

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 4103/17

Amended pursuant to the Orders of Justice
Mullins dated 7 and 12 June 2017.

Plaintiff:

MALLONLAND PTY LTD
ACN 051 136 291 (as trustee for the
Andrew Jenner Family Trust)

AND

Defendant:

ADVANTA SEEDS PTY LTD
ACN 010 933 061

AMENDED STATEMENT OF CLAIM

This claim in this proceeding is made in reliance on the following facts:

A. Introduction

The Plaintiff commences this proceeding as a Representative Party pursuant to Part 13A of the *Civil Proceedings Act 2011* (Qld).

2. Gain sorghum (**sorghum**) is a crop commercially grown and sold in Queensland and New South Wales for the provision of animal feed and for the production of biofuels.
3. Shattercane (also known as *sorghum bicolor*) (**shattercane**) is a noxious weed which has the characteristics and effects pleaded in paragraphs 31 and 32 herein.
4. MR43 Elite (**MR43**) is a sorghum hybrid variety of seed sold, distributed and/or produced by the Defendant and used by farmers (**growers**) for the purpose of the commercial cultivation and sale of sorghum.

STATEMENT OF CLAIM
Filed on Behalf of the Plaintiff
Form 16, Version 2
Uniform Civil Procedure Rules 1999
Rule 146

Creevey Russell Lawyers
Level 24, 300 Queen Street
BRISBANE QLD 4000
Ph: (07) 3009 6999
Fax: (07) 3009 6599

5. MR43 seed can only be used for cropping purposes and cannot be ~~used~~ used as feedstock as it has been treated in a way which makes it unsuitable as animal feed.

Particulars

- A. MR43 seed has been treated with an insecticide or insecticides called Thiram Concep Cruiser which is a treatment against thrips, aphids and the phytotoxic effects of metalochlor herbicides, the result of which makes the seed unsuitable as animal feed.
6. A Group Member to whom these proceedings relates is a person or corporation who between 2010 and 2014 (the **Claim Period**):
- (a) conducted a business in Queensland and/or New South Wales for the planting and commercial cultivation and sale of sorghum;
 - (b) purchased MR43 seed ~~from either the Defendant directly or from a~~ gain merchant who had been authorised by the Defendant to sell MR43 seed;
 - (c) the purchased MR43 seed ~~which~~ contained shattercane seed;
 - (d) was not notified and was otherwise unaware that the purchased MR43 seed contained shattercane seed;
 - (e) planted the purchased MR43 seed in order to produce a crop of sorghum for commercial cultivation and sale;
 - (f) suffered loss and damage due to the presence of shattercane seed in the MR43 seed;
 - (g) in the alternative to sub-paragraphs (a) to (f) herein:

- (i) held an interest in land in Queensland or New South Wales (whether in the nature of freehold title, leasehold or otherwise) on which was planted MR43 seed as part of the commercial cultivation and sale of sorghum;
- (ii) the planted MR43 seed contained shattercane seed;
- (iii) was not notified and did not otherwise become aware of the fact that the planted MR43 seed contained shattercane seed;
- (iv) suffered loss and damage due to the presence of shattercane on their land due to the planting of MR43 seed;

~~(h) — in the alternative to sub-paragraphs (a) to (g) herein:~~

- ~~(i) — owned land in Queensland which has become contaminated with shattercane through the use of MR43;~~
- (ii) ~~suffered loss and damage due to the presence of shattercane on their land; [blank]~~

- (i) has not commenced and settled any legal action against the Defendant for the sale or use of MR43 seed which had been contaminated with shattercane seed during in the Claim Period.

(The persons who the Plaintiff represents in these proceedings will be referred to as **Group Members**. The Plaintiff and Group Members collectively will be referred to as **Claimants**)

- 7. The claims made herein are in respect of or arise out of the same, similar or related circumstances in that:

- (a) during the Claim Period the Claimants either held an interest in land in Queensland and/or New South Wales (whether in the nature of freehold title, leasehold or otherwise) and grew or permitted sorghum to be grown on their land for commercial cultivation and sale, or conducted a business in Queensland or New South Wales for the planting and commercial cultivation and sale of sorghum ~~and/or owned land in Queensland which became contaminated with shattereane;~~
- (b) the Claimants either purchased MR43 seed ~~from the Defendant or from~~ a gain merchant who had been authorised by the Defendant to sell MR43 seed, or had MR43 seed planted on their land as part of the commercial cultivation of sorghum, ~~or their land became infected with shattereane due to the use of MR43;~~
- (c) the MR43 seed was marketed by the Defendant as being a hybrid variety of grain sorghum seed;
- (d) the MR43 seed was packaged in 20kg bags which had attached a label which was marked with the Defendant's logo and on which the following information was provided:
- (i) that the variety of the seed contained in the bag was MR43;
 - (ii) the applicable batch number for the seed;
 - (iii) the number of seeds per kilogram;
 - (iv) the packaging date of the bag;
 - (v) the minimum germination percentage for the seed;
 - (vi) the minimum purity of seed;
 - (vii) the maximum percentage of other seeds;

- (viii) the maximum percentage of inert material
 - (ix) the fact that a seed analysis certificate was available on request and how that information could be obtained;
 - (x) that the seed had been treated with an insecticide or insecticides called Thiram Concep Cruiser which was a treatment against thrips, aphids and the phytotoxic effects of metalochlor herbicides;
- (e) the MR43 seed included shattercane seed;
- (f) the Claimants (~~or some of them~~) planted or permitted MR43 seed to be planted on their land between 2010 and 2014 for the purpose of commercially cultivating sorghum for sale;
- (g) no warning or other notification was given by the Defendant or any other person to the Claimants or any of them that the MR43 seed may have contained shattercane seed;
- (h) the effect of planting the MR43 seed was that, in addition to growing sorghum, shattercane also grew on the land;
- (i) the effect of shattercane growing on the land was that it would germinate, propagate and multiply on the land;
- (j) ~~a further effect of shattercane growing on the land was that, through the use of farm machinery or naturally, it infested surrounding land including land owned by some Group Members; [blank]~~
- (k) shattercane has a deleterious effect on the commercial production of sorghum as it competes vigorously with planted crops and reduces their yield;

- (l) shattercane is difficult to eradicate, has recurring infestations as the seed can lie dormant in the soil for up to 12 years, its presence impacts on the land's value and when active its presence impacts on the profitability of crops grown on the land.
8. The common issues of law or fact that arise in this proceeding are set out in the Amended Claim filed herewith.
9. As at the date of the commencement of this proceeding there are seven or more persons who are Group Members having claims against the Defendant.
10. The Group Members do not include any of the class of persons referred to in s. 103D(2) of the *Civil Proceedings Act* 2011 (Qld).

B. The Plaintiff

11. During the Claim Period the Plaintiff:
 - (a) was and is incorporated according to law;
 - (b) was and is the trustee of the Andrew Jenner Family Trust and at all times acted in its capacity as trustee;
 - (c) traded using the registered business name "Jenner Truck & Equipment Sale";
 - (d) conducted a business in Queensland which included the planting and commercial cultivation and sale of crops including sorghum (the **Business**);
 - (e) conducted that part of the Business which involved the commercial cultivation of sorghum on the following properties which are located in Queensland:

Property name	Property description and location	Area (acres)	Owner of the property
Sugarloaf	L367 A3421490 Baines Road, Heading Hill Qld 4361	235	Andrew John & Sandra Jane Jenner
Wandavale West	L2 SP203519 239 McGovern Road, Headington Hill, Qld 4361	489.3	Plaintiff
Sugarloaf Super Block	L368 A342149 239 McGovern Road, Headington Hill, Qld 4361	137.5	Plaintiff

(the properties referred to above on which the Plaintiff conducted the Business are collectively called the *Properties*).

- (d) worked the Properties collectively although they were geographically separate;
- (e) was engaged in the business of crop farming, including growing sorghum for commercial cultivation and sale on the Properties;
- (f) in total cultivated sorghum over about 422 acres on the Properties.

C. The Defendant

12. Since the beginning of the Claim Period the Defendant was and remains:

- (a) a duly incorporated company capable of being sued.
- (b) a “corporation” as that term is defined in section 4 of the *Trade Practices Act 1974 (TPA)*;
- (c) a “person” as that term is used in section 18 of Schedule 2 of the *Competition and Consumer Act 2010 (Cth) (ACL)*;

13. Up until 15 December 2014 the Defendant was called Pacific Seeds Pty Ltd.

D. The Defendant's business

14. At all material times the Defendant:

- (a) was engaged in the business of the commercial production of seed, including sorghum seed, for sale and distribution to growers;
- (b) produced or caused to be produced MR43 seed (which was a sorghum hybrid variety of seed properly called "MR43 Elite") for the purpose of commercial planting and harvesting by growers;
- (c) made MR43 seed available to be sold and distributed to growers for planting during the Claim Period;
- (d) marketed MR43 as being a grain sorghum variety which delivered increased yields with superior grain size, stress tolerance and standability, and which had the following attributes:

Attribute	Score (out of 9 with 9 being excellent and 1 being poor)
Seeding vigour	7.5
Seeding cold tolerance	7
Standability	7.5
Grain size	7
Pollen production	7
Pre-flowering stress tolerance	8
Post-flowering stress tolerance	7

Particulars

- A. An example of the marketing of MR43 by the Defendant is found at www.pacificseeds.com.au/pacific-mr-43.html.

- (e) ~~either sold MR43 in Queensland itself or sold and distributed MR43 in Queensland and New South Wales~~ through authorised grain merchants.
15. The production, marketing and/or sale of MR43 seed was conduct undertaken by the Defendant “in trade or commerce” as that phrase is used in section 52 of the TPA and section 18 of the ACL.
16. During the Claim Period the Defendant had an agreement (called a “Stocklist Agreement”) with grain merchants in Queensland and New South Wales by which the Defendant authorised the grain merchants to resell, market and store the Defendant’s products including MR43 (**Distributors**).

Particulars

- A. The names of the Distributors in Queensland and New South Wales with whom the Defendant had an agreement to resell, market and store MR43 seed cannot be provided until after disclosure of documents.
- B. During the Claim Period the Defendant’s Distributors included Dalby Rural Supplies Pty Ltd in Dalby and Downs Fertiliser Co. Pty Ltd in Pittsworth.
17. Growers purchased MR43 seed from either the Defendant directly or from a Distributor.
18. MR43 was sold and supplied by ~~either the Defendant or~~ a Distributor to growers in 20kg bags which had a label on which was printed the Defendant’s name and logo and which included the following information:
- (a) the variety of the seed contained in the bag was MR43;
 - (b) the applicable batch number for the seed;
 - (c) that there were 29,000 seeds per kilogram;

- (d) the packaging date of the bag;
 - (e) that the minimum germination percentage was 85%;
 - (f) that the minimum purity of seed was 99%;
 - (g) that the maximum number of other seeds was 0.1%;
 - (h) that the maximum amount of inert material was 0.5%;
 - (i) the fact that a seed analysis certificate was available on request by texting the full batch number to 0409668671;
 - (j) that the seed had been treated with an insecticide or insecticides called Thiram Concep Cruiser (the **Label**).
19. The information contained on the Label meant and was reasonably understood to mean that the seed contained in the bags:
- (a) was grain sorghum MR43 seed which had been produced by the Defendant;
 - (b) was at least 99% pure grain sorghum MR43 seed;
 - (c) contained no more than 0.1% other seed species;
 - (d) did not contain shattercane seed;
 - (e) was free of weed seed;
 - (f) did not contain any other seed which would either:

- (i) compete against the sorghum seed and thereby reduce the commercial output of sorghum; or
 - (ii) harm or otherwise adversely affect or be detrimental to the land on which the seed was planted and the land's continued use for commercial cultivation;
- (g) had been the subject of an expert analysis which had been undertaken to ensure that the information referred to in sub-paragraphs (a) to (f) was correct and accurate;
- (h) had been the subject of expert testing to ensure that the seed was safe to be used for the purpose of commercial sorghum cropping;
- (i) would not cause damage or alternatively not cause significant or material damage to land on which it was planted;
- (j) would not cause damage or alternatively not cause significant or material damage to other land either surrounding or near land on which MR43 was planted or land on which machinery which had been used to harvest MR43 was used;
- (k) would contain the characteristics of MR43 seed as marketed by the Defendant.

20. Further the Defendant:

- (a) knew and intended that the MR43 seed would be sold to growers for the purpose of cultivating commercial sorghum crops for sale;
- (b) knew or ought to have known that the growers would rely on the information on the label;

- (c) knew or ought to have known that it was unlikely that the seed would be tested further by the growers;
- (d) knew or ought to have known that any contamination of the seed by shattercane seed would cause loss and damage to the growers;
- (e) was silent with regard to the fact that the MR43 seed contained shattercane seed.

Particulars

- A. The Defendant's knowledge can be inferred from the facts pleaded in paragraphs 3, 11, 14, 15, 16, 17, 18, 19, 31 and 32 herein.

E. Plaintiff's conduct

- 21. In late 2010, the Plaintiff purchased 10 x 20kg bags of MR43 seed from Downs Fertiliser Co Pty Ltd at Pittsworth (**Downs Fertiliser**), a Distributor of the Defendant.
- 22. The bags of MR43 seed purchased by the Plaintiff in 2010 had attached to them the Label.
- 23. In December 2010 the Plaintiff planted the MR43 seed purchased from Downs Fertiliser in December 2010 on the Properties as follows:

Property name	Area cultivated for sorghum (acres)
Sugarloaf	100 acres
Wandavale	187 acres
Sugarloaf Super Block	135 acres

24. In late 2011, the Plaintiff purchased a further 10 x 20kg bays of MR43 seed from Downs Fertiliser.
25. The bags of MR43 seed purchased by the Plaintiff in 2011 also had attached to them the Label.
26. In December 2011 the Plaintiff planted the additional MR43 seed purchased from Downs Fertiliser in 2011 on the Properties as follows:

Property name	Area cultivated for sorghum (acres)
Sugarloaf	100 acres
Wandavale	187 acres
Sugarloaf Super Block	135 acres

F. Group Members' conduct

27. During the Claim Period some of the Group Members purchased MR43 seed from ~~either the Defendant or one of its~~ the Defendant's Distributors for planting and cultivating a sorghum for commercial sale.
28. The MR43 seed purchased by each Group Member was purchased in 20 kilogram bags which had attached the Label.
29. During the Claim Period the Group Members who had purchased MR43 seed planted the seed for commercial cultivation and sale of sorghum.
30. During the Claim Period some of the Group Members who held an interest in land planted or permitted to be planted on their land MR43 seed for the commercial cultivation and sale of sorghum.

G. Shattercane

31. The effect of shattercane growing on land is that:
- (a) if present in a crop of sorghum, it competes strongly with the planted sorghum resulting in a reduced yield;
 - (b) it has a deleterious effect on the commercial production of sorghum;
 - (c) once present on land it can spread vigorously;
 - (d) it can germinate, propagate and multiply quickly, infesting and overrunning the land;
 - (e) ~~through the use of farm machinery and natural, it can spread and infest surrounding land~~ [blank];
 - (f) it can reinfest land as its seeds can lie dormant in soil for up to 12 years.
32. Shattercane is hard to eradicate and during any eradication process it is difficult to grow other commercial crops on the land.

H. Negligence

33. The Defendant owed the Plaintiff and each Group Member who during the Claim Period either purchased and planted MR43 seed as part of a business for the commercial cultivation of sorghum and/or who held an interest in land on which was planted MR 43 seed, a duty to exercise reasonable care in the production, sale and/or distribution of the MR43 seed and to avoid causing the Plaintiff and Group Members foreseeable harm.

Particulars

- A. The Plaintiff repeats and relies on the facts pleaded paragraphs 11 to 26 herein to support the existence of the duty.

34. It was foreseeable by the Defendant, or a reasonable person in the position of the Defendant that:

- (a) if shattercane seed was planted with sorghum seed then the shattercane would vigorously compete with sorghum resulting in a lower yield;
- (b) once present on land shattercane would be difficult to eradicate;
- (c) the eradication of shattercane would mean that the land on which it was located could not be used to its full commercial potential during the eradication period;
- (d) the existence of shattercane would reduce the value of the land on which it was located;
- ~~(e) shattercane could spread onto other or adjoining land through the use of farm machinery and naturally.~~

35. The Defendant breached its duty of care owed to the Plaintiff by:

- (a) procuring and selling to the Plaintiff (~~either itself or~~ through its Distributors) MR43 seed that was contaminated with shattercane seed;
- (b) failing to properly test or otherwise ensure that the MR43 seed was free of shattercane seed before selling it to growers or providing it to its Distributors for sale;
- (c) failing to warn or otherwise tell the Plaintiff of the existence of shattercane in the MR43 seed;
- (d) failing to warn its Distributors, or otherwise cause the Plaintiff to be warned, that the MR43 seed was or might be contaminated with shattercane seed;

- (e) failing to warn its Distributors, or otherwise cause the Plaintiff to be warned, that the MR43 seed may contain noxious weed seeds which would have an adverse effect on the sorghum yield;
 - (f) as part of the production of MR43 seed, failing to undertake a proper or adequate grow-out process or to otherwise ensure that the MR43 seed was free of shattercane seed.
36. The Defendant breached its duty of care owed to Group Members who during the Claim Period purchased and planted MR43 seed as part of a business for the commercial cultivation of sorghum by:
- (a) procuring and selling to those Group Members (~~either itself or through~~ its Distributors) MR43 seed that was contaminated with shattercane seed;
 - (b) failing to properly test or otherwise ensure that the MR43 seed was free of shattercane seed before selling it to growers or providing it to its Distributors for sale;
 - (c) failing to warn or otherwise tell Group Members of the existence of shattercane in the MR43 seed;
 - (d) failing to warn its Distributors, or otherwise cause Group Members to be warned, that the MR43 seed was or might be contaminated with shattercane seed;
 - (e) failing to warn its Distributors, or otherwise cause Group Members to be warned, that the MR43 seed may contain noxious weed seeds which would have an adverse effect on the sorghum yield;

- (f) as part of the production of MR43, failing to undertake a proper or adequate grow-out process or to otherwise ensure that the MR43 seed was free of shattercane seed.
37. The Defendant breached its duty of care owed to Group Members who held an interest in land on which was planted MR43 seed by:
- (a) procuring and selling (~~either itself or~~ through its Distributors) MR43 seed that was contaminated with shattercane seed;
 - (b) failing to properly test or otherwise ensure that the MR43 seed was free of shattercane seed before selling it to growers or providing it to its Distributors for sale;
 - (c) failing to warn or otherwise tell Group Members of the existence of shattercane in the MR43 seed;
 - (d) failing to warn its Distributors, or otherwise cause Group Members to be warned, that the MR43 seed was or might be contaminated with shattercane seed;
 - (e) failing to warn its Distributors, or otherwise cause Group Members to be warned, that the MR43 seed may contain noxious weed seeds which would have an adverse effect on the sorghum yield;
 - (f) as part of the production of MR43 seed, failing to undertake a proper or adequate grow-out process or to otherwise ensure that the MR43 seed was free of shattercane seed.
38. As a result of the Defendant's breach of its duty of care, the Plaintiff and Group Members have suffered loss and damage.

Particulars

- A. The Plaintiff repeats and relies on the facts pleaded in paragraphs 46 and 47 herein.

I. Misleading and Deceptive Conduct

39. At the time of the Plaintiff purchased the MR43 seed in 2010 and 2011 the Defendant and/or the Distributors remained silent as to:
- (a) the possibility that the MR43 seed might be contaminated or contain noxious weeds, including shattercane;
 - (b) the fact that the Plaintiff ought test the MR43 seed itself to ensure that it did not contain shattercane seed.
40. At the time any Group Member purchased MR43 seed during the Claim Period the Defendant and/or the Distributors remained silent to the Group Members who purchased the seed and to the world at large as to:
- (a) the possibility that the MR43 seed might be contaminated or contain noxious weeds, including shattercane;
 - (b) the fact that the purchaser ought test the MR43 seed itself to ensure that it did not contain shattercane seed.
41. The Defendant's silence (either itself or through its Distributors) referred to in paragraphs 39 and 40 herein was misleading or deceptive or likely to mislead or deceive the Plaintiff and Group Members as to the existence of shattercane seed in the MR43 seed.
42. Further, by the information contained on the Label, the Defendant represented to the Plaintiff, Group Members who purchased MR43 seed, and other Group Members who had an interest in land on which MR43 was planted that the seed:

- (a) was grain sorghum MR43 seed which had been produced by the Defendant;
- (b) was a least 99% pure grain sorghum MR43 seed;
- (c) contained no more than 0.1% of other seed species;
- (d) did not contain shattercane seed;
- (e) was free of any noxious weed seed;
- (e) did not contain any other seed which would either:
 - (i) compete against the sorghum seed and thereby reduce the commercial output of sorghum; or
 - (ii) harm or otherwise adversely affect or be detrimental to the land on which the seed was planted and the land's continued use for commercial cultivation
- (f) had been the subject of expert testing which had been undertaken to ensure that the information contained on the Label was correct and accurate;
- (g) had been the subject of expert testing to ensure that the seed was safe to be used for for the purpose of commercial sorghum cropping;
- (h) would not cause damage or alternatively not cause any significant or material damage to the land on which is was planted
(the *Representations*).

43. In reliance upon the Representations the Plaintiff purchased MR43 seed and planted the seed on the Properties as pleaded herein.

44. The marketing of MR43 and the Representations both amounted to misleading and deceptive conduct as:

- (a) the MR43 seed was in fact contaminated with shattercane seed which has a deleterious effect on the commercial production of sorghum;
- (b) the MR43 seed sold in the bags in fact contained at least 0.1% of shattercane seed;
- (c) the Label did not state or otherwise mention that the bags of MR43 would also contain shattercane seed;
- (d) the MR43 seed had not been tested or properly tested by the Defendant to ensure that it did not contain shattercane seed and was safe for growers to use for the purpose of commercial sorghum cropping;
- (e) the MR43 seed would in fact cause, or was likely to cause, damage due to the presence of shattercane seed;
- (f) it induced an error with regard to the quality, nature and composition of MR43.

45. In the circumstances, the Defendant engaged in misleading and deceptive conduct in contravention of section 52 of the TPA, or to the extent that such conduct occurred after 1 January 2011 section 18 of the ACL.

J Plaintiff's Loss and Damage

46. The planting of MR43 seed on the Properties has caused a shattercane infestation on the Properties and consequently the Plaintiff has suffered loss and damage in the form of:

- (a) reduced cropping revenue;

- (b) the expense of shattercane mitigation and eradication measures;
- (c) permanent damage to the Properties with an associated loss of value.

Particulars

- A. The Plaintiff will provide further and better particulars of its loss and damage by way of an expert report and evidence.

K. Group Members Loss and Damage

47. As a result of the Defendant's negligent conduct against Group Members (pleaded in paragraphs 33 to 38 herein) and the Defendant's breach of s52 of the TPA or s.18 of the ACL (pleaded in paragraphs 39 to 45 herein) ~~some or~~ all of the Group Members have suffered loss and damages in the form of:

- (a) reduced cropping revenue;
- (b) the expense of shattercane mitigation and eradication measures;
- (c) permanent damage to property with an associated loss of value.

Particulars

- A. Rule 157 of the *Uniform Civil Procedure Rules* requires a "party" to include particulars "necessary to...define the issues for...the trial". The Group Members are not parties to the proceeding, but the Plaintiff in its representative capacity has specified a number of claims made on behalf of Group Members, being claims for breach of the TPA , ACL or negligent conduct. If following a determination of the common issues it is necessary to determine the individual claims of Group Members then:

- (i) the Plaintiff anticipates that claims under the TPA, ACL and in negligence of the nature set out above will be brought by some or all of the Group members; and
- (ii) further detailed particular of those claims will be provided.

And the Plaintiff claims the following relief against the Defendant:

1. Damages pursuant to s.82 of the *Trade Practices Act 1974 (Cth) (TPA)* for conduct that was done by the Defendant in contravention of s.52 of that Act in circumstances where the relevant act or omission occurred prior to 1 January 2011.
2. Damages pursuant to s. 236 of the *Competition and Consumer Act 2010 (Cth)* for a contravention of section 18 of Schedule 2 of that Act (**ACL**) where the relevant act or omission occurred after 1 January 2011.
3. Damages for negligence.
4. Interest.
5. Costs.
6. Such other order as the Court thinks appropriate.

Signed:



Description: *SOLICITOR FOR PLAINTIFF*

This pleading was settled by D J Campbell QC and Blair Hall of Counsel

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.