



Federal Court of Australia
District Registry: New South Wales
Division: General

No: NSD1908/2016

GAVIN SMITH and others named in the schedule
Applicant

COMMONWEALTH OF AUSTRALIA (DEPARTMENT OF DEFENCE)
Respondent

ORDER (AMENDED PURSUANT TO R 39.04)

JUDGE: JUSTICE JAGOT

DATE OF ORDER: 30 May 2017

WHERE MADE: Sydney

THE COURT ORDERS THAT:

Further amended Statement of Claim

1. The applicants file and serve the Further Amended Statement of Claim dated 29 May 2017, such document to be filed and served within two days after the making of these orders.
2. Any additional group member who is included within the description of the group by reason of the amendment not have the benefit of having their rights relate back to the date of the original filing of the proceedings.

Orders in relation to the “initial trial”

3. By 4:00pm on 30 June 2017, the applicants are to notify the respondent in writing of the name of each of the named applicants to which the orders set out in Annexure A apply (currently identified “[to be notified]”).
4. By 4:00pm on 30 August 2017, the respondent is to inform the applicants whether it consents to the orders set out in Annexure A being made in the proceedings and, if it does not consent, inform the applicants of the nature and reasons for any objections to those orders being made.
5. By 4:00pm on 6 September 2017, the applicants and the respondent to:



- a. inform the Associate to Jagot J that the the orders set out in Annexure A are agreed; or
- b. inform the Associate to Jagot J that the the orders set out in Annexure A are not agreed, advise what matters are in dispute, and that those matters will be dealt with at the further case management hearing on 19 September 2017 (as per order 8 below).

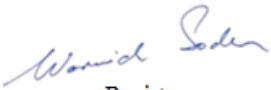
Evidence and other matters

6. Order 8 of the orders made on 4 April 2017 be amended such that the words “30 June 2017” be replaced with the words “30 August 2017”.
- 6A. Order 7 of the orders made on 4 April 2017 be amended such that the words “31 August 2017” be replaced with the words “15 August 2017”.
7. Order 9 of the Orders made on 4 April 2017 be vacated.

Further directions

8. The matter is listed for a further case management hearing at 9:30am on 19 September 2017.
9. Liberty to restore on 48 hours’ notice.

Date that entry is stamped: 30 May 2017


Registrar



Annexure A

No. NSD1908 of 2016

Federal Court of Australia
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Division: General

GAVIN SMITH and others named in the schedule
Applicant

COMMONWEALTH OF AUSTRALIA (DEPARTMENT OF DEFENCE)
Respondent

ORDER

JUDGE:	Justice Jagot
DATE OF ORDER:	
WHERE MADE:	Sydney

THE COURT ORDERS THAT:

1. The initial trial be a trial of the whole of the claims of the [to be notified] Applicant (a Landowner Group Member), the [to be notified] Applicant (a Business Owner Group Member representative and the [to be notified] Applicant (an Occupier Group Member representative (as identified pursuant to Order 1 above), and, subject to further order, the common questions to be determined at the initial trial, in accordance with the principles explained by the Full Court in *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2009] FCAFC 26* are:

Nuisance

(a) Whether the Respondent's use of Aqueous Film Forming Foam ("AFFF") products at the Williamstown Base including their disposal amounts to a substantial and unreasonable interference with the use and enjoyment of land by:

- (i) Landowner Group Members;
- (ii) Business Owner Group Members; and/or
- (iii) Occupier Group Members.

(b) Do:

- (i) Landowner Group Members;
- (ii) Business Owner Group Members; and/or
- (iii) Occupier Group Members,

having standing to bring a suit in nuisance in respect of any substantial and unreasonable interference with the use and enjoyment of land by the Respondent.



- (c) What categories of loss and damage may be recovered as a result of any substantial and unreasonable interference by the Respondent with the use and enjoyment of land by:
- (i) Landowner Group Members;
 - (ii) Business Owner Group Members; and/or
 - (iii) Occupier Group Members.

(d) Is any claim in nuisance against the Respondent barred by the Limitation Act 1969 (NSW).

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

- (e) What is the relevant “action” of the Respondent for the purposes of s 28(1) of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (“**EPBC Act**”) (the **relevant action**)?
- (f) Whether the relevant action is exempt from the operation of Part 3 of the EPBC Act, by virtue of Schedule 1 of the *Environmental Reform (Consequential Provisions) Act 1999 (Cth)*?
- (g) Whether the relevant action is exempt from the operation of s 28(1) of the EPBC Act, by virtue of s 28(2) and s 43B?
- (h) Whether the Respondent’s use and discharge of AFFF products at the Williamstown Base has, will, or is likely to have a significant impact on the environment within the meaning of s.28(1) of the EPBC Act;
- (i) Whether the Respondent’s use and discharge of AFFF products at the Williamstown Base amounts to a breach of s.28(1) of the EPBC Act;
- (j) What categories of loss and damage may be recovered by reason of any contravention by the Respondent of s.28(1) of the EPBC Act by:
- (i) Landowner Group Members;
 - (ii) Business Owner Group Members; and/or
 - (iii) Occupier Group Members.

Defence Force Regulations 1952 (Cth)

- (k) Whether loss or damage by reason of the Respondent’s use of AFFF products within the meaning of cl.57 of the *Defence Force Regulations 1952 (Cth)* (“the **Regulations**”) has been sustained by:
- (i) Landowner Group Members;
 - (ii) Business Owner Group Members; and/or
 - (iii) Occupier Group Members.



(l) What categories of compensation may be recovered pursuant to cl.57 of the Regulations from the Respondent by:

- (i) Landowner Group Members;
- (ii) Business Owner Group Members; and/or
- (iii) Occupier Group Members.

(m) Does the Court have jurisdiction to determine claims brought against the Respondent under cl 57 of the Regulations if the claim was not made in writing to the Secretary.

Negligence

(n) Did the respondent owe a duty of care as pleaded in paragraph 88 of the Further Amended Statement of Claim to:

- (i) Landowner Group Members;
- (ii) Business Owner Group Members; and/or
- (iii) Occupier Group Members.

(o) What was the scope of the duty of care owed by the Respondent to:

- (i) Landowner Group Members;
- (ii) Business Owner Group Members; and/or
- (iii) Occupier Group Members.

(p) Did the Respondent breach its duty of care owed to:

- (i) Landowner Group Members;
- (ii) Business Owner Group Members; and/or
- (iii) Occupier Group Members.

(q) What categories of loss and damage may be recovered by reason any breach of duty of care, by:

- (i) Landowner Group Members;
- (ii) Business Owner Group Members; and/or
- (iii) Occupier Group Members.

(r) Is any claim in negligence against the Respondent as pleaded in the Further Amended Statement of Claim barred by the *Limitation Act 1969* (NSW).

2. The trial of the individual claims of the Applicants, other than those notified pursuant to Order 1 above, be deferred to second stage trials to be conducted following the initial trial referred to in Order 1.



Schedule

No: NSD1908/2016

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Second Applicant	KIM SMITH
Third Applicant	ANN AND LINDSAY CLOUT SMSF PTY LTD ACN 154 516 006
Fourth Applicant	ANN CLOUT
Fifth Applicant	LINDSAY CLOUT
Sixth Applicant	JOHN ARTHUR HEWITT
Seventh Applicant	CHANTEL WALKER
Eighth Applicant	MARSHALLS TRANSPORT PTY LTD
Ninth Applicant	NICHOLAS MARSHALL
Tenth Applicant	MELISSA MARSHALL