's risk of developing NHL.

Particulars

Mr McNickle refers to and repeats the matters pleaded in

paragraphs 3 to 31 of the Amended Reply and the particulars thereto.

(g) By reason of the matters pleaded at subparagraphs (a) to (f) above, Monsanto Company US (Old) and Monsanto Company US (New) intended to, and did, prevent or hamper:

a. proper investigation of the carcinogenic properties of glyphosate and/or the Roundup Products; and

b. information or data about the carcinogenic properties of glyphosate and/or the Roundup Products becoming available to regulatory authorities and consumers.

(h) from at least 2001, Monsanto Company US (New) engaged in at least some of the conduct referred to at subparagraphs (b) to (f) with the purposes of:

a. ensuring ongoing and unrestricted regulatory approval of glyphosate and glyphosate-based products; and

b. avoiding reputational damage;

so as to continue to profit from the sale of those products.

Particulars

(i) Monsanto Company US (New) adopted an approach from at least 2001 onwards known as 'Freedom to Operate' whereby it pursued a strategy of maintaining minimal regulatory restrictions to promote consumer acceptance and sales of the Roundup Products. Mr McNickle refers to, inter alia:

a. An email from Adams to Farmer and others dated 20 March 2001 [McNickleProdVolNine00010092], where Adams described Farmer and others as being "core members" of the "Roundup FTO action team" to "defend the Roundup name". The email also states that "this defense, especially in such affluent urban areas" was "important" to Monsanto's "ITO business" and to "retain and promote further public consumer acceptance."

b. An internal report from 2009 titled 'Glyphosate Registration Reviews in US and Canada' [McNickleProdVolNine00005183] states in part the "overall goal for Monsanto with regards to statutory obligation for registration review and registration…is to maintain the freedom to operate its glyphosate…businesses at the same level it does today or better on both sides of the border. Not only is this goal critical to the continued success and future of Monsanto's crop chemical business, it is also extremely critical to the continued success and future of its

glyphosate-tolerant crop business in not only the US and Canada but worldwide".

c. A presentation titled "Roundup FTO Growth Initiative" circulated by Martin Voss of Monsanto Company US (New) to Monsanto employees in February 2009 [McNickleProdVolTwo00002969; McNickleProdVolNine00010647] states "SO FAR, FTO ISSUES HAVEN'T HAD A CLEAR IMPACT ON THE AG BUSINESS...but RISK IS HIGH: Loss or restriction of registration would have a direct and immediate impact on the business". It further states that Roundup's FTO should be grown to "[p]reserve the value of a $470M GP business at the horizon of 2014".

d. A Monsanto Company US (New) draft plan for responding to the IARC classification dated February 2015 [McNickleProdVolNine00010077] which identifies as the first objective to "[p]rotect the reputation and FTO of Roundup by communicating the safety of glyphosate".

e. A Monsanto Company US (New) draft plan for "Glyphosate FTO" from May 2015 [McNickleProdVolSeven00014114] which identifies the objective for responding to the IARC as to "[e]nsure global regulatory agencies maintain positive conclusion on cancer assessment and do not limit FTO after IARC's recent misclassification of glyphosate as a 'probable carcinogen'."

(ii) Mr McNickle refers to the fact that Monsanto Company US (New) scientists have demonstrated an awareness of the commercial significance of avoiding Roundup Products being classified as carcinogenic, and thereby maintaining regulatory approval or unrestricted regulatory approval and/or minimising reputational damage, in their decision making:

a. In an email from 2000, Farmer commented about a reference on the California Department of Pesticide Regulation website to glyphosate having a "possible adverse effect" regarding oncogenicity: "I could be wrong but if we don't get accurate info on this website – we will have a huge problem" [McNickleProdVolNine00009276].

b. In an email from 2002, in response to a suggestion from a colleague that Parry be permitted to undertake a further test, Heydens stated: "I would not want to explain to senior Ag management that an adverse effect occurred after we gave test material to a researcher to conduct a risky test without first doing all our homework. I have seen this happen and it is not a pretty sight" [McNickleProdVolEleven00015464].

(iii) Mr McNickle refers also to the fact that Monsanto Company US (Old) and Monsanto Company US (New) have generated substantial revenue from the sale of glyphosate and

glyphosate-based products.

(iv) Further, Mr McNickle refers to the decision dated 9 August 2021 of the Court of Appeal of the State of California (First Appellate District, Division Two) in *Alberta Pilliod et al. v Monsanto Company* in which it was found that "Monsanto's conduct evidenced reckless disregard of the health and safety of the multitude of unsuspecting consumers it kept in the dark" and "involved repeated actions over a period of many years motivated by the desire for sales and profit' and that 'Monsanto made ongoing efforts....to impede, discourage or distort scientific inquiry and the resulting science about glyphosate in conscious disregard of public health": pages 70 to 71 of the decision in *Alberta Pilliod et al. v Monsanto Company* (A158228, Alameda County Super Ct No. RG17862702).

(i) The matters pleaded at paragraphs 57 to 72 (the tort of negligence) and paragraphs 73 to 85 (the tort of deceit) and the particulars thereto; and/or

(j) By reason of the matters pleaded at subparagraphs (a) to (i) above, Monsanto Company US (Old) and Monsanto Company US (New), evidenced conscious and contumelious disregard for the health and safety of consumers of the Roundup Products.

I. COMMON QUESTIONS OF LAW OR FACT

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

89. Were each of Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) manufacturers of the Roundup Products within the meaning of section 74A of the Trade Practices Act and/or section 7 of the Australian Consumer Law?

90. Were glyphosate, glyphosate-based formulations and Roundup Products carcinogenic?

91. When Roundup Products made contact with the skin, did surfactants increase absorption into the bloodstream?

92. Did use of or exposure to Roundup Products increase an individual's risk of developing NHL?

93. Did the Roundup Products:

(a) have a defect within the meaning of section 75AC of the Trade Practices Act; and/or

(b) have a safety defect within the meaning of section 9 of the Australian Consumer Law?

94. Were the Roundup Products:

(a) not of merchantable quality within the meaning of section 74D(1) and 74D(3) of the Trade Practices Act; and/or

(b) not of acceptable quality within the meaning of section 54 of the Australian Consumer Law?

95. Did Monsanto Company US (Old), Monsanto Australia (Old), Monsanto Australia (New) and/or Monsanto Company US (New) owe Mr McNickle and NHL Group Members:

(a) a duty to exercise reasonable care to prevent harm from the Roundup Products; and/or

(b) a duty to inform them of the matters alleged in paragraphs 26 and/or 27~~, further and alternatively paragraphs 26 to 29, further and alternatively paragraphs 26 to 30~~ and/or the matters alleged in paragraphs 26 and/or 27 combined with the matters alleged in paragraphs 28 and/or 29 and/or the matters alleged in paragraph 30 and/or the matters alleged in paragraph 30 combined with the matters alleged in paragraphs 28 and/or 29?

96. What was the applicable standard of care in relation to:

(a) Manufacture, distribution and/or supply of the Roundup Products and/or glyphosate and/or glyphosate intermediate which was used in the manufacture of the Roundup Products; and/or

(b) promotion and marketing of the Roundup Products?

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

(a) Manufacturing the Roundup Products and/or glyphosate and/or glyphosate intermediate which was used in the manufacture of the Roundup Products;

(b) distributing and supplying for sale the Roundup Products and/or glyphosate and/or glyphosate intermediate which was used in the manufacture of the Roundup Products;

(c) promoting or marketing, or facilitating the promotion or marketing of, the Roundup

Products without warning or adequate warning about the matters alleged in paragraphs 26 to 30 ~~and 27, further and alternatively paragraphs 26 to 29, further and alternatively paragraphs 26 to 30~~; and/or

(d) failing to make available information disclosing the matters alleged in paragraphs 26 to 30, including to regulatory authorities ~~and 27, further and alternatively paragraphs 26 to 29, further and alternatively paragraphs 26 to 30~~; and/or

(e) failing to ensure that adequate scientific testing and/or evaluation of the matters alleged in paragraphs 26 to 30 was undertaken; and/or

(f) failing to ensure that the Labels, including the 'Directions for Use' and the Safety Directions, and the Marketing Material referred to in paragraphs 23, 24 and 25 contained the warnings referred to in paragraphs 64(c) and 66(c)?

98. Did Monsanto Company US (Old) and/or Monsanto Company US (New) engage in the Concealing Conduct?

99. Did Monsanto Company US (Old) and/or Monsanto Company US (New) make the Not Carcinogenic Representation and the Does Not Cause NHL Representation?

100. Were the Not Carcinogenic Representation and the Does Not Cause NHL Representation false?

101. Did Monsanto Company US (Old) and/or Monsanto Company US (New) know that the Not Carcinogenic Representation and the Does Not Cause NHL Representation were false or alternatively, were reckless as to whether they were true or false?

102. Did Monsanto Company US (Old) and/or Monsanto Company US (New) intend for consumers of Roundup Products to rely on the Not Carcinogenic Representation and the Does Not Cause NHL Representation?

103. Did Monsanto Company US (Old) and/or Monsanto Company US (New) know, or were reckless, as to whether the Roundup Products were carcinogenic and/or increased an individual's risk of developing NHL?

104. Did Monsanto Company US (Old) and/or Monsanto Company US (New) not disclose to regulatory authorities, consumers and potential consumers of Roundup Products that those products were carcinogenic or that there was a real and significant risk that they were carcinogenic and/or that use of or exposure to Roundup Products increased an individual's

risk of developing NHL or that there was a real and significant risk that use of or exposure to the Roundup Products increased an individual's risk of developing NHL?

105. Was the Concealing Conduct, together with the matters addressed in the preceding two paragraphs, deceitful?

106. Did the Concealing Conduct deprive Mr McNickle and group members of the ability to discover that the Roundup Products were carcinogenic and/or that there was a real and significant risk that they were carcinogenic and/or that use of or exposure to the Roundup Products increased an individual's risk of developing NHL and/or that there was a real and significant risk that use of or exposure to the Roundup Products increased an individual's risk of developing NHL?

107. Did Monsanto Company US (Old) and Monsanto Company US (New) show conscious and contumelious disregard for the rights of Mr McNickle and group members, which conduct is deserving of punishment by an award of exemplary damages?

108. Did Monsanto Company US (Old), Monsanto Company US (New), Monsanto Australia (Old) and Monsanto Australia (New) aggravate Mr McNickle and the group members' suffering so as to warrant an award of aggravated damages?

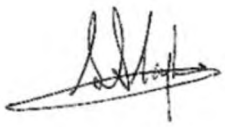
J. MONSANTO COMPANY US (OLD)

109. Monsanto Company US (Old) was and is a corporation registered in the United States of America and capable of being sued.

110. Mr McNickle refers to and repeats the matters alleged in sub-paragraphs 17(c)(i) to (vi) above.

This fourth ~~third~~ further amended pleading was prepared by Jack Rush QC, Andrew Clements QC, Melanie Szydzik, Rebecca Howe and Rose Singleton counsel for Mr McNickle.

Date: 4 July 2022 ~~10 February 2022~~



Signed by Lee Taylor
Lawyer for the Applicant

Schedule A

(i) Part 3.1 of the Civil Law (Wrongs) Act 2002 (ACT)

(ii) The Compensation to Relatives Act 1897 (NSW)

(iii) The Compensation (Fatal Injuries) Act 1974 (NT)

(iv) Part 10 of the Civil Proceedings Act 2011 (QLD)

(v) Part 5 of the Civil Liability Act 1936 (SA)

(vi) The Fatal Accidents Act 1934 (Tas)

(vii) Part III of the Wrongs Act 1958 (Vic)

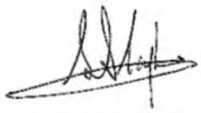
(viii) The Fatal Accidents Act 1959 (WA)

(ix) Sections 75AD(f) and 75AE of the Trade Practices Act and/or sections 138 and 139 of the Australian Consumer Law

Certificate of lawyer

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

Date: 4 July 2022 ~~10 February 2022~~



Signed by Lee Taylor
Lawyer for the Applicant

Schedule

No. VID 243 of 2020

Federal Court of Australia
District Registry: Victoria
Division: General

Respondents

Second Respondent:	Monsanto Australia Pty Ltd (ACN 006 725 560)
Third Respondent:	Monsanto Company
Fourth Respondent:	Pharmacia LLC

GLOSSARY