



**TRADE PRACTICES ACT 1974**  
**UNDERTAKING**  
**TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**  
**GIVEN UNDER SECTION 87B**

**BY MONSANTO COMPANY**

**9 May 2002**

**Definitions**

"Anti-Dumping Act" means the *Customs Tariff (Anti-Dumping) Act 1975* (Cth).

"Commission" means the Australian Competition and Consumer Commission.

"Customs" means the Australian Customs Service.

"Customs Act" means the *Customs Act 1901* (Cth).

"Formulated glyphosate" means the formulated forms of the herbicides which use the organic acid N-phosphonomethyl glycine as the primary active ingredient.

"Glyphosate" means the systemic, post-emergent, non-selective herbicide for the control of annual and perennial weeds using the organic acid N-phosphonomethyl glycine as the primary active ingredient. Glyphosate comes in the following forms:

- \* Glyphosate acid;
- \* Glyphosate cake or salt; and
- \* Formulated glyphosate.

"Glyphosate acid" means the acid forms of the organic acid N-phosphonomethyl glycine from which formulated glyphosate is made.

"Judicial Review Act" means the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

"Monsanto Co." means Monsanto Company, a corporation organised and existing under the laws of the state of Delaware of the United States of America, having its principal office at 800 North Lindbergh Boulevard, St. Louis, Missouri 63141.

"Monsanto" means Monsanto Australia Limited (ACN 006 725 560).

"Nufarm" means Nufarm Australia Limited (ABN 004 377 780) and any of its related bodies corporate.

"on the condition" includes:

- \* any direct or indirect condition;
- \* any condition whether or not it has legal or equitable force; and

- \* any condition the existence or nature of which is ascertainable by inference only.

"PRC" means the People's Republic of China.

"Roundup" means Monsanto Co.'s range of glyphosate products which use the brand name Roundup.

"Roundup Ready crop seeds" means Monsanto Co.'s range of seed products which have been modified using genetic engineering techniques to increase their tolerance to glyphosate, including Roundup Ready herbicide.

"suitably qualified" means having knowledge of, and experience in, the Anti-Dumping Act, Customs Act, and the processes and methodologies by which Customs administers applications under Part XVB, Division 2 of the Customs Act.

"supply" includes:

- \* supplying, or offering to supply, goods or services by way of sale, exchange, lease, hire or hire-purchase;
- \* supplying, or offering to supply, goods or services at a particular price;
- \* giving or allowing, or offering to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services.

"Trade Practices Act" means the *Trade Practices Act 1974* (Cth).

## **Background**

Monsanto is the wholly owned Australian subsidiary of Monsanto Co.

In February 2002, Nufarm and Monsanto approached the Commission seeking clearance for an arrangement between Nufarm and Monsanto Co. under which Monsanto would appoint Nufarm as the exclusive distributor of Roundup for agricultural uses ("the Proposed Roundup Arrangement").

Roundup is Monsanto Co.'s proprietary brand of glyphosate herbicide. Roundup and other glyphosate herbicide is formulated from glyphosate acid. Monsanto is the sole manufacturer of glyphosate acid in Australia. However, glyphosate is also imported into Australia from a number of countries including the PRC.

In June 2000, following an application by Monsanto, Customs initiated an investigation into alleged dumping of glyphosate from the PRC. Customs completed its investigation and recommended that no anti-dumping action be taken against glyphosate imported from the PRC. Nufarm was an "interested party" in respect of the application and provided information to Customs during its investigation.

On 27 February 2002 the Minister responsible for Customs accepted Customs' recommendations and declared, pursuant to section 269TL of the Customs Act, that section 8 of the Anti-Dumping Act does not apply to glyphosate exported to Australia from the PRC ("the Minister's decision").

An interested party may request an administrative review of the Minister's decision under Part XVB of the Customs Act. The Minister's decision may also be reviewed under the Judicial Review Act.

On 22 March 2002 Monsanto advised the Commission that it was undecided regarding whether to pursue a review of the Minister's decision. Monsanto also stated that any review could take between 12 to 18 months to conclude.

The Commission's market inquiries revealed that the anti-dumping application had already had a negative effect on import competition and that any review of the Minister's decision would be likely to cause further disruption to competition, especially given the length of the review process. The Commission was concerned that any review would undermine the competitive constraint arising from actual and potential import competition.

Following market inquiries, the Commission was also concerned about the potential for exclusive dealing conduct by Monsanto, Monsanto Co, and/or Nufarm to prevent or hinder import competition for glyphosate.

Monsanto Co. has now offered, without admission of liability, the undertakings set out in this document. The Commission has decided that, taking into account, and subject to the implementation of, the undertakings set out herein, it will not intervene in the Proposed Roundup Arrangement pursuant to the Trade Practices Act.

#### **Commencement of Undertakings**

- 1.1 These undertakings come into effect when:
- (a) the undertakings are executed by Monsanto Co.; and
  - (b) the undertakings as executed are accepted by the Commission.

#### **Undertakings**

- 1.2 Monsanto Co. will not make an application for a review of the Minister's decision.

- 1.3 For 3 years from the date of commencement of these undertakings,

Monsanto Co. will not make an application, nor procure any other person to make an application, under Part XVB, Division 2 of the Customs Act in relation to the importation of any glyphosate into Australia by any person, unless:

- (a) Monsanto Co. has first obtained a written opinion from a reputable and suitably qualified independent adviser in the field approved by the Commission (which approval may be withdrawn, but must not be unreasonably withheld at any time) ("the independent adviser"), after the independent adviser has made such inquiries as the independent adviser considers appropriate, as to the prospects of success of that application;
- (b) the independent adviser has provided to the Commission a certificate, together with a copy of the written opinion, to the effect that, in the view of the independent adviser, the application to be made:

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- (i) is to be made bona fide and not frivolously or vexatiously; and
    - (ii) upon the information then available to the independent expert, and upon due inquiry, Monsanto Co. has good prospects of making out the grounds upon which the Minister may properly decide to publish a notice for anti-dumping relief, or accept an undertaking in lieu thereof;
  - (c) Monsanto Co. shall provide to the independent adviser all necessary information reasonably requested by the independent adviser for the purposes of determining the matters in clauses 1.3(a) and (b) above; and
  - (d) the independent adviser has consulted with the Commission as to the independent adviser's view of the application, and has taken into account any views put forward by the Commission.
- 1.4 Monsanto Co. will pay the reasonable fees of the independent adviser incurred in complying with clause 1.3.
- 1.5 Monsanto Co. shall not supply any Roundup Ready crop seeds or allocate licences to use Roundup Ready crop seeds to any party on the condition that:
- (a) the party acquire or use Roundup or other glyphosate supplied by Nufarm or Monsanto or Monsanto Co.;
  - (b) the party not acquire, or continue to acquire, any competing glyphosate.
- 1.6 Monsanto Co. shall not refuse to supply any Roundup Ready crop seeds or allocate licences to use Roundup Ready crop seeds to any party on the basis that:
- (a) the party did not acquire Monsanto's Roundup products or any other glyphosate supplied by Nufarm or Monsanto or Monsanto Co.; or
  - (b) the party has acquired, or continues to acquire, any competing glyphosate.
2. **Obligations to procure and notify**
- 2.1 When the performance by Monsanto Co. of an obligation under these undertakings requires a related company of Monsanto Co. to take some action or refrain from taking some action, Monsanto Co. will procure that related company to take that action or to refrain from taking that action.
- 2.2 Monsanto Co. must promptly provide to the Commission (in confidence) all information reasonably requested by the Commission which is relevant to the performance of these undertakings.
3. **Copy of contract**
- 3.1 Monsanto Co. shall, within 14 days of the commencement of this Undertaking, provide to the Commission a copy of any executed contract, memorandum of understanding, instrument or any other document ("the contract") which forms the basis of the Proposed Roundup Arrangement.

3.2 Monsanto Co. shall, within 14 days of any amendments, additions, deletions or any change whatsoever to the contract, provide to the Commission a copy of the contract as so amended or changed.

3.3 Clauses 3.1 and 3.2 above shall operate for a period of three years from the commencement of this Undertaking.

4. **Confidentiality**

4.1 Monsanto Co. acknowledges that the Commission will make this Undertaking available for public inspection.

4.2 Monsanto Co. acknowledges that the Commission will from time to time publicly refer to this Undertaking.

DATED: 9 May 2002

SIGNED for and on behalf of **Monsanto Company** by Mr. Jeremy Steiner,  
Director  
in the presence of:

Cynthia Lenahan  
Signature of witness

Mark Astin  
DIRECTOR

CYNTHIA LENAHAN  
Name of witness

ACCEPTED by THE AUSTRALIAN  
COMPETITION & CONSUMER COMMISSION

[Signature]

Chairman

Date: May 28, 2002