



**TRADE PRACTICES ACT 1974**

**UNDERTAKING  
TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  
GIVEN UNDER SECTION 87B**

**BY NUFARM AUSTRALIA LIMITED (ABN 004 377 780)**

**1 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" means Monsanto Australia Limited (ACN 006 725 560) and any of its related bodies corporate.

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

"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

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

Roundup is Monsanto'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 and/or Nufarm to prevent or hinder import competition for glyphosate. Nufarm 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 Nufarm; and
- (b) the undertakings as executed are accepted by the Commission.

### **Undertakings**

1.2 Nufarm 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,

Nufarm 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) Nufarm 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:
  - (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, Nufarm 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) Nufarm 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 Nufarm will pay the reasonable fees of the independent adviser incurred in complying with clause 1.3.

1.5 Nufarm shall not supply Roundup or any other glyphosate to any party on the condition that the party not acquire, or continue to acquire, any competing glyphosate.

1.6 Nufarm shall not refuse to supply Roundup or any other glyphosate to any party on the basis that the party has acquired, or continues to acquire, any competing glyphosate.

## 2. **Obligations to procure and notify**

2.1 When the performance by Nufarm of an obligation under these undertakings requires a related company of Nufarm to take some action or refrain from taking some action, Nufarm will procure that related company to take that action or to refrain from taking that action.

2.2 Nufarm 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 Nufarm 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 Nufarm 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 Nufarm acknowledges that the Commission will make this Undertaking available for public inspection.

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

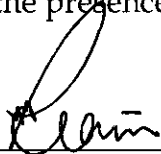
## 5. **Compliance**

5.1 Nufarm shall develop a compliance program, in accordance with Australian Standard 3806, which has as its aim the training and education of Nufarm's relevant sales and

marketing staff and Nufarm's general executive/senior management personnel on compliance with the provisions of this Undertaking.

DATED: 1 May 2002

SIGNED for and on behalf of NUFARM AUSTRALIA LIMITED (ABN 004 377 780) by Director, in the presence of:



Signature of witness

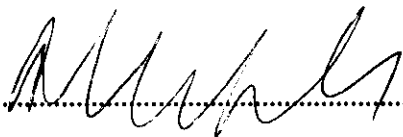
RODNEY HEATH

Name of witness



DIRECTOR

ACCEPTED by THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION



Chairman

Date: May 2, 2002