

CLAYTON UTZ

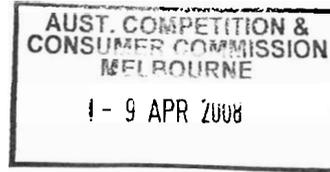
Sydney Melbourne Brisbane Perth Canberra Darwin

Clayton Utz
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9 April 2008

By Hand

Adjudications Branch
Australian Competition and Consumer Commission
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Melbourne Central
Melbourne VIC 3000



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Our reference: 12206/12910/80070742

Dear Sir/Madam

Lodgement of Notification of Exclusive Dealing Monsanto Australia Limited and Others

Please find enclosed the following:

- a Notification of Exclusive Dealing; and
- a cheque for \$2200.00 made payable to the ACCC.

Please contact the writer with any queries.

Yours faithfully

A handwritten signature in black ink, appearing to read 'JD', enclosed in a circular scribble.

Joanne Daniels, Partner
+61 3 9286 6967
jdaniels@claytonutz.com

FILE No:
DOC:
MARS/PRISM:

Enclosure

Form G

Commonwealth of Australia
Trade Practices Act 1974 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission (**Commission**):

Notice is hereby given, in accordance with subsection 93 (1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of person(s) giving notice:

- N93367 Monsanto Australia Limited (ACN 006 725 560) (**Monsanto**)
- N93368 Landmark Operations Limited (CAN 008 743 217) (**Landmark**)
- N93369 Agritech Rural Pty Ltd (ACN 107 217 934) (**Agritech**)
- N93370 Caldwell and Pither Pty Ltd (ACN 005 375 879) (**Caldwell**)
- N93371 Delta Agribusiness Pty Ltd (ABN 93 118 781 445) (**Delta**)
- N93372 Driscoll Seeds Pty Ltd (ABN 33 853 025 041) (**Driscoll**)
- N93373 Harberger's Farm Supplies Pty Ltd (ABN 83 007 131 777) (**Harberger's**)
- N93374 Lachlan Fertilizers Rural Pty Ltd (ABN 62 000 488 004) (**Lachlan**)
- N93375 Riverina Co-operative Society Ltd (ABN 22 748 372 499) (**Riverina**)
- N93376 Western Ag Supplies Pty Ltd (ABN 27 113 662 758) (**Western Ag**)
- N93377 Lockhart Rural Service Pty Ltd (ABN 17 073 075 180) (**Lockhart**)
- N93378 North West Ag Services Pty Ltd (ACN 050 270 543) (**North West Ag**)
- N93379 Gorst Rural Supplies Pty Ltd (ABN 62 006 542 829) (**Gorst**)
- N93380 Elders Limited (ACN 004 045 121) (**Elders**)
- N93381 Riverland Oilseeds Pty Ltd (ABN 79 006 772 578) (**Riverland**)
- N93382 Pacific Seeds Pty Ltd (ABN 87 010 933 061) (**Pacific Seeds**)
- N93383 Nufarm Australia Limited (ACN 004 377 780), Nuseed Pty Ltd (ACN 088
N93384 231 814), Nugrain Pty Ltd (ACN 085 901 604), Nutrihealth Pty Ltd (ACN N93386
N93387 091 021 813), Nutrihealth Grain Pty Ltd (ACN 089 476 504), Crop Care
Australasia Pty Ltd (ACN 061 362 347) (collectively **Nufarm**) N93388

(b) Short description of business carried on by that person(s):

- (i) Monsanto develops new technologies for the farming industry, including biotechnology traits for insect protection and herbicide tolerance. Monsanto has developed patented technology which can be used in the production of genetically modified Canola seeds (**ROUNDUP READY® Canola**) to produce canola plants that exhibit tolerance to the herbicide active ingredient glyphosate, the active ingredient in Roundup brand agricultural herbicides.
- (ii) Landmark, Agritech, Caldwell, Delta, Driscoll, Harberger's, Lachlan, Riverina, Western Ag, Lockhart, North West Ag, Gorst and Elders are distributors of seeds to growers of crops.
- (iii) Riverland is a grain handler.
- (iv) Pacific Seeds and Nufarm are commercial seed producers.

(c) Address in Australia for service of documents on that person(s):

Ms Jo Daniels
Partner, Clayton Utz
Level 18
333 Collins Street
MELBOURNE VIC 3000

2. Notified arrangement

(a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

The notification relates to the supply of licences to develop and/or use Monsanto's patented technology in the production and sale of ROUNDUP READY Canola seeds and the supply of the ROUNDUP READY Canola crop by canola growers to authorised grain handlers.

(b) Description of the conduct or proposed conduct:

The relevant contractual arrangements in respect of the distribution of ROUNDUP READY Canola will involve:

- (i) Monsanto requiring the distributors of ROUNDUP READY Canola (known as Technology Service Providers (**TSPs**)) to supply the ROUNDUP READY Canola seeds to growers on the condition that the grower enter into a Licence and Stewardship Agreement (**LSA**) and a Technology User Agreement (**TUA**) with Monsanto;

[®] Roundup Ready is a registered trade mark of Monsanto Technologies LLC.

- (ii) The TSPs supplying ROUNDUP READY Canola seeds to growers on the condition that the grower enter into a LSA and a TUA with Monsanto;
- (iii) Monsanto licensing growers to use its patented technology on the condition that the grower acquire seeds containing Monsanto's patented technology only from authorised TSPs;
- (iv) Monsanto licensing growers to use its patented technology on the condition that the grower deliver the grain produced using ROUNDUP READY Canola only to licensed seed companies for use as seed or authorized grain handlers, for crushing;
- (v) Monsanto licensing its commercial seed producers (the companies who will use the patented technology to actually produce ROUNDUP READY Canola seeds for on-sale to growers) (**Commercial Seed Producers**) on the condition that the commercial growers engaged to produce the seeds enter into a LSA and a TUA with Monsanto; and
- (vi) The Commercial Seed Producers licensing only those commercial growers who have entered into an LSA and a TUA with Monsanto to produce the seeds containing Monsanto's patented technology.

Further details are set out in the attached submission.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct:

(a) Class or classes of persons to which the conduct relates:

Existing and prospective persons wanting to:

- (i) distribute ROUNDUP READY Canola seed as a TSP;
- (ii) grow or purchase ROUNDUP READY Canola seeds;
- (iii) purchase or take delivery of ROUNDUP READY Canola crops; and
- (iv) be appointed as a Commercial Seed Producer.

(b) Number of those persons:

(i) At present time:

Nil.

(ii) **Estimated within the next year:**

It is anticipated that there will be in excess of 30 individual branches which are authorised TSPs, 120 growers of canola using canola seeds containing Monsanto's patented technology, 3 authorised grain handlers and 3 Commercial Seed Producers appointed within the next year.

(c) **Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:**

Not applicable.

4. Public benefit claims:

(a) **Arguments in support of notification:**

Please refer to attached submission.

(b) **Facts and evidence relied upon in support of these claims:**

Please refer to attached submission.

5. Market definition

Please refer to attached submission.

6. Public detriments

(a) **Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:**

Please refer to attached submission.

(b) **Facts and evidence relevant to these detriments:**

Please refer to attached submission.

7. Further information

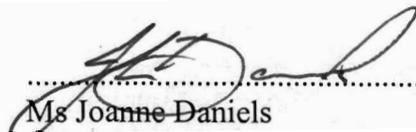
(a) **Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:**

Ms Jo Daniels
Partner, Clayton Utz
Level 18
333 Collins Street
MELBOURNE VIC 3000

Dated: 9 April 2008

Filed for and on behalf of
and with the consent of
the parties listed in item 1(a) by:




.....
Ms Joanne Daniels
Partner, Clayton Utz
Solicitors for Monsanto

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.

SUBMISSION TO AUSTRALIAN COMPETITION AND CONSUMER COMMISSION IN SUPPORT OF NOTIFICATION UNDER SECTION 93(1) OF THE *TRADE PRACTICES ACT 1974* (CTH)

1. INTRODUCTION

This submission is in support of a notice lodged under section 93(1) of the *Trade Practices Act 1974* (Cth) in relation to conduct potentially falling within sections 47(6) or (7) of the *Trade Practices Act*. Accordingly, the relevant test to be applied by the Commission is set out in section 93(3A) of the *Trade Practices Act*, whereby the Commission assesses whether the public benefits associated with the relevant conduct outweigh any likely public detriment.

Monsanto Australia Limited (**Monsanto**) is the licensee of various patents in relation to the ROUNDUP READY Canola technology. ROUNDUP READY Canola is tolerant to glyphosate which is the active constituent of a range of herbicides. Any herbicides used on ROUNDUP READY Canola must be registered with the Australian Pesticide and Veterinary Medicines Authority (**APVMA**). Canola is grown commercially primarily for its seeds which are used for oil and animal feed.

Monsanto has developed the patented technology but does not intend to grow or sell the seeds containing the technology. In order to distribute the technology, Monsanto intends to licence three companies (being the Commercial Seed Producers identified in item 1(b)(iv) or their affiliates) (**Commercial Seed Producers**) to develop and sell ROUNDUP READY Canola seed in Australia (**Seeds**). These companies intend to engage commercial growers to actually grow the canola plants and produce the Seeds. The Seeds are subsequently sold to distributors known as Technology Service Providers (**TSPs**) for on-sale to growers. The TSPs will include the distributors identified in item 1(b)(ii) (or their affiliates) who distribute a range of farming products including seeds to farmers. To ensure compliance with the relevant regulatory regime and appropriate product stewardship it is necessary that growers are licensed by Monsanto to use the technology and provide their product to authorised grain handlers (who will include the persons identified in item 1(b)(iii) or their affiliates).

Therefore, the relevant contractual arrangements in respect of the distribution of ROUNDUP READY Canola will involve:

- (a) Monsanto requiring the TSPs to supply the ROUNDUP READY Canola seeds to growers on the condition that the grower enter into a Licence and Stewardship Agreement (**LSA**) and a Technology User Agreement (**TUA**) with Monsanto;
- (b) The TSPs supplying ROUNDUP READY Canola seeds to growers on the condition that the grower enter into a LSA and a TUA with Monsanto;
- (c) Monsanto licensing growers to use its patented technology on the condition that the grower acquire seeds containing this patented technology from authorised TSPs;

- (d) Monsanto licensing growers to use its patented technology on the condition that the grower deliver the grain produced using ROUNDUP READY Canola only to licensed seed companies for use as seed or authorized grain handlers, for crushing;
- (e) Monsanto licensing its Commercial Seed Producers on the condition that the commercial growers engaged to produce the seeds enter into a LSA and a TUA with Monsanto and that they acquire distribution services only from authorised TSPs; and
- (f) The Commercial Seed Producers licensing the commercial growers to produce the seeds containing Monsanto's patented technology on the condition that they enter into a LSA and a TUA with Monsanto;

(collectively referred to as the **Proposed Conduct**). The Proposed Conduct is described in more detail below.

Monsanto submits that the proposed conduct has significant public benefits and no public detriment and accordingly, the Commission should not issue a notice under section 93(3A) in respect of the notified conduct.

2. DESCRIPTION OF THE SEED TECHNOLOGY

Monsanto's patented technology known as ROUNDUP READY Canola involves the modification of canola to introduce tolerance to the compound glyphosate, the active ingredient in a number of herbicides.

Herbicide tolerance is conferred to ROUNDUP READY Canola by two mechanisms. The first is through introduction of the *CP4 EPSPS* gene from the soil bacterium *Agrobacterium* sp, which produces a version of an essential plant enzyme that is less sensitive to glyphosate. The second is through the introduction of the *goxv247* gene from the soil bacteria *Ochrobactrum anthropi* that produces glyphosate oxidoreductase, which breaks down glyphosate into non-herbicidal compounds.

Short regulatory sequences that control expression of the genes are also present in ROUNDUP READY Canola. These sequences are derived from the figwort mosaic virus, *Arabidopsis thaliana*, and *Pisum sativum*.

3. REGULATORY REGIME APPLYING TO GENETICALLY MODIFIED CANOLA

There is a significant regulatory regime which applies to dealings with, and the use of, the Seeds and the use of herbicide on ROUNDUP READY Canola including under the Agricultural and Veterinary Chemicals Code Act 1994 (Cth) (**Agvet Code**) and the Gene Technology Act 2000 (Cth) (**GT Act**). The regulatory bodies that administer this legislation are the APVMA and the Office of Gene Technology Regulator (**OGTR**) respectively.

As ROUNDUP READY Canola is a "genetically modified organism" as defined under the GT Act, experiments, production, manufacture and other dealings with ROUNDUP READY Canola, is heavily regulated under the GT Act. For example, under the GT Act Monsanto is required to hold a licence to engage in dealings with ROUNDUP

READY Canola. This licence is issued by the OGTR and Monsanto is required to comply with any licence conditions imposed by OGTR.

Monsanto is the holder of the licence and all persons dealing with ROUNDUP READY Canola must not deal with it except as expressly permitted by the licence. Under the licence, Monsanto is required to inform a person covered by the licence of any applicable licence conditions. Such licence conditions include requirements that Monsanto audit, monitor and keep records relating to dealings with ROUNDUP READY Canola and provide written reports to the OGTR including in relation to:

- (a) adverse impacts, unintended effects or new information relating to the risks caused by ROUNDUP READY Canola;
- (b) information about the volumes of ROUNDUP READY Canola grown for commercial purposes for each State or Territory each growing season; and
- (c) other information including annual surveys.

The OGTR may also require Monsanto to take any steps it deems necessary to protect the health and safety of people and the environment.

In order to ensure that Monsanto complies with the above and other regulatory requirements (including the APVMA), Monsanto proposes to require ROUNDUP READY Canola growers to enter into a TUA and a LSA with Monsanto to ensure that it can meet its licence conditions and stewardship requirements in relation to ROUNDUP READY Canola. These agreements include a limited licence to Monsanto's intellectual property rights (including patents) in the ROUNDUP READY Canola technology and obligations on the grower to enable Monsanto to meet its regulatory and stewardship obligations.

4. CANOLA IN AUSTRALIA

Canola is Australia's third largest field crop. The area of canola harvested in Australia has increased from around 400,000 hectares in the mid 1990s to 1.9 million hectares in 1999/2000. Canola has emerged as a significant crop in terms of the gross value of both oilseeds and total crop production. Approximately 1.35 million hectares of canola was sown in Australia in 2001/02, producing 1.8 million tonnes of canola¹.

A number of different insect pests, diseases and weeds can damage canola crops. The Australian and New Zealand Food Authority approved the use of ROUNDUP READY canola for use in food in 2000 and the use of hybrid glufosinate tolerant canola for use in food in 2001².

Conventional breeding programs have been used to develop canola varieties tolerant to triazine and imidazolinone herbicides. These canola varieties that have not been genetically modified currently comprise approximately 75% of the Australian canola market.

Bayer CropScience Pty Ltd (**Bayer**) has been granted approval by the OGTR to commercialise "In Vigor". This is genetically modified canola which contains a hybrid

¹ <http://www.awb.com.au/aboutawb/communityeducation/industryoverview/#Oilseeds>

² <http://www.ogtr.gov.au/rtf/ir/brassica.rtf>

breeding system and is resistant to a different herbicide - glufosinate ammonium. This product is not currently commercially available.

There is currently no genetically modified canola available in Australia for the following reasons:

- (a) Under the GT Act there is provision to create zones free of GM crops.
- (b) Under the GT Act, the Ministerial Council (comprising of the Federal, State and Territory ministers) issued a policy principle, "Recognising areas, if any, designated under state law for the purpose of preserving the identity of one or both of GM or non-GM crops for marketing purposes".
- (c) In 2003, the Ministerial Council agreed to issue a policy principle to recognise the rights of state and territory governments to designate zones for GM or non-GM crops for marketing purposes.
- (d) As a result, all canola growing states and territories in Australia (New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory) imposed bans on the commercial production of the two genetically modified canola products for marketing purposes.
- (e) The ban in Victoria was lifted effective 1 March 2008 and the ban in New South Wales was lifted effective 14 March 2008.

Therefore, the Proposed Conduct will facilitate the entry of a new, innovative product into the Australian market for canola.

5. DETAILED DESCRIPTION OF THE CONDUCT

As outlined above, Monsanto proposes to licence the Commercial Seed Producers to actually develop and sell the Seeds. The Seeds that are sold to growers will be grown by Commercial Growers. The Seeds will be sold to through TSPs, who will in turn sell the Seeds to growers. Monsanto intends to enter into agency agreements with the TSPs for the purposes of licensing growers to grow the Seeds.

In order to comply with the current monitoring and other obligations set down by the OGTR and the APVMA in relation to ROUNDUP READY Canola Monsanto proposes to adopt the following structure in relation to the licensing of growers who wish to plant the Seeds:

- (a) The TSPs will act as Monsanto's agents in relation to executing TUAs with growers for the planting of the Seeds;
- (b) A canola grower that wishes to purchase the Seed must enter into a TUA and LSA. The grower enters into the LSA with Monsanto and a TUA with a TSP (in its capacity as agent for Monsanto). These agreements permit the grower to plant ROUNDUP READY Canola in consideration for the payment of certain fees to Monsanto and obligations to comply with certain stewardship and intellectual property obligations.

- (c) The TUA and LSA impose a variety of obligations on the Canola grower, in order to ensure that Monsanto can, in turn, comply with the obligations imposed upon it by the regulatory authorities and to protect the investment made by Monsanto in its intellectual property in developing the Seeds by ensuring that growers do not keep seeds from crops for replanting and thereby avoiding the need to purchase any further seeds. These obligations include the following:
- (i) adhere to the Crop Management Plan including the Resistance Management Plan;
 - (ii) keep records and allow audits;
 - (iii) plant ROUNDUP READY Canola only where permitted (to meet the various restrictions in different States and Territories);
 - (iv) use only herbicides authorised for use on ROUNDUP READY Canola by the APVMA;
 - (v) disclose any adverse effects;
 - (vi) deliver the grain only to a grain handler authorised by Monsanto;
 - (vii) not resell the ROUNDUP READY Canola; and
 - (viii) identify where the ROUNDUP READY Canola will be grown.

Upon entering the LSA and undergoing training, the grower will become authorised to purchase Seed. When purchasing Seed from a TSP, the grower will be required to sign a TUA with Monsanto (via the TSP as Monsanto's agent.) The grower can choose to purchase the Seed from any TSP with whom the grower wishes to deal. This process will enable Monsanto to calculate the amount of Seed grown on a particular farm, for the purposes of compliance with the regulatory requirements.

After harvesting, the canola crop will, as with conventional canola, be delivered to a grain handler. The technology fee payable to Monsanto for the licence to its intellectual property rights under the LSA is payable on the volume of ROUNDUP READY Canola that is delivered to the grain handler. The grower will be able to choose any grain handler authorised by Monsanto to accept ROUNDUP READY Canola and that grain handler will have the authority collect that royalty on behalf of Monsanto. It is expected that after the initial growing season for ROUNDUP READY Canola (when a lack of time before crops must be planted mean that only a limited number of licences can be granted to grain handlers) virtually all Australian grain handlers will be offered a licence by Monsanto to accept ROUNDUP READY Canola.

6. NO PUBLIC DETRIMENT

The proposed conduct will not result in public detriment. The Proposed Conduct is part of the arrangement to introduce a new, innovative product to market and is required to ensure compliance with the regulatory regime which applies to genetically modified canola in Australia.

The Proposed Conduct does not restrict canola growers from being able to purchase and plant the Seeds. As discussed above, once the grower has entered into the TUA, the grower may then purchase the Seeds from his/her choice of TSPs.

Both presently and in the future, TSPs are, and will be, unconstrained by Monsanto in relation to the pricing of the Seed. Monsanto only determines the price paid for the biotechnology trait, not the Seed itself. However, the pricing of the Seed will be constrained by the price of conventional canola seeds which competes with the genetically modified canola Seed. This competitive dynamic will continue to operate in the future, and accordingly, the Proposed Conduct will have no detrimental effect on price or price competition in relation to the supply of the Seeds.

It is Monsanto's intention to offer a licence to virtually all grain handlers in Australia and so from the second growing season onward there is unlikely to be any restriction on the ability to use any grain handler in Australia. The only possible restriction is if a grain handler refuses the licence or is determined to be unable or unwilling to adhere to the terms of the licence. Although this is technically possible Monsanto expects that most will accept the licence and growers will have a wide range of grain handlers which they can use.

7. PUBLIC BENEFIT

The Proposed Conducts seeks to ensure that the use of, and dealings with ROUNDUP READY Canola are closely monitored, audited and controlled by Monsanto, as required by the APVMA and the OGTR.

The Proposed Conduct also seeks to ensure that Monsanto can accurately audit and control its compliance with regulatory requirements including ensuring that ROUNDUP READY Canola is only grown where permitted.

ROUNDUP READY Canola has been developed by Monsanto to provide growers with more efficient, low tillage methods of farming canola. The regulatory requirements have been put in place to prevent any unintended consequences or unsafe use of ROUNDUP READY Canola, thereby ensuring the ongoing benefits that it offers to growers.

A failure to comply with the regulatory requirements may render Monsanto's licence to grant licences in relation to ROUNDUP READY Canola subject to cancellation. This in turn will remove a new, innovative product from the market and may slow the development of further cost effective and efficient canola farming methods in Australia.