

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS4103/17

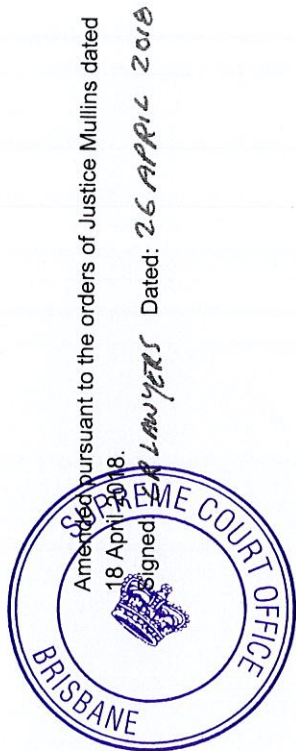
First Plaintiff: MALLONLAND PTY LTD  
ACN 051 136 291 (as trustee for the  
Andrew Jenner Family Trust)

AND

Second Plaintiff: ME & JL NITSCHKE PTY LTD  
ACN 074 520 228 (as trustee for the  
Nitschke Family Trust)

AND

Defendant: ADVANTA SEEDS PTY LTD  
ACN 010 933 061



SECOND AMENDED CLAIM

The Plaintiffs claims on its their own behalf and as a Representative Parties y under Part 13A of the *Civil Proceedings Act 2011* (Qld) on behalf of Group Members:-

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.

Damages for negligence.

4. Interest

**2<sup>ND</sup> AMENDED CLAIM**

Filed on behalf of the Plaintiffs

Form 2, Version 2

Uniform Civil Procedure Rules 1999

Rule 22

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5. Costs.
6. Such other order as the Court thinks appropriate.

The Plaintiffs makes this Claim in reliance on of the Facts alleged in the attached Fourth Amended Statement of Claim.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

and filed in the Brisbane Registry on **27 APR 2018**

Registrar: \_\_\_\_\_



To the Defendant: **TAKE NOTICE** that you are being sued by the Plaintiffs in the Court. If you intend to dispute this Claim or wish to raise any Counterclaim against the Plaintiff, you must within 28 days of the service upon you of this Claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. This Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it on the Plaintiff's address for service show in this Claim as soon as possible.

Address of Registry: QEII Court of Law Complex, 415 George Street, Brisbane.

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

### **Representative Action**

The Plaintiffs brings this proceeding as a Representative Parties ~~y~~ under Part 13A of the *Civil Proceedings Act* 2011.

The Group Members to whom this proceeding relates are persons or corporations who between 2010 and 2014 (the **Claim Period**):

1. conducted a business in Queensland and/or New South Wales for the planting and commercial cultivation and sale of sorghum;
2. purchased MR43 seed ~~from either the Defendant directly or~~ from a gain merchant who had been authorised by the Defendant to sell MR43 seed;
3. purchased MR43 seed ~~which~~ contained shattercane seed;
4. ~~wasere~~ not notified and ~~wasere~~ otherwise unaware that the purchased MR43 seed contained shattercane seed;
5. planted the purchased MR43 seed in order to produce a crop of sorghum for commercial cultivation and sale;
6. first suffered loss and damage in the form of reduced income and/or increased expenditure due to the presence of shattercane seed in the MR43 seed no more than 6 years before the commencement of this action;
7. in the alternative to paragraphs (1) to (6) above:
  - (a) held an interest in land in Queensland and/or New South Wales (whether in the nature of freehold title, leasehold or otherwise) on which was planted MR43 seed for the purpose of the commercial cultivation and sale of sorghum; or
  - (aa) ~~alternatively to 7(a) above,~~ was related to or otherwise connected with a Group Member who planted MR43 seed on its land (as referred to in sub-paragraph (a) above) and was jointly engaged in farming activities and the commercial cultivation of sorghum with that Group Member; and
  - (b) the planted MR43 seed contained shattercane seed;
  - (c) was not notified and did not otherwise become aware of the fact that the MR43 seed contained shattercane seed;
  - (d) first suffered loss and damage due to the presence of shattercane on their land due to the planting of MR43 seed;
8. ~~in the alternative to paragraphs (1) to (7) above:~~

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

9. have not commenced and settled any legal action against the Defendant for the sale or use of MR43 seed which has been contaminated with shattercane during the Claim Period.

The claims of the Plaintiffs give rise to the following substantial common issues of law or fact:

1. Was MR43 a sorghum hybrid variety of seed used for the commercial cultivation of grain sorghum.
  - 1A. Is 'shattercane' a term used by persons involved in the cultivation of sorghum to describe a plant which is:
    - (a) a grassy off-type sorghum with shattering characteristics;
    - (b) generally 2 metres tall, which is similar to sudan grass in appearance, with swollen nodes, generally having 3 to 4 grain bearing heads, generally having a uniform inflorescence, with seeds coloured red to brown with black glumes, and which readily fall from the head at or just prior to harvest;
    - (c) often identified as "sorghum bicolor" (subspecies drummondi) but which is in fact a grassy off-type sorghum which has the same or very similar appearance and characteristics to "sorghum bicolor" (subspecies drummondi), such appearance and characteristics being those set out in sub-paragraphs (a) and (b) above
2. Is shattercane a weed which, if present in a crop of sorghum If shattercane is present on land:
  - (a) does it competes strongly with planted sorghum;
  - (b) ~~has~~ does it have a deleterious effect on the commercial production of sorghum;
  - (c) does it reduce the sorghum yield;
  - (d) ~~once present on land~~ does it spreads vigorously;

- (e) can it germinate, propagate and multiply quickly, infesting and overrunning land;
- (f) ~~can spread and infest surrounding land through the use of farm machinery and/or naturally;~~ [blank];
- (g) can it lie dormant in soil for up to 12 years;
- (h) is it difficult or impossible to eradicate;
- (i) does it make it difficult to grow other commercial crops.

3. Did the Defendant:

- (a) produce MR43 for the commercial cultivation of sorghum during the Claim Period;
- (b) ~~sell MR43 directly to some of the Group Members~~ [blank];
- (c) sell MR43 to the Plaintiffs and some of the Group Members through grain merchants who had been authorised by the Defendant to sell and market MR43.

4. Was MR43 seed sold during the Claim Period marketed by the Defendant as being a hybrid variety of grain sorghum seed that had certain characteristics.

5. Was the MR43 seed sold to the Plaintiffs and some Group Members during the Claim Period packaged in 20kg bags which had attached a label (the **Label**) which was marked with the Defendant's logo and on which the following information was provided:

- (a) that 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 of 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) the maximum percentage of other seeds;
- (h) that the maximum percentage of inert material was 0.1%;
- (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 which was a treatment against thrips, aphids and the phytotoxic effects of metalochlor herbicides.
6. Was the information provided on the Label meant to mean or was it 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) was free of weed seed;
  - (e) had been the subject of an expert analysis which had been undertaken to ensure that the information referred to in sub-paragraphs (a) to (d) above was correct and accurate;
  - (f) would have the characteristics of MR43 seed as marketed by the Defendant.
7. Whether the information provided on the Label represented to the Plaintiffs and Group Members and the world at large that the seed:
- (a) was free of any off-type contaminant;
  - (b) contained no more than 0.1% of other seed species;
  - (c) did not contain shattercane seed;
  - (d) had been tested by or on behalf of the Defendant and was safe to be used for the commercial cultivation of Sorghum;
  - (e) could be safely used for the purpose of commercial sorghum cropping;
  - (f) ~~would not cause damage or alternatively not cause any significant or material damage to the land on which it was planted or 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;~~
8. Did the MR43 seed sold in the 20kgs bags during the Claim Period include shattercane seed.



9. Was MR43 seed planted ~~or permitted to be planted~~ by the Plaintiffs and some Group Members during the Claim Period for the purpose of commercially cultivating sorghum for sale.
  
- 9A. Was MR43 seed planted for the purpose of the commercial cultivation of sorghum on land which some Group Members held an interest.
  
10. Was any warning or other notification given by the Defendant or any other person to the Plaintiffs and Group Members that the purchased MR43 seed contained shattercane seed.
  
11. Was the effect of planting MR43 seed during the Claim Period that, in addition to growing sorghum, shattercane also grew on the land.
  
12. Was the effect of shattercane growing on the land that it would germinate and propagate on the land and increase its presence on the land.
  
13. ~~Was an effect of shattercane growing on the land that, through the use of farm machinery or naturally, it infests surrounding land.~~ [blank]
  
14. Does shattercane have a deleterious effect on the commercial production of sorghum.
  
15. Whether shattercane is difficult or impossible to eradicate.
  
16. Whether shattercane has recurring infestations.
  
17. Whether the presence of shattercane has an adverse impact on the land's value.
  
18. Whether the presence of shattercane, when active, impacts on the profitability of commercially grown crops on the land.
  
- 18A. Whether it was known within the industry for the commercial production and cultivation of sorghum that:
  - a. shattercane has a deleterious effect on the commercial production of sorghum;

- b. shattercane is difficult or impossible to eradicate;
  - c. shattercane has recurring infestations;
  - d. whether the presence of shattercane, when active, impacts on the profitability of commercially grown crops on the land;
  - e. there had been an earlier outbreak of shattercane in sorghum grown in the Burdekin region of Queensland in 1977 and 1978;
  - f. in the USA shattercane was a prevalent weed whose presence in sorghum seed had a deleterious effect on the production of sorghum;
  - g. it was necessary to scientifically test sorghum seed in order to determine whether it did contain shattercane seed and/or any other off-type contaminant similar to shattercane;
  - h. an infestation of Shattercane is more effectively dealt with and it is more easily eradicated if an eradication program is commenced as soon as the presence of shattercane is found.
19. Was the production, marketing and/or sale (either by itself or through it's distributors) of MR43 seed 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.
20. Did the Defendant know and intend that the MR43 seed sold during the Claim Period would be sold to the Plaintiffs and some Group Members for the purpose of cultivating commercial sorghum crops for sale.
21. Did the Defendant know or ought it to have known that the Plaintiffs and the Group Members, either themselves or by their employees, agents, contractors, would rely on the information on the Label to the 20kgs bags.



22. Whether the Defendant knew or ought to have known that it was unlikely that the seed contained in the 20kgs bags would be further tested by the Plaintiffs or Group Members.
23. Whether the Defendant knew or ought to have known that any contamination of the seed with shattercane seed would cause loss and damage to the Plaintiffs and Group Members.
24. Whether the Defendant was silent with regard to ~~the fact that the MR43 seed contained shattercane seed~~; the possibility that:
- a. because the seed had not been tested or properly tested for contaminants and because a proper or adequate grow out process had not been undertaken as part of the production of the seed, the MR43 seed might be contaminated or contain an off-type contaminant noxious weeds, including shattercane;
  - b. the Plaintiffs ought test the MR43 seed themselves to ensure that it did not contain shattercane seed or any other off-type contaminant.
25. Whether the Plaintiffs and some Group Members purchased MR43 seed from ~~either the Defendant or one of its~~ the Defendant's Distributors for planting and cultivation of sorghum for commercial sale during the Claim Period.
26. Whether the Defendant owed the Plaintiffs and Group Members a duty to exercise reasonable care in the production, sale and/or distribution of MR43 seed and to avoid causing the Plaintiffs and Group Members foreseeable harm.
- 26A. Whether at the times when MR43 seed was sold to the Plaintiffs and Group Members, and during the whole of the Claim Period, the Defendant knew or ought to have known:
- a. MR43 seed would be sold to growers for the purpose of cultivating commercial sorghum crops for sale;

- b. shattercane:
  - (i) has a high fertility rate;
  - (ii) spreads quickly across land due to the “shattering” nature of its head;
  - (iii) would grow if planted together with MR43 seed;
  - (iv) competes strongly with any planted sorghum crop resulting in a reduced yield of sorghum;
  - (v) is hard and expensive to eradicate and during any eradication process it is difficult or impossible to grow other commercial crops on the land;
  - (vi) can lie dormant in the soil for up to 12 years;
  
- c. growers would rely on the information on the Label;
  
- d. it was unlikely that the MR43 seed would be further tested by the growers;
  
- e. any contamination of the seed by shattercane seed or an off-type contaminant which was similar to shattercane seed would cause loss and damage to the growers or the owners of land on which the seed was planted;
  
- f. there had been an earlier outbreak of shattercane in sorghum grown in the Burdekin region of Queensland in 1977 and 1978;
  
- g. in the USA shattercane was a prevalent weed whose presence in sorghum seed had a deleterious effect on the production of sorghum;
  
- h. the production of sorghum seed required a grow-out process to ensure that the seed was free of shattercane and/or any other off type contaminants;
  
- i. it was necessary to scientifically test sorghum seed in order to determine whether it did contain shattercane seed and/or any other off-type contaminant;
  
- j. by no later than 2008 there had been the appearance of a tall open-headed shattering grassy off-type plants present in sorghum grown from MR43 seed;

- k. an infestation of Shattercane is more effectively dealt with and it is more easily eradicated if an eradication program is commenced as soon as the presence of shattercane is found;
- l. MR43 seed may be planted on land which was owned by a different entity to the one who purchased the seed.

26B. Whether during the the Claim Period, the Defendant was reckless in that it did not know one way or the other whether:

- a. MR43 seed had been tested to ensure that it was free of shattercane or any other off-type contaminant seed; and
- b. a proper or adequate grow-out process had taken place to determine whether shattercane or any other off-type contaminant seed was present in MR43 seed.

27. Whether it was foreseeable 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 or impossible to eradicate;
- (c) the process of eradicating shattercane would mean that the land on which it was located could not be used to its full commercial potential during this period;
- ~~(d) the existence of shattercane would reduce the value of the land on which it was located;~~
- ~~(e) shattercane could be spread onto other or adjoining land through the use of farm machinery and naturally.~~

27A. Whether the Plaintiffs and Group Members were vulnerable to a breach of duty by the Defendant due to the effect of shattercane growing on land and the difficulty associated with its eradication.

28. Whether the Defendant breached the duty of care owed by it to the Plaintiffs and Group Members by:

- (a) procuring and selling to 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 Group Members or~~ providing it to its Distributors for sale;
- (c) 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;
- (d) failing to warn its Distributors, or otherwise cause Group Members to be warned, that the MR43 seed may contain an off-type contaminant which would have an adverse effect on the sorghum's yield;
- (e) failing to warn or otherwise tell Group Members of the existence of shattercane seed in the MR43 seed;
- (f) failing to warn or otherwise tell Group Members that there may be shattercane seed or an off-type contaminant in the MR43 seed;
- (g) failing to undertake a proper or adequate grow-out process or to otherwise ensure that the MR43 seed was free of shattercane seed;
- (h) failing to withdraw the MR43 seed from sale by at least May 2012 when it knew that it had been contaminated with an off type;
- (i) failing to inform the Plaintiff and Group Members by at least May 2012 of the existence of an off-type contaminant in the MR43 seed.

29. At the time the Plaintiff and some Group Members purchased the MR43 seed during the Claim Period did the Defendant and/or its Distributors remain silent as to:

- (a) the possibility that the MR43 seed might in any way be contaminated or contain shattercane seed;
- (b) the fact that the Plaintiff purchasers ought to test the MR43 seed itself themselves to ensure that it did not contain shattercane seed or an off-type contaminant.

30. Was the Defendant's silence misleading or deceptive or likely to mislead and deceive.

31. ~~Did the Plaintiffs and some~~ Group Members ~~rely on the information contained on the label when purchasing MR43.~~ [blank]

32. ~~Was the marketing of MR43 and~~ Were the representations made on the label misleading and deceptive.
33. Did the Defendant engage in misleading and deceptive conduct in contravention of section 52 of the TPA or to the extent that such acts or omissions occurred after 1 January 2011 in breach of section 18 of the ACL.
34. ~~Due to the presence of shattercane did the Plaintiffs and Group members suffer loss and damage being:~~
- ~~(a) a reducing in cropping revenue;~~
  - ~~(b) the expense of shatter mitigation and eradication measures;~~
  - ~~(c) permanent damage to the land which becomes infested with shattercane and any associated loss in value to that land. [blank]~~

#### **PARTICULARS OF THE PLAINTIFFS**

##### **First Plaintiff:**

Name: MALLONLAND PTY LTD ACN 051 136 291

Plaintiff's residential or

Business address

310 Anduramba Road  
CROWS NEST QLD 4355

Plaintiff's solicitor's name:

Dan Creevey

and firm name:

Creevey Russell Lawyers

Solicitor's business address:

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Address for service: Level 24, 300 Queen St, Brisbane QLD 4000

Telephone: (07) 30096555

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Second Plaintiff:

Name: ME & JL NITSCHKE PTY LTD ACN 074 520 228 AS TRUSTEE FOR THE  
~~ACACIA FARMING~~ NITSCHKE FAMILY TRUST

Plaintiff's residential or

Business address

"Parkhead" 2/19485 Warrego Highway, Dalby

Plaintiff's solicitor's name:

Dan Creevey

and firm name:

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Solicitor's business address:

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Signed:

*CR LAWYERS*

Description: *CR* Partner, Creevey Russell Lawyers

Dated: *26 April 2018*

This Claim is to be served on: Advanta Seeds Pty Ltd

of:

268 Anzac Avenue,

TOOWOOPA QLD 4350