

Form 17
Rule 8.05(1)(a)

Amended Statement of Claim

No. 1971 of 2019

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

JOHN FENTON

Applicant

MONSANTO AUSTRALIA PTY LTD ACN 006 725 560

Respondent

Table of Contents

A	INTRODUCTION.....	2
	A.1. The Applicant and Group Members	2
	A.2. The Respondent	4
B	ROUNDUP PRODUCTS.....	5
	B.1. Roundup and Glyphosate	5
	B.2. Carcinogenic Properties of Roundup.....	6
C	Publications by Monsanto Australia Concerning Safety of Roundup Products (1987-2020).....	8
	C.1. Domestic Products	8
	C.2. Agricultural Products	9
D	DEFECTIVE GOODS CONTRAVENTION.....	11
E	CUSTOMER QUALITY GUARANTEE CLAIMS.....	15
F	NEGLIGENCE.....	19
	F.1. Duty of care.....	19
	F.2. Standard of care.....	20

Filed on behalf of (name & role of party) John Fenton, Lead Applicant
Prepared by (name of person/lawyer) G Donnellan with B May
Law firm (if applicable) LHD Lawyers
Tel (02) 9264 6644 Fax (02) 9246 6622
Email mlbcagroup@lhd.com.au
Address for service Level 8, 151 Castlereagh Street, Sydney NSW 2000
(include state and postcode)

F.3. Breach of duty.....	21
G CAUSATION, LOSS AND DAMAGE.....	23
G.1. Causation – Applicant.....	23
G.2. Loss and damage – Applicant.....	26
G.3. Causation – Group Members.....	27
G.4. Loss and Damage.....	29
Schedule A – Particulars of Applicant’s Loss and Damage.....	30
Glossary.....	34

[NB: where a range of paragraphs is referred to, e.g. ‘paragraphs 2 – 5’, the reference is inclusive of the start and end numbers.]

Unless otherwise indicated:

- *References to paragraphs include their sub-paragraphs.*
- *References to sub-paragraphs include the chapeau to the sub-paragraph]*

A. INTRODUCTION

A.1. The Applicant and Group Members

1. This is a representative proceeding brought pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) on behalf of the Applicant and all persons:
 - (a) who contracted non-Hodgkin’s lymphoma (**NHL**) and thereby suffered injury and/or loss or damage in the period from 24 March 1987 to **(date of filing)** (**Relevant Period**) by or as a result of the contravening conduct of Monsanto Australia Pty Ltd ACN 006 725 560 (**Monsanto Australia**) pleaded in this amended statement of claim (**ASOC**);
 - (b) who are executors or administrators of the estates of deceased persons referred to in (a) where:
 - (i) the death of the deceased was caused by the conduct of Monsanto Australia pleaded in this ASOC; and
 - (ii) the cause of action so arising survives the death of the deceased; and/or
 - (iii) an action may be brought for the benefit of another person pursuant to:
 - A. the *Compensation to Relatives Act 1897* (NSW);

- B. Part 10 of the *Civil Proceedings Act 2011* (QLD) and/or s 59A of the *Civil Liability Act 2003* (QLD);
 - C. Part III of the *Wrongs Act 1958* (VIC);
 - D. Chapter 3 of the *Civil Law (Wrongs) Act* (ACT);
 - E. the *Compensation (Fatal Injuries) Act 1974* (NT);
 - F. Part 5 of the *Civil Liability Act 1936* (SA);
 - G. Part 7 of the *Civil Liability Act 2002* (TAS);
 - H. the *Fatal Accidents Act 1959* (WA);
 - I. ss 75AD(f) and/or 75AH of the *Trade Practices Act 1974* (Cth) (**TPA**);
 - J. ss 138(3) and/or 145 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**Australian Consumer Law**);
- (c) who are persons who, pursuant to s 75AE of the TPA and/or s 139 of the Australian Consumer Law, have a claim against Monsanto Australia arising from the death or the injuries of a person referred to in 1(a); and
- (d) whose causes of action are not time-barred,
- (together, **Group Members**).
2. As at the commencement of this proceeding, seven or more Group Members have claims against Monsanto Australia within the meaning of s 33C of the FCAA.
3. The Applicant:
- (a) was a user of Roundup herbicide products (**Roundup products**) in the period between 2000 and 2008;

Particulars

The Applicant refers to and repeats the matters pleaded and particularised in paragraphs 39 to 41 below.

- (b) was diagnosed with NHL in 2008; and

- (c) first became aware that his NHL was caused by the fault of Monsanto Australia in 2019.

Particulars

- (i) *The Applicant first became aware of an alleged link between Roundup use and NHL in 2018 as a result of reading news reports of Dewayne Johnson v. Monsanto Company, a court case in the United States of America in which the plaintiff alleged that he contracted NHL from using Roundup products.*
- (ii) *The Applicant became aware that his NHL was caused by the fault of Monsanto Australia in 2019.*

A.2. The Respondent

4. Monsanto Australia:

- (a) was incorporated in Australia as a public company on 24 March 1987 under the name “Animus No. 8 Limited” (but will be referred to in this ASOC as Monsanto Australia for all time periods);
- (b) was a publicly listed company from that date until 24 August 2018 during which time it was known by other names;

Particulars

- (i) *Between 30 March 1988 and 18 April 1988 was known as “Legis (No. 20) Limited”.*
- (ii) *Between 19 April 1988 and 23 August 2018 was known as “Monsanto Australia Limited”.*
- (c) on or about 24 August 2018, was delisted and became a proprietary company known as “Monsanto Australia Pty Ltd”;
- (d) is and was at all material times capable of being sued in its corporate name and style;
- (e) was, prior to 31 December 2010, a corporation within the meaning of the TPA;

- (f) was, at all material times from 1 January 2011, a corporation within the meaning of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
- (g) had at all material times until 7 June 2018 as its ultimate holding company the Monsanto Company, Inc. a company incorporated in Delaware, in the United States of America (**Monsanto USA**);
- (h) had at all material times from 8 June 2018 as its ultimate holding company Bayer AG, a company based in Leverkusen, Germany;
- (i) at all material times from on or about 24 March 1987 to [date of filing to be inserted]:
 - (i) held the Australian rights to the “Roundup” brand, including the details of its formulations, raw materials and specifications; and
 - (ii) had a licence agreement or licence agreements with Monsanto USA or (after 8 June 2018) Bayer AG relating to: (A) the distribution and marketing; and/or (B) the manufacture of Roundup products in Australia.

B. ROUNDUP PRODUCTS

B.1. Roundup and glyphosate

5. Roundup:

- (a) is the brand name of a range of herbicide products used and marketed as a weed-killer for domestic and agricultural use (respectively, Roundup **domestic products** and **agricultural products**);
- (b) was first marketed and sold to the public by or on behalf of Monsanto USA in 1974; and
- (c) was first registered for use in Australia on or about 11 November 1976 and has been produced, sold and marketed in Australia continuously since at or about that time.

6. At all material times:

- (a) all Roundup products contained:
 - (i) as their main active ingredient, glyphosate; and

- (ii) 'surfactants' to increase the effectiveness of glyphosate by enabling it to penetrate foliage; and
- (b) the surfactants in Roundup products enabled the glyphosate in Roundup products to penetrate human skin and enter the bloodstream.

Particulars (6(a) and 6(b))

- (i) *Glyphosate (present in Roundup products as an isopropylamine salt) is an organophosphorus compound, specifically a phosphonate, which interferes with a plant's ability to form aromatic amino acids necessary for protein synthesis.*
- (ii) *Further particulars of the chemical action of glyphosate will be given in the Applicant's expert evidence.*
- (iii) *Surfactants enhance the effectiveness of active ingredients by both reducing the surface tension of the water in the mixture, allowing the product to remain on the plant, and also by driving the active ingredient through the lipid and protein layers of the plant in order to reach the targeted cells.*
- (iv) *The properties which allow surfactants to penetrate the lipid and protein layers of vegetation also enable it to penetrate the lipid and protein layers of human skin.*
- (v) *Further particulars of the chemical action of surfactants will be given in the Applicant's expert evidence.*

B.2. Carcinogenic properties of Roundup

- 7. Glyphosate is, and was at all material times, a carcinogen.

Particulars

- (a) *The Applicant refers to the findings and reasons of the International Agency for Research on Cancer (IARC) in volume 12 of the IARC Monographs on the Evaluation of Carcinogenic Risks to Humans in which the IARC determined: (a) that glyphosate was a "class 2A" carcinogenic hazard, and (b) that there was an association between exposure to glyphosate and incidence of NHL.*

- (b) *The relevant IARC findings were based on exposure studies, animal testing and mechanistic evidence concerning the genotoxic effect of glyphosate on human and animal cells.*
 - (c) *Further particulars will be provided in expert evidence.*
8. At all material times, by reason of the matters pleaded and particularised in paragraphs 6 and 7 above, transcutaneous (skin) absorption and/or exposure by inhalation of glyphosate in any quantity increased the risk of NHL in humans.
9. Further and in the alternative to paragraph 8 above, at all material times during the Relevant Period, users of Roundup products, including those who followed the safety directions provided by Monsanto Australia, were exposed to an increased risk of developing NHL.

Particulars

- (a) *The applicant repeats the matters pleaded and particularised in paragraphs 6, 7 and 8 above.*
- (b) *NHL arises as a result of a mutation in the genetic makeup of lymphocytes, (white blood cells), resulting in the lymphocytes overgrowing their normal limitations. Mutated lymphocytes then form tumours in lymph nodes and other parts of the body.*
- (c) *At all material times during the Relevant Period:*
 - (i) *all Roundup products were manufactured with: (A) glyphosate; and (B) surfactants which increased the ability of glyphosate to be absorbed into the bloodstream and to penetrate the cell walls of lymphocytes (see paragraph 6 above);*
 - (ii) *the only safety directions for Roundup domestic products were for the user to avoid contact between those products and the eyes or skin and to wash their hands after use (see paragraphs 10 to 12 below);*
 - (iii) *adherence to the domestic product safety directions did not prevent transcutaneous absorption or inhalation of Roundup, each of which is*

sufficient to increase the risk of NHL in the person so exposed (see paragraph 8 above);

- (iv) *the safety directions for Roundup agricultural products directed users of Roundup agricultural products to wear, while handling or using the products: (A) elbow-length PVC or other impervious gloves; (B) cotton overalls buttoned to the neck and wrist (or equivalent clothing); (C) face shield or goggles, or a mist respirator if the user determined an inhalation risk existed; and (D) protective waterproof clothing and impervious footwear if a controlled droplet applicator was being used (see paragraphs 13 to 15 below);*
- (v) *these precautions did not prevent transcutaneous absorption or inhalation of Roundup, each of which is sufficient to increase the risk of NHL in the person so exposed (see paragraph 8 above).*

- (d) *Further particulars will be provided following service of the Applicant's lay and expert evidence.*

C. PUBLICATIONS BY MONSANTO AUSTRALIA CONCERNING SAFETY OF ROUNDUP PRODUCTS (1987-2019)

C.1. Domestic products

- 10. At all material times, Monsanto Australia published, caused to be published, and/or approved the publication of directions for use and safety information in relation to Roundup domestic products as pleaded and particularised in paragraphs 11 and 12 below.

Particulars

- (a) *Monsanto Australia authorised the content of the domestic product labels and/or held itself out as doing so by allowing its corporate name to be affixed to the product labels and safety data sheets.*
 - (b) *Further particulars will be provided after discovery.*
- 11. At all material times during the Relevant Period, the product label that was affixed to Roundup domestic products and, after in or about December 2003, also published on the internet stated the following or similar wording:

“Safety Directions: Avoid contact with the eyes. Wash hands after use.”

(Domestic Product Safety Directions).

Particulars

The Domestic Product Safety Directions were published on each of the domestic product labels and, after in or about December 2003, online at www.roundup.com.au.

12. At all material times, the safety data sheet for each of the Roundup domestic products stated the following or similar wording:

“Carcinogenicity

Not considered to be a carcinogenic hazard”,

(the Domestic Product Safety Statement).

Particulars

The Domestic Product Safety Statement was published on the safety data sheet for each of the domestic products. This was available directly upon request from Monsanto Australia and, after in or about December 2003, online at www.roundup.com.au.

C.2. Agricultural products

13. At all material times, Monsanto Australia published, caused to be published and/or approved the publication of directions for use and safety information in the product labels and safety data sheets for Roundup agricultural products in the form pleaded and particularised in paragraphs 14 and 15 below.

Particulars

- (a) *Monsanto Australia authorised the content of the agricultural product labels and/or held itself out as doing so by allowing its corporate name to be affixed to the product labels and safety data sheets.*
- (b) *Further particulars will be provided after discovery.*

14. At all material times the product labels that accompanied the Roundup agricultural products stated the following or similar wording:

“SAFETY DIRECTIONS

Will irritate the eyes. May irritate the nose and throat. Repeated exposure may cause allergic disorders. Avoid contact with eyes and skin. When opening the container, preparing spray and using the prepared spray, wear cotton overalls buttoned to the neck and wrist (or equivalent clothing), elbow-length PVC gloves and face shield or goggles, or mist respirator if an inhalation risk exists. If product in eyes, wash it out immediately with water. Wash hands after use. After each day’s use, wash gloves, face shield or goggles and contaminated clothing. When using controlled droplet applicators wear protective waterproof clothing and impervious footwear.”

(Agricultural Product Safety Directions).

Particulars

The Agricultural Product Safety Directions were displayed on each of the product labels that accompanied the Roundup agricultural products.

15. At all material times the safety data sheet that was available for each of the Roundup agricultural products stated the following or similar wording:

“No adverse health effects expected if the product is handled in accordance with this Safety Data Sheet and the product label.”

(Agricultural Product Safety Statement).

Particulars

The Agricultural Product Safety Statement was displayed on the safety data sheet that was available for each of the Roundup agricultural products on request from Monsanto Australia and, after December 2003, published on the internet.

D. DEFECTIVE GOODS

16. Monsanto Australia, at all times during the Relevant Period:

- (a) until 31 December 2010, 'manufactured' Roundup products within the meaning of s 75AA of the TPA; and

Particulars

(i) *At the material times, Monsanto Australia extracted, and/or produced, and/or processed and/or assembled Roundup products within the meaning of s 75AA of the TPA.*

(ii) *Further and in the alternative, the Applicant:*

A. refers to and repeats the matters pleaded and particularised in paragraph 21 below; and

B. says that Monsanto Australia was a 'manufacturer' within the meaning of s 74A of the TPA, and is thereby taken to have manufactured Roundup products pursuant to s 75AB of the TPA.

(b) from 1 January 2011, was a 'manufacturer' of Roundup products within the meaning of s 7 of the Australian Consumer Law as applicable pursuant to:

(i) section 12 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic);

(ii) section 28 of the *Fair Trading Act 1987* (NSW),

(iii) section 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas);

(iv) section 26 of the *Fair Trading Act 1989* (Qld);

(v) section 19 of the *Fair Trading Act 2010* (WA);

(vi) section 14 of the *Fair Trading Act 1987* (SA);

(vii) section 27 of the *Consumer Affairs and Fair Trading Act* (NT);

(viii) section 7 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT);
and/or

(ix) section 131 of the *Competition and Consumer Act 2010* (Cth),

(individually or together the **ACL**).

Particulars

At all material times from 1 January 2011, Monsanto Australia:

- (a) *held itself out to the public as the manufacturer of Roundup by causing or permitting its name to be applied to Roundup products within the meaning of s 7(1)(b) and s 7(1)(c) of the ACL; and*
- (b) *further and in the alternative, caused or permitted other persons to hold out Monsanto Australia to the public, in connexion with the supply and promotion of Roundup products, as the manufacturer of Roundup products within the meaning of s 7(1)(d) of the ACL.*

17. At all material times during the Relevant Period, Monsanto Australia supplied Roundup products to persons in trade or commerce.
18. By reason of the matters pleaded in paragraphs 16 and 17 above, pursuant to s 75AD of the TPA and/or s 138 of the ACL, Monsanto Australia was liable to compensate an individual injured by Roundup products if those products had a 'defect' within the meaning of s 75AC of the TPA or a 'safety defect' within the meaning of s 9 of the ACL.
19. By reason of the matters pleaded in paragraphs 6, 7, 8, and 9 above (alone or in combination), at all times during the Relevant Period the safety of the Roundup domestic products and agricultural products was not such as persons generally are entitled to expect such that:
 - (a) from the commencement of the Relevant Period to 31 December 2010, the domestic products and the agricultural products had a defect within the meaning of s 75AC of the TPA; and
 - (b) from 1 January 2011, the domestic products and the agricultural products had a safety defect within the meaning of s 9 of the ACL,

(separately and together, the **Product Defect**).

Particulars

The Applicant repeats the matters pleaded and particularised in paragraphs 6 to 15 above and says that the safety of Roundup products was not such as persons generally are entitled to expect due, inter alia, to the following facts which subsisted throughout the Relevant Period:

- (i) All Roundup products contained: (A) glyphosate, a carcinogen; and (B) surfactants which enabled the product to permeate skin and enter the bloodstream.*
- (ii) Exposure to all Roundup products by transcutaneous absorption and/or exposure by inhalation of glyphosate in any quantity increased the risk of NHL in humans.*
- (iii) Users of Roundup products, including those who followed the safety directions provided by Monsanto Australia, were exposed to an increased risk of developing NHL.*
- (iv) The risk of developing NHL from use of Roundup products was not disclosed to purchasers and potential purchasers of Roundup products by Monsanto Australia.*
- (v) At no time during the Relevant Period did Monsanto Australia warn purchasers and potential purchasers of Roundup products of the risk of developing NHL from use of those products on the packaging of those products (or otherwise), and as such the product labels on Roundup products were incorrect and/or misleading.*
- (vi) Further or in the alternative to (v) above, the packaging of the domestic products contained the Domestic Product Safety Directions, which would lead a reasonable purchaser of the domestic products to assume from the lack of any other warnings that the safety directions provided were a complete list of safety precautions which were necessary to ensure their safety and protect them from potential adverse health outcomes, which was not the case.*

- (vii) *Further or in the alternative to (v) above, the Safety Data Sheet for each of the domestic products contained the Domestic Product Safety Statement, which would lead a reasonable purchaser of the domestic products to believe, wrongly, that the domestic products were not carcinogenic.*
- (viii) *Further or in the alternative to (v) above, the packaging of the agricultural products contained the Agricultural Product Safety Directions, which would lead a reasonable purchaser of the agricultural products to assume, wrongly, that the health consequences of exposure to those products was limited to irritation of the eyes, nose, and throat, and allergic disorders after repeated exposure.*
- (ix) *Further or in the alternative to (v) above, the Safety Data Sheet associated with each of the agricultural products contained the Agricultural Product Safety Statement, which would lead a reasonable purchaser of the agricultural products to assume from the lack of any other warnings, wrongly, that the safety directions provided in the product label (including in the Agricultural Product Safety Directions) and the Safety Data Sheet for the agricultural products were a complete list of safety precautions which were necessary to ensure their safety and protect them from potential adverse health outcomes.*
- (x) *The domestic products were marketed to consumers as being suitable for use in domestic settings.*
- (xi) *The agricultural products were marketed to consumers such as the Applicant and Group Members as being suitable for use in agricultural settings.*

20. In the premises of paragraphs 16 to 19 above, pursuant to s 75AD of the TPA and/or s 138 of the ACL, Monsanto Australia is liable to compensate:
- (a) the Applicant pursuant to s 75AD of the TPA for loss and damage suffered because of injuries sustained by him as a result of the defect pleaded in subparagraph 19(a); and

Particulars

As to causation, and loss and damage suffered by him, the Applicant refers to the matters pleaded and particularised in paragraphs 38 to 46 and 49 below.

(b) Group Members:

- (i) from the commencement of the Relevant Period to 31 December 2010, for any loss and damage suffered because of injuries sustained by them or another as a result of the defect pleaded in subparagraph 19(a) pursuant to s 75AD of the TPA; and
- (ii) from 1 January 2011 to the end of the Relevant Period, for any loss and damage suffered because of injuries sustained by them or another as a result of the safety defect pleaded in subparagraph 19(b) above, pursuant to s 138 of the ACL.

Particulars

As to causation, and loss and damage suffered by Group Members, the Applicant refers to the matters pleaded and particularised in paragraphs 52 to 56 below.

E. CONSUMER QUALITY GUARANTEE CLAIMS

21. Monsanto Australia, at all times during the Relevant Period:

- (a) until 31 December 2010, was a 'manufacturer' of Roundup within the meaning of s 74A of the TPA;

Particulars

At all material times prior to 31 December 2010 Monsanto Australia:

- (i) *held itself out to the public as the manufacturer of Roundup products within the meaning of s 74A(3)(a) of the TPA, including by reason of the matters particularised in (ii) below;*
- (ii) *further and in the alternative, caused or permitted its name, a name by which it carried on business or its brand or mark to be*

applied to Roundup products within the meaning of s 74(3)(b) of the TPA;

(iii) *further and in the alternative, caused or permitted third party suppliers, in connexion with the supply of Roundup products by those suppliers, or in connexion with the promotion of Roundup products by those suppliers, to hold out Monsanto Australia to the public as the manufacturer of Roundup products within the meaning of s 74(3)(c) of the TPA;*

(iv) *the Applicant repeats the matters pleaded and particularised in paragraphs 10 to 15 above.*

(b) from 1 January 2011, was a 'manufacturer' of Roundup within the meaning of s 7 of the ACL; and

Particulars

The Applicant repeats matters pleaded and particularised in subparagraph 16(b) above.

(c) supplied the domestic products and the agricultural products to consumers in trade or commerce through retailers and wholesalers;

(d) supplied the domestic products and the agricultural products to retailers and wholesalers:

(i) other than by way of sale by auction; and

(ii) for the purpose of re-supply to consumers, where such re-supply did not occur by way of sale by auction.

22. From the commencement of the Relevant Period until 2008, the Applicant acquired Roundup products from retailers and wholesalers otherwise than by way of sale by auction as a consumer within the meaning of s 4B of the TPA.

Particulars

(a) *The Applicant relies on the presumption in s 4B(3) of the TPA.*

- (b) *In the alternative to (a) above, the Applicant repeats the matters pleaded and particularised in paragraphs 38 to 41 below and says that, during the period from 1996 to 2008 (during which he contracted NHL) he acquired Roundup products as a consumer as the amount he paid for particular Roundup products on each occasion of purchase during this time did not exceed \$40,000, in accordance with s 4B(2)(a) of the TPA then in force.*

23. Throughout the Relevant Period, Group Members acquired Roundup products from retailers and wholesalers otherwise than by way of sale by auction as consumers within the meaning of s 4B of the TPA and/or (after 31 December 2010) s 3 of the ACL.

Particulars

Further particulars will be obtained following opt out, the determination of the Applicant's claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.

24. By reason of the matters pleaded in paragraphs 21 to 23 above, throughout the Relevant Period:

- (a) prior to 31 December 2010, Monsanto Australia guaranteed to consumers that Roundup products were of merchantable quality within the meaning of s 74D of the TPA;
- (b) on and after 1 January 2011, Monsanto Australia guaranteed to consumers that Roundup products were of merchantable quality and/or acceptable quality within the meaning of sub-s 54(2) of the ACL

(separately and together, the **Quality Guarantee**).

25. By reason of the matters pleaded and particularised in paragraphs 6 to 9 above (alone or in combination), Roundup products were, throughout the Relevant Period:

- (a) prior to 31 December 2010, not of merchantable quality within the meaning of s 71 of the TPA; and
- (b) on and after 1 January 2011, not of acceptable quality within the meaning of sub-s 54(2) of the ACL,

as they were not fit for the purpose for which products of their kind are commonly bought as a reasonable consumer in the position of the Applicant and each of the Group Members who bought those products was entitled to expect.

Particulars

- (i) *The purpose for which each of the domestic products and each of the agricultural products are commonly bought is for use as a weed-killer to be applied by persons in domestic settings or agricultural settings.*
- (ii) *The domestic products and the agricultural products were not fit for that purpose as they were not safe to use, or not safe to use in accordance with the safety directions provided.*
- (iii) *The Applicant refers to and repeats the particulars subjoined to paragraph 19 above.*

26. By reason of the matters pleaded in paragraphs 6 to 15 above (alone or in combination), throughout the Relevant Period, Monsanto Australia breached the Quality Guarantee in connexion with the supply of Roundup products to consumers (**Quality Guarantee Breach**).
27. Throughout the Relevant Period it was reasonably foreseeable to a person in the position of Monsanto Australia that the Applicant and Group Members would suffer loss or damage as pleaded in this amended statement of claim if its products were not of merchantable quality or fit for purpose.

Particulars

- (a) *It was reasonably foreseeable that: (a) persons exposed to a chemical herbicide which could penetrate the skin and which was not of merchantable quality or fit for purpose might contract cancer or other diseases from using the product; and (b) the safety directions provided to consumers were not adequate to protect them from inhaling or absorbing the product.*
- (b) *Further and in the alternative, the Applicant refers to and repeats the matters pleaded and particularised in paragraphs 29 and 33 below.*

28. By reason of the matters pleaded in paragraphs 26 and 27 above, Monsanto Australia is liable to compensate:
- (a) the Applicant pursuant to s 74D of the TPA for loss and damage suffered by him as a result of the Quality Guarantee Breach; and
 - (b) Group Members for loss and damage suffered by them as a result of the Quality Guarantee Breach:
 - (i) from the commencement of the Relevant Period to 31 December 2010, pursuant to s 74D of the TPA; and
 - (ii) from 1 January 2011 to the end of the Relevant Period, pursuant to s 271 of the ACL.

Particulars

The Applicant refers to and repeats the particulars subjoined to 20(a) and 20(b) above.

F. NEGLIGENCE

F.1. Duty of care

29. Throughout the Relevant Period, Monsanto Australia:
- (a) manufactured or produced Roundup products;
 - (b) marketed and/or distributed Roundup products;
 - (c) caused Roundup products to be available in the Australian market;
 - (d) held itself out as having knowledge of the risks associated with Roundup products;

Particulars

The Applicant refers to and repeats the matters pleaded and particularised in paragraphs 10 to 15 above.

- (e) was liable to compensate consumers for loss and damage suffered because of injuries sustained as a result of its supply of goods:

- (i) prior to 1 January 2011, which had defects within the meaning of s 75AC of the TPA; and
 - (ii) after 31 December 2010, which had safety defects within the meaning of s 9 of the ACL;
- (f) was bound by the Quality Guarantee imposed by statute as pleaded in paragraph 24 above;
- (g) by reason of the matters pleaded in 29(a) to (f) above (separately or in combination), ought to have known of scientific evidence which was publicly available throughout the Relevant Period which suggested that:
- (i) glyphosate is a carcinogen or probable carcinogen; and
 - (ii) use of Roundup products is associated with an increased risk of developing NHL.

Particulars

- A. *The Applicant repeats the matters pleaded in paragraphs 6 to 15 and 29(a) to (f) above.*
- B. *Particulars of the publicly available scientific data concerning the risks of exposure to glyphosate and glyphosate-based herbicides referred to in (i) and (ii) above throughout the Relevant Period that should have put Monsanto Australia on inquiry as to the risk of those matters will be given in the Applicant's expert evidence.*

30. By reason of the matters pleaded in subparagraphs 29(a) to 29(g) above (alone or in combination), Monsanto Australia owed a duty to take reasonable care to users of Roundup products (including the Applicant and the Group Members who used those products) to avoid foreseeable risks of injury to them from the use of those products.

F.2. Standard of care

31. During the Relevant Period, the scope of Monsanto Australia's duty of care was informed by:

- (a) its potential statutory liability in relation to defective goods as pleaded in paragraphs 16 to 20 above; and/or
 - (b) its statutory and contractual obligations implied by law by the Quality Guarantee.
32. In the premises, Monsanto Australia's duty of care to users of Roundup products during the Relevant Period required it:
- (a) to conduct sufficient testing and research to ensure: (i) the safety of glyphosate and/or Roundup products; and/or (ii) that its warnings and safety directions in relation to those products were sufficient to protect users from risk of injury;
 - (b) further and in the alternative to (a), to keep itself informed of scientific literature concerning the safety of glyphosate and/or Roundup products in order to ensure: (i) the safety of glyphosate and/or Roundup products; and/or (ii) that its warnings and safety directions in relation to those products were sufficient to protect users from risk of injury;
 - (c) to cease the manufacture and supply of any unsafe products, or products that it has reason to believe may be unsafe;
 - (d) alternatively to (c), to provide proper warnings concerning unsafe products or products that it has reason to believe may be unsafe; and/or
 - (e) further and in the alternative, to ensure that any warning labels or safety information provided in relation to Roundup products:
 - (i) took into account what might reasonably be expected to be done with or in relation to the products, including potential misuse; and
 - (ii) were drafted accordingly to sufficiently protect the user.

F.3. Breach of duty

33. By reason of the matters pleaded in paragraphs 4(i), 6 to 15, 19, 21, 24 and 29 above, at all material times during the Relevant Period, it was reasonably foreseeable to a person in the position of Monsanto Australia that there was a risk of injury to users of Roundup products.

Particulars

The Applicant repeats the matters pleaded and particularised in paragraphs 4(i), 6 to 15, 19, 21, 24 and 29 above.

34. At all material times during the Relevant Period, the risk of developing NHL from the use of Roundup products was not insignificant.

Particulars

Particulars of the risk of developing NHL from use of Roundup products will be provided in the Applicant's expert evidence.

35. In the premises, a reasonable person in the position of Monsanto Australia would have taken the one or more of the following precautions against the risk that users could develop NHL through use of Roundup products:
- (a) withdrawn Roundup products from the market entirely;
 - (b) alternatively, warned users and potential users of Roundup products of the increased risk of developing NHL from using Roundup products;
 - (c) alternatively, warned users and potential users of Roundup products that Roundup products contained substances that were carcinogenic;
 - (d) alternatively, warned users and potential users of Roundup products that Roundup products contained substances which were probable carcinogens;
 - (e) alternatively, provided warnings and/or safety directions which were sufficient to prevent an increased risk of users of Roundup domestic products from contracting NHL;
 - (f) alternatively, provided warnings and/or safety directions which were adequate to prevent an increased risk of users of Roundup agricultural products from contracting NHL;
 - (g) alternatively, after the publication of the results of the IARC working group findings in relation to glyphosate in March 2015, warned users and potential users of Roundup products that those products contained glyphosate, which had been classified as a probable (Class 2A) carcinogen.

Particulars

- (i) *Press release: "IARC Monographs Volume 112: evaluation of five organophosphate insecticides and herbicides, 15 March 2015" (IARC 2015 Results).*
- (ii) *Particulars of the warnings and/or safety directions that Monsanto Australia ought to have provided to users and potential users of the domestic products and agricultural products will be provided on service of the Applicant's expert evidence.*

36. Throughout the Relevant Period, Monsanto Australia:
- (a) failed to take each of the precautions referred to in 35(a)-(f) above (or any of them);
 - (b) from March 2015, failed to take the precautions referred to in 35(g) above.
37. By reason of the matters pleaded in paragraphs 6 to 15, 19, 21, 24, 25, 29 and 36 above, Monsanto Australia breached its duty of care to the Applicant and the Group Members who used Roundup products.

G. CAUSATION, LOSS AND DAMAGE

G.1. Causation - Applicant

38. Between 1996 and 2000, the Applicant worked as a farm hand on various properties in Victoria and used Roundup products to control weeds during this time approximately 2 hours per week.
39. In about 2000, the Applicant started his own agricultural spray business, Spraying Technology and Agronomy Pty Ltd in Warrnambool Victoria (**Stag Spraying**).
40. Between 2000 and 2006 the Applicant:
- (a) operated the business known as Stag Spraying;
 - (b) used Roundup products in the course of his business (typically in an agricultural setting) approximately 20 hours per week;

Particulars

The Roundup products commonly used by the Applicant while conducting the business of Stag Spraying were Roundup 540 (also known as Roundup PowerMAX) and Roundup CT 450 (also known as Roundup CT Broadacre).

- (c) typically applied Roundup by:
 - (i) mixing 20 litre drums of Roundup product with water and surfactant;
 - (ii) placing a tank on the back of his utility vehicle and distributing the product via a boom spray; and
- (d) refilling the tank manually during the course of the job where necessary.

41. From 2006, the Applicant operated his own home maintenance business in South Australia, and in the course of that business provided weed control services using Roundup products.

Particulars

The Roundup products commonly used by the Applicant during this period were Roundup 540 (also known as Roundup PowerMAX) and Roundup CT 450 (also known as Roundup CT Broadacre).

42. In 2008 the Applicant was diagnosed with diffuse large B-cell lymphoma, a form of NHL.
43. The Applicant contracted NHL as a result of his use of Roundup products in the period 1996 to 2008.

Particulars

- (a) *The Applicant repeats the paragraphs 6 to 9 and 38 to 42 above.*
- (b) *The latency period for diffuse large B-cell lymphoma NHL is no more than ten years such that the point of contraction occurred in the period after 1996 and likely after 1998 (**Latency Period**).*
- (c) *The Applicant would not have contracted NHL if he had not used Roundup products during the Latency Period.*

(d) *Further particulars will be provided in expert evidence.*

44. If, from the commencement of the Relevant Period and prior to 1996 Monsanto Australia had: (a) recognised the Product Defect and taken appropriate action in relation to it; (b) not breached the Quality Guarantee and/or (c) not breached its duty of care towards the Applicant; (i) it would have withdrawn Roundup products from the market by no later than the commencement of the Latency Period, (ii) the Applicant would not have used Roundup products during the Latency Period; and (iii) in the premises, the Applicant would not have contracted NHL.

45. Further and in the alternative to the matters pleaded in paragraph 44 above, if, from the commencement of the Relevant Period and prior to 1996 Monsanto Australia had: (a) recognised the Product Defect and taken appropriate action in relation to it; (b) not breached the Quality Guarantee and/or (c) not breached its duty of care towards the Applicant, it would have, on the Roundup product labels:

- (a) warned users and potential users of Roundup products of the risk of developing NHL from using Roundup products;
- (b) warned users and potential users of Roundup products that Roundup products contained substances that were carcinogenic;
- (c) warned users and potential users of Roundup products that Roundup products contained substances which were probable carcinogens;
- (d) provided warnings and/or safety directions which were sufficient to prevent an increased risk of users of Roundup domestic products from contracting NHL; or
- (e) provided warnings which were sufficient to prevent users of Roundup agricultural products from contracting NHL as a result of their use of the products; and

the Applicant would not have used Roundup products during the Latency Period and would not have contracted NHL.

46. Further or in the alternative to paragraphs 44 and 45 above, Monsanto Australia's negligence in failing to take any or all of the steps referred to in paragraph 35 above: (a) materially contributed to the Applicant's decision to purchase and use Roundup products; and (b) thereby caused him to contract NHL.

G.2 Loss and damage - Applicant

47. Following his NHL diagnosis in 2008, the Applicant ceased business activities and began undergoing treatment, including immunotherapy, chemotherapy, radiotherapy, leukocytapheresis, and prescription medication.
48. In February 2009, the Applicant's NHL was diagnosed as being in remission.
49. In the premises of the matters pleaded and particularised in:
- (a) paragraph 43 above; and
 - (b) any of paragraphs 44 to 48 above;
- the Applicant has suffered loss and damage:
- (c) because of the Product Defect and/or the Quality Guarantee Breach; and/or
 - (d) as a result of Monsanto Australia's negligence.
50. The Applicant's loss and damage includes economic loss, being for:
- (a) out of pocket costs for medical professionals;
 - (b) out of pocket costs for medical treatment;
 - (c) out of pocket costs for prescription medication;
 - (d) additional health insurance premiums;
 - (e) costs of rental properties near hospitals and treatment centres;
 - (f) travel expenses for traveling to and from hospitals and treatment centres;
 - (g) domestic care;
 - (h) loss of income;
 - (i) loss of superannuation arising from loss of earnings; and
 - (j) future costs of (a) – (i) above.

Particulars

- (i) *Particulars to paragraph 50 are in Schedule A.*
- (ii) *Further particulars to paragraph 50 will be provided in the Applicant's lay and expert evidence.*

51. The Applicant's loss and damage includes non-economic loss within the meaning of s 87D of the TPA and s 87D of the CCA, including for:

- (a) Pain and suffering;
- (b) Post-Traumatic Stress Disorder;
- (c) Depressed moods;
- (d) Anxiety; and
- (e) Fatigue.

Particulars

Particulars to paragraph 51 will be provided in the Applicant's lay and expert evidence.

G.3. Causation – Group Members

52. As to the Group Members who used Roundup products, each Group Member's NHL was caused by that Group Member's use of and exposure to Roundup products.

Particulars

Further particulars will be obtained following opt out, the determination of the Applicant's claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.

53. If Monsanto Australia had, during the Relevant Period: (a) recognised the Product Defect and taken appropriate action in relation to it; (b) not breached the Quality Guarantee and/or (c) not breached its duty of care towards Group Members who used Roundup

products; (i) it would have withdrawn Roundup products from the market, (ii) Group Members who used Roundup products would not have used Roundup products during their NHL Latency Periods; and (iii) in the premises, would not have contracted NHL.

54. Further and in the alternative to the matters pleaded in paragraph 53 above, if, during the Relevant Period Monsanto Australia had: (a) recognised the Product Defect and taken appropriate action in relation to it; (b) not breached the Quality Guarantee and/or (c) not breached its duty of care towards Group Members who used Roundup products, it would have, on the Roundup product labels, safety data sheets and/or online at www.roundup.com.au:

- (a) warned users and potential users of Roundup products of the increased risk of developing NHL from using Roundup products;
- (b) warned users and potential users of Roundup products that Roundup products contained substances that were carcinogenic;
- (c) warned users and potential users of Roundup products that Roundup products contained substances which were probable carcinogens;
- (d) provided warnings and/or safety directions which were sufficient to prevent an increased risk of users of Roundup domestic products from contracting NHL;
- (e) provided warnings which were sufficient to prevent an increased risk of users of Roundup agricultural products from contracting NHL; or
- (f) alternatively, after the publication of the IARC March 2015 Results, warned users and potential users of Roundup products that those products contained glyphosate, which had been classified as a probable (Class 2A) carcinogen;

and, as a result, Group Members that purchased or used Roundup products would not have purchased and/or used Roundup products during their NHL Latency Periods and would not have contracted NHL.

55. Further or in the alternative to paragraphs 53 and 54, Monsanto Australia's negligence in failing to take any or all of the steps referred to in paragraph 54 above materially contributed to: (a) Group Members' decisions to purchase and use Roundup products; and (b) thereby caused Group Members to contract NHL.

Particulars

The Applicant repeats the particulars to paragraph 52 above.

G.4. Loss and Damage

56. As a result of the Product Defect, the Quality Guarantee Breach, and/or Monsanto Australia’s negligence (alone or in combination), each of the Group Members suffered loss and damage.

Particulars

(a) To the extent it is within the Applicant’s knowledge, the loss and damage suffered by the Group Members who used Roundup products will be calculated by reference to:

- (i) personal injury within the meaning of section 4KA of the TPA and/or section 13 of the ACL;*
- (ii) the cost of past and future medical evaluations and treatments and associated out of pocket expenses;*
- (iii) loss of income;*
- (iv) the cost of past and future care;*
- (v) past and future economic loss; and*
- (vi) non-economic loss within the meaning of s 87D of the TPA and s 87D of the CCA.*

(b) Further particulars of the loss and damage suffered by the Group Members, including those Group Members who suffered loss and damage by reason of the injuries suffered by another, will be provided following the determination of the Applicant’s claim and identified common issues at an initial trial and if and when necessary for a determination.

.....

Signed by Matthew Berenger
Solicitor for the Applicant

This pleading was prepared by Brendan May, and settled by Guy Donnellan, Counsel for the Applicant.

Schedule A – Particulars of the Applicant's loss and damage

INJURIES

1. Non-Hodgkin's Lymphoma;
2. Post-Traumatic Stress Disorder; and
3. Possible development of Secondary Leukaemia.

DISABILITIES

1. Difficulty performing previous domestic and personal care tasks;
2. Difficulty performing previous duties of employment;
3. Lethargy and limited ability to concentrate;
4. Kidney and liver damage due to chemotherapy and radiotherapy treatments;
5. Requirement to maintain a specific diet and limit alcohol consumption due to kidney and liver damage;
6. Depressed and anxious moods;
7. Increased tendency to become emotional;
8. Difficulty maintaining relationships, resulting in the breakdown of previous marriage;
9. Reduced ability to cope with stress and high pressure situations; and
10. Difficulty sleeping.

PARTICULARS OF ECONOMIC LOSS

1. Between 1996 and 2000, the Applicant worked as a farm hand on various properties in Victoria. He then started his own agricultural spraying business, Spraying Technology and Agronomy Pty Ltd (Stag Spraying) in 2000 and maintained that business until 2006.

The Applicant's duties in that business predominantly involved the spraying of herbicides, namely Roundup, at various farming properties in Warrnambool, Victoria.

2. In early 2006, the Applicant then started a painting and maintenance business, now known as Robe Maintenance Plus, in which capacity he was working at the time of his diagnosis in June 2008. At the time of the Applicant's diagnosis he had two employees working in his business and had a large clientele base. The Applicant's duties in that business required him to engage in various maintenance jobs, including gardening, carpentry tasks, and painting.
3. Prior to his diagnosis of Non-Hodgkin's Lymphoma and the subsequent development of post-traumatic stress disorder, the Applicant was successful in his businesses due to his determination and robust nature. At the time of his diagnosis, the Applicant had the intention to develop his painting and maintenance business by growing his clientele base and workload, in order to increase the business profits.
4. The Applicant continued to work in his business until around December 2008, until his condition worsened and he was required to undergo high dose chemotherapy. Due to the Applicant's physical condition he was unable to maintain the business as he did not have the physical or emotional capacity to engage in its activities and as a consequence sold the equipment and ceased trading.
5. In February 2009, the Applicant returned to work in his business, Robe Maintenance Plus in South Australia. The Applicant returned to work on a part time basis, working light duties due to his reduced capacity. The Applicant, over a period, increased his work and returned to full-time hours in around 2012. It is alleged that despite his return to full-time hours, the Applicant has continued to work at a reduced capacity due to persisting fatigue and psychological issues.
6. The Applicant currently manages a small clientele base and has no employees. Due to the Applicant's ongoing fatigue and psychological difficulties, it is alleged that he no longer has the physical or emotional capacity to manage demanding workloads or engage in tasks that require prolonged physical activity, and as a result has been unable to grow his business as previously intended.
7. Due to the development of Non-Hodgkin's Lymphoma, the Applicant has been unable to grow his business and as a result of his ongoing symptoms, he now has a significantly reduced earning capacity, which will continue to until retirement age or beyond.
8. The Applicant makes a claim for past and future economic loss. The details of these claims will be provided upon receipt of evidence.

PARTICULARS OF OUT OF POCKET EXPENSES

1. The Applicant has incurred medical expenses which include hospital expenses, doctor consultations, specialist reviews, medication, radiotherapy and chemotherapy. The details of the expenses claimed will be provided upon receipt of evidence.
2. The Applicant will require medical treatment into the future and makes a claim for those expenses. The details of future expenses will be provided upon receipt of expert evidence.

PARTICULARS OF CLAIM FOR DOMESTIC ASSISTANCE OR ATTENDANT CARE**Past Domestic Assistance**

1. As a result of the development of the Applicant's Non-Hodgkin's Lymphoma and the associated ongoing disabilities, the Applicant has required assistance with personal care and domestic tasks which has been provided by his family and spouse on a gratuitous basis.
2. At the time of his diagnosis in June 2008 the Applicant required assistance with personal and domestic care which was provided to him by his family and friends. The Applicant also received substantial care provided to him by his family during his chemotherapy treatment, particularly the high dose chemotherapy undergone in January 2009.
3. The Applicant alleges that due to his ongoing disabilities such as fatigue and psychological difficulties, he has continued to struggle when performing domestic tasks. Due to his difficulties, the Applicant has also received ongoing care from his wife since 2014 when they began residing together. Since that time, the Applicant's wife has been required to assist him with tasks such as but not limited to, cooking, vacuuming, mopping, shopping and laundry duties.
4. The Applicant, as a result of his condition, will continue to require assistance into the future with household tasks.

CERTIFICATE OF LAWYER

I, Matthew Berenger, certify to the Court that, in relation to the 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:

.....

Signed by Matthew Berenger

Solicitor for the Applicant

Glossary

Defined Term	Definition
Agricultural Product Safety Directions	<p><i>“SAFETY DIRECTIONS</i></p> <p><i>Will irritate the eyes. May irritate the nose and throat. Repeated exposure may cause allergic disorders. Avoid contact with eyes and skin. When opening the container, preparing spray and using the prepared spray, wear cotton overalls buttoned to the neck and wrist (or equivalent clothing) elbow-length PVC gloves and face shield or goggles. If product in eyes, wash it out immediately with water. Wash hands after use. After each day’s use, wash gloves, face shield or goggles and contaminated clothing. When using controlled droplet applicators wear protective waterproof clothing and impervious footwear.”</i></p>
Agricultural Product Safety Statement	<p><i>“No adverse health effects expected if the product is handled in accordance with this Safety Data Sheet and product label.”</i></p>
Domestic Product Safety Directions	<p><i>“Safety Directions: Avoid contact with the eyes. Wash hands after use.”</i></p>
Domestic Product Safety Statement	<p><i>“Carcinogenicity</i></p> <p><i>Not considered to be a carcinogenic hazard.”</i></p>
Product Defect	See paragraph 19.
Quality Guarantee	See paragraph 24
Quality Guarantee Breach	See paragraph 26
Relevant period	24 March 1987 to (date of filing).