



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

No: NSD1908/2016  
NSD1155/2017  
NSD1388/2018

No: NSD1908/2016

**GAVIN SMITH** and others named in the schedule  
Applicants

**COMMONWEALTH OF AUSTRALIA**  
Respondent

No: NSD1155/2017

**BRADLEY JAMES HUDSON** and others named in the schedule  
Applicants

**COMMONWEALTH OF AUSTRALIA**  
Respondent

No: NSD1388/2018

**KIRSTY BARTLETT** and another named in the schedule  
Applicants

**COMMONWEALTH OF AUSTRALIA**  
Respondent

## **ORDER**

**JUDGE:** JUSTICE LEE

**DATE OF ORDER:** 1 November 2019

**WHERE MADE:** Sydney

### **THE COURT ORDERS THAT:**

#### **Smith, Hudson and Bartlett Proceedings**

1. In orders 2 to 23 below:
  - (a) **Common Questions** has the meaning defined in order 15 of the orders made on 2 October 2019;



- (b) **Epidemiology/Toxicology Report** has the meaning defined in order 19 of the orders made on 2 October 2019;
- (c) **Initial Trial** has the meaning defined in order 2 of the orders made on 24 September 2019;
- (d) **Initial Trial Applicants** has the meaning defined in order 2 of the orders made on 24 September 2019;
- (e) **First Stage Hearing** has the meaning defined in order 3 of the orders made on 24 September 2019;
- (f) **First Stage Hearing Questions** has the meaning defined in order 15 of the orders made on 2 October 2019;
- (g) **Land Valuation Report** has the meaning defined in order 25 of the orders made on 2 October 2019;
- (h) **Remediation Reference** has the meaning defined in order 31 of the orders made on 2 October 2019; and
- (i) **Joint Report** means the report of Professor Jennifer Field and Professor Ian Cousins dated 30 August 2019.

***Common Questions and First Stage Hearing Questions***

2. Subject to further order:

- (a) the Common Questions to be determined at the Initial Trial in the Smith proceeding are the questions in Schedule 1;
- (b) the Common Questions to be determined at the Initial Trial in the Hudson proceeding are the questions in Schedule 2; and
- (c) the Common Questions to be determined at the Initial Trial in the Bartlett proceeding are the questions in Schedule 3.

3. It is ordered that:



- (a) questions 1 to 24 in Schedule 1 are to be heard separately from any other questions in the Initial Trial in the Smith proceeding;
- (b) questions 1 to 25 in Schedule 2 are to be heard separately from any other questions in the Initial Trial in the Hudson proceeding; and
- (c) questions 1 to 25 in Schedule 3 are to be heard separately from any other questions in the Initial Trial in the Bartlett proceeding.

### ***References***

4. Pursuant to s 33ZF and/or s 37P(2) and/or s 54A of the Act, Dr Annette Nolan is appointed as referee for the purpose of the Remediation Reference.
5. Aditi Rao, barrister, is appointed as counsel assisting the Remediation Referee.
6. Aditi Rao, barrister, is appointed as counsel assisting the Hydrogeology Referee.
7. Dion Fahey, barrister, is appointed as counsel assisting the Hydrology Referee.

### ***Evidence***

8. At the Initial Trial, evidence in any of the Smith, Hudson and Bartlett proceedings is to be evidence in each of them, subject to relevance and any further order of the Court.

### ***Trial orders***

9. Order 3(a) of the orders made on 24 September 2019 be amended by deleting the words “1 April 2020” and inserting the words “16 March 2020”.
10. By 6 December 2019, the applicants serve an index of all documents that, as presently advised, they propose to tender at the hearing and an index of the material they propose be included in parts D and E of the Court Book.
11. By 28 February 2020, the parties confer and attempt to agree on and produce:
  - (a) a document entitled “Agreed Background Facts” which, in narrative form, identifies relevant facts that the parties have agreed are not, for the purposes of the Initial Trial, to be disputed;



- (b) a template for opening submissions for the First Stage Hearing (**Submission Template**), which document, when completed will:
- (i) provide an overview of each party's case in summary form (Part A);
  - (ii) identify that party's summary contentions in relation to each of the substantive contested factual issues the parties consider it necessary for the Court to make at the First Stage Hearing (to the extent they relate to that party) (Part B);
  - (iii) identify that party's summary contentions in relation to each of the substantive contested legal issues the parties consider it necessary for the Court to make at the First Stage Hearing (to the extent they relate to that party) (Part C).
12. By 4pm on 13 March 2020, the parties provide to the Associate to Justice Lee:
- (a) the agreed documents prepared in accordance with order 11; or
  - (b) in the event the parties are unable to reach agreement as to the contents of any of the documents to be prepared in accordance with order 11(b), one version of the draft agreed document with the extent of the disagreement identified in mark-up together with brief submissions explaining the reasons for the disagreement.
13. By 21 February 2020, the respondent serve an index of any document, not included in the applicants' index, that it, as presently advised, proposes to tender at the hearing and an index of the material they propose be included in parts D and E of the Court Book to the extent not already included in the applicants' index.
14. By 4 March 2020, the applicants file and serve their opening submissions.
15. By 4pm on 18 March 2020, the respondent file and serve its opening submissions.
16. By 4pm on 25 March 2020, the applicants provide their reply to opening submissions of the respondent by way of including, in a revised opening submission, any material in reply and file and serve their revised opening submissions.
17. The submissions filed by the parties in accordance with these Orders follow the Submissions Template.



18. Upon filing submissions, each party provide by email to the Associate to Justice Lee a Word copy of the submissions.
19. By 27 March 2020, the parties deliver to the Associate to Justice Lee a Court Book which:
  - (a) as *Part A* contains the final version only of the pleadings relied upon by the parties, a consolidated pleadings document (which in schedule format identifies each pleaded allegation and any corresponding defence or reply), any particulars not included in the pleadings, the final versions of the Agreed Background Facts;
  - (b) as *Part B* contains the final versions of the Opening Submissions of each party (updated to contain cross references to Part C of the Court Book to the extent a document is the subject of reference);
  - (c) as *Part C* contains, in chronological order, one paginated copy only of the documents for tender notified by each party (being only documents to which a party proposes to refer to in submissions) and, in this regard, if only part of a document is to be relied upon, only part of the document should be reproduced (additionally, in relation to any email, the email “chain” should not be reproduced but only one copy of each individual email communication should be extracted and then placed in the bundle chronologically by reference to when it was sent);
  - (d) as *Part D* contains any of the lay affidavit material proposed to be relied upon by any party (without any annexures or exhibits) and, to the extent the affidavit refers to any document, a cross reference to Part C of the Court Book;
  - (e) as *Part E* contains any of the expert affidavit and report material proposed to be relied upon by any party (without any annexures or exhibits) and, to the extent the affidavit and report material refers to any document which is to be referred to by a party in submissions, a cross reference to Part C of the Court Book; and
  - (f) as *Part F* contains the Joint Report, the Epidemiology/Toxicology Report (if that report has been adopted by the Court pursuant to s 54A of the *Federal*



*Court Act*) and the Land Valuation Report (if that report has been adopted by the Court pursuant to s 54A of the *Federal Court Act*).

20. The Court Book contain double sided printing and, to the extent filed Court documents are reproduced, the Notice of Filing form is to be reproduced at the end of the relevant Court document.
21. By 7 March 2020, each party notify each other party of the objections which the notifying party has to material proposed by the other party to be contained in Parts C, D and E of Court Book and, in respect of each objection, the grounds of the objection.
22. By 14 March 2020, the parties confer and endeavour to resolve all objections.
23. By 12 noon on 20 March 2020, the parties file and serve a Consolidated List of Objections that contains a list of those objections that are pressed and, in respect of each such objection, the grounds of the objection and the response to those grounds provided by the counter-party.

***Next case management hearing***

24. The matters be listed for a case management hearing at 2.15pm on 29 November 2019.
25. Any application for leave to administer interrogatories be made returnable at 2.15pm on 29 November 2019.
26. The parties are to provide an agenda setting out any issues to be resolved at the case management hearing on 29 November 2019, together with any draft interrogatories, by midday on 28 November 2019.

**THE COURT NOTES THAT:**

27. In the event Shine Lawyers, the solicitors for the applicants in the Katherine and Oakey proceedings, commence a Pt IVA proceeding which raises issues common or substantially common to the issues in those proceedings then they have leave to approach the Associate to Lee J in Chambers to obtain a return date for that originating application on the next listing for case management of these proceedings, at which time the Court will consider the best way of case managing those proceedings in accordance with the requirements of the overarching purpose including



whether any separate issue in those proceedings can be determined at the initial trial of these proceedings.

Date that entry is stamped: 1 November 2019

*Warrick Soden*  
Registrar



**Schedule**

No: NSD1908/2016

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

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
Eighth Applicant	MARSHALLS TRANSPORT PTY LTD
Ninth Applicant	NICHOLAS MARSHALL
Tenth Applicant	MELISSA MARSHALL

No: NSD1155/2017

Second Applicant	SHARYN DANELLE HUDSON
Third Applicant	MEATIES PTY LTD (ACN 113 651 755) AS TRUSTEE FOR THE BSTS UNIT TRUST
Interested Person	BANK OF QUEENSLAND

No: NSD1388/2018

Second Applicant	ANTHONY CRAIG BARTLETT
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## SCHEDULE 1

### QUESTIONS OF FACT OR LAW COMMON TO THE CLAIMS OF THE INITIAL TRIAL APPLICANTS AND THE GROUP MEMBERS

#### FIRST STAGE HEARING AND SECOND STAGE HEARING

*Smith v Commonwealth of Australia*

(Williamstown Class Action)

#### Defined Terms

**AFFF** means aspirated Aqueous Film Forming Foam manufactured by 3M company.

**End Date** means the date on which the Respondent ceased using AFFF at Williamstown Base.

**EPBC Act** means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

**Relevant PFAS** means perfluorooctane sulfonate (**PFOS**), perfluorooctanoic acid (**PFOA**) and perfluorohexane sulfonate (**PFHxS**).

**Spent AFFF** means AFFF following discharge, or the same commingled with combustion by-products created during firefighting and fire-suppression.

**WLM 4FASOC** means the Fourth Further Amended Statement of Claim filed on 4 October 2019 in *Smith v Commonwealth*.

**Williamstown Base** means RAAF Base Williamstown in New South Wales.

## Questions

### FIRST STAGE HEARING

#### *Use and Properties of AFFF*

1. What was the nature and volume of the Respondent's use of AFFF at Williamtown Base during the period from 1976 to the End Date?
  - 1A. What is the End Date?
2. What were the Respondent's methods for storage, containment and disposal of Spent AFFF at Williamtown Base during the period from 1976 to the End Date?
3. Did the AFFF used at Williamtown Base during the period from 1976 to the End Date, and Spent AFFF, contain the Relevant PFAS? If so, in what approximate quantities or proportions?
4. What were the properties of the Relevant PFAS in relation to:
  - a. solubility and interaction with water;
  - b. persistence in soil, water and biota (including humans);
  - c. mobility and ability to migrate significant distances with little attenuation; and
  - d. toxicity.

<b>Questions</b>	
5.	By what pathways can humans and animals potentially be exposed to the Relevant PFAS?
6.	Was AFFF and / or Spent AFFF damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above), the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so, what was the nature of the environmental damage or potential environmental damage?
7.	Was AFFF and / or Spent AFFF causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above), the properties of the Relevant PFAS (see Questions 4 and 5 above), and/or by reason of the other characteristics of AFFF and/or Spent AFFF?
<b><i>Knowledge of properties of AFFF and Relevant PFAS</i></b>	
8.	<p>If “yes” to Question 6 above, did the Respondent know that AFFF and/or Spent AFFF was damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <ul style="list-style-type: none"> <li>a. what was the nature of the actual or potential environmental damage known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
9.	<p>Alternatively, if “yes” to Question 6 above, would a reasonable person in the position of the Respondent have known that AFFF and/or Spent AFFF was damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <ul style="list-style-type: none"> <li>a. what was the nature of the actual or potential environmental damage that would have been known to a reasonable person in the position of the Respondent; and</li> </ul>

<b>Questions</b>	
	b. when would that person have had that knowledge?
10.	<p>If “yes” to Question 7 above, did the Respondent know that AFFF and/or Spent AFFF was causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <p>a. what was known to the Respondent; and</p> <p>b. when did the Respondent have that knowledge?</p>
11.	<p>Alternatively, if “yes” to Question 7 above, would a reasonable person in the position of the Respondent have known that AFFF and/or Spent AFFF was causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <p>a. what would a reasonable person in the position of the Respondent have known; and</p> <p>b. when would that person have had that knowledge?</p>
<b>Remediation</b>	
12.	During the period from 1976 to date, what precautions has the Respondent taken to assess, avoid or reduce any risks associated with use of AFFF at Williamtown Base?
13.	Without limiting Question 12 above, during the period from 1976 to date, what steps has the Respondent taken to remediate land and water, which has been contaminated with the Relevant PFAS at and around Williamtown Base, and when were those steps taken?

<b>Questions</b>
<b><i>Williamtown Base</i></b>
14. Has the Respondent owned and occupied all or part of the land described in [16] of the WLM 4FASOC since 1941?
<b><i>Knowledge</i></b>
15. Did the Respondent know how the land and waters around Williamtown Base were used? If so: <ul style="list-style-type: none"> <li>a. what was known to the Respondent;</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
16. Alternatively, would a reasonable person in the position of the Respondent have known how the land and waters around the Williamtown Base were used? If so: <ul style="list-style-type: none"> <li>a. what would a reasonable person in the position of the Respondent have known; and</li> <li>b. when would that person have had that knowledge?</li> </ul>
17. Did the Respondent know where the AFFF used at Williamtown Base and / or Spent AFFF may flow? If so: <ul style="list-style-type: none"> <li>a. what was known to the Respondent;</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
18. Alternatively, would a reasonable person in the position of the Respondent have known where the AFFF used at Williamtown Base and / or Spent AFFF may flow? If so:

Questions	
	<ul style="list-style-type: none"> <li>a. what would a reasonable person in the position of the Respondent have known and</li> <li>b. when would that person have had that knowledge?</li> </ul>
19.	<p>Did the Respondent know that its use of AFFF at Williamtown Base during the period from 1976 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was damaging or potentially damaging to the environment? If so:</p> <ul style="list-style-type: none"> <li>a. what was the nature of the damage or potential damage known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
20.	<p>Alternatively, would a reasonable person in the position of the Respondent have known that the use of AFFF at Williamtown Base in the manner used by the Commonwealth during the period from 1976 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was damaging or potentially damaging to the environment? If so:</p> <ul style="list-style-type: none"> <li>a. What was the nature of the damage or potential damage that would have been known to such a reasonable person; and</li> <li>b. when would that person have had that knowledge?</li> </ul>
21.	<p>Did the Respondent know that its use of AFFF at Williamtown Base during the period from 1976 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was causative or potentially causative of adverse health effects in humans? If so:</p> <ul style="list-style-type: none"> <li>a. What was known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
22.	<p>Alternatively, would a reasonable person in the position of the Respondent have known that the use of AFFF at Williamtown Base in the manner used by the Commonwealth during the period from 1976 to the End Date (including storage, containment and disposal)</p>

<b>Questions</b>
<p>(see Questions 1 and 2 above) was causative or potentially causative of adverse health effects in humans? If so:</p> <ul style="list-style-type: none"> <li>a. What would a reasonable person in the position of the Respondent have known; and</li> <li>b. When would that person have had that knowledge?</li> </ul>
<p>23. Did the Respondent know that AFFF had contaminated the groundwater underneath Williamtown Base? If so, when did the Respondent know this?</p>
<p>24. Alternatively, would a reasonable person in the position of the Respondent have known that AFFF had contaminated the groundwater underneath Williamtown Base? If so, when would that reasonable person have had that knowledge?</p>
<b>SECOND STAGE HEARING</b>
<i>Precautions</i>
<p>25. Was the AFFF used at Williamtown Base:</p> <ul style="list-style-type: none"> <li>a. used as an operational requirement;</li> <li>b. a highly effective fire suppression product for, and the most appropriate substance to fight, fuel based fires;</li> <li>c. protective of life and operational equipment at Williamtown Base from fires and potential fires;</li> <li>d. used in circumstances where no reasonable alternative to AFFF was available from manufacturers during that period?</li> </ul>
<p>26. At any time from 1976, were there practical or cost-effective precautions or remediation measures that the Respondent could have taken in relation to the use, storage, containment and disposal of AFFF at the Williamtown Base?</p>

<b>Questions</b>
27. At any time from 1976, did the Respondent fail to take the precautions in Question 26 above at Williamtown Base?
<b><i>Extent of contamination</i></b>
28. Where and to what extent have Relevant PFAS emanating from Williamtown Base been transmitted to and in the area around Williamtown Base, in land, groundwater or surface water, biotic and abiotic matrices from 1976 (such further dates to be specified following the First Stage Hearing and the Hydrology, Hydrogeology and Remediation References)?
29. Where and to what extent will Relevant PFAS emanating from Williamtown Base be transmitted to and in the area around Williamtown Base, in land, groundwater or surface water, biotic and abiotic matrices in the future (such further dates to be specified following the First Stage Hearing and the Hydrology, Hydrogeology and Remediation References)?
<b><i>EPBC Act</i></b>
30. Was the use of AFFF at Williamtown Base in the manner used by the Commonwealth during the period from 1976 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) an “action” of the Respondent for the purposes of s 28(1) of the EPBC Act ( <b>relevant action</b> )?
31. Has the relevant action had, will the relevant action have, or is the relevant action likely to have, a significant impact on the environment within the meaning of s 28(1) of the EPBC Act?
32. Does the relevant action amount to a breach of s 28 of the EPBC Act?
33. Is the relevant action exempt from: <ul style="list-style-type: none"> <li>a. the operation of Part 3 of the EPBC Act, by virtue of Schedule 1 of the <i>Environmental Reform (Consequential Provisions) Act 1999</i> (Cth)?</li> </ul>

## Questions

- b. the operation of s 28(1) of the EPBC Act by virtue of s 28(2) and s 43B of the EPBC Act?

## *Recoverable heads of damage*

34. Do the categories of loss and damages that may be recovered as a result of any proven:
- a. substantial and unreasonable interference by the Respondent with the use and enjoyment of land;
  - b. breach of duty of care by the Respondent; or
  - c. contravention of s 28(1) of the EPBC Act by the Respondent,  
include:
    - d. diminution in the value of land;
    - e. loss of opportunity to have acquired property in a different area and obtain the benefit of increases in the market value of that land;
    - f. inconvenience, distress and vexation;
    - g. costs of relocating to the land owned by the Landowners;
    - h. costs of past and future medical expenses to deal with distress and vexation?
35. Do the categories of loss and damages that may be recovered as a result of any proven:
- a. substantial and unreasonable interference by the Respondent with the use and enjoyment of land;

## Questions

b. breach of duty of care by the Respondent; or

include

a. aggravated damages; or

b. exemplary damages?

## SCHEDULE 2

### QUESTIONS OF FACT OR LAW COMMON TO THE CLAIMS OF THE INITIAL TRIAL APPLICANTS AND THE GROUP MEMBERS

#### FIRST STAGE HEARING AND SECOND STAGE HEARING

*Hudson v Commonwealth of Australia*

(Oakey Class Action)

#### Defined Terms

**AACO** or **Oakey Base** means Army Aviation Centre Oakey in Queensland.

**AACO ASOC** means the Amended Statement of Claim filed on 9 April 2019 in *Hudson v Commonwealth* (**Oakey Proceeding**).

**AACO Relevant Area** means the area defined in [1(a)(i)] of the AACO ASOC.

**AFFF** means aspirated “Aqueous Film Forming Foam manufactured by 3M company.

**EPBC Act** means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

**End Date** means the date on which the Respondent ceased using AFFF at Oakey Base.

**Relevant PFAS** means perfluorooctane sulfonate (**PFOS**), perfluorooctanoic acid (**PFOA**) and perfluorohexane sulfonate (**PFHxS**).

**Spent AFFF** means AFFF following discharge, or the same commingled with combustion by-products created during firefighting and fire-suppression.

<b>Questions</b>
<b>FIRST STAGE HEARING</b>
<i>Use and Properties of AFFF</i>
1. What was the nature and volume of the Respondent’s use of AFFF at Oakey Base during the period from 1977 to the End Date?
1A. What is the End Date?
2. What were the Respondent’s methods for storage, containment and disposal of Spent AFFF at Oakey Base during the period from 1977 – to the End Date?
3. Did the AFFF used at Oakey Base during the period from 1977 the End Date, and Spent AFFF, contain the Relevant PFAS? If so, in what approximate quantities or proportions?
4. What were the properties of the Relevant PFAS in relation to: <ul style="list-style-type: none"> <li>a. solubility and interaction with water;</li> <li>b. persistence in soil, water, and biota (including humans);</li> <li>c. mobility and ability to migrate significant distances with little attenuation; and</li> <li>d. toxicity.</li> </ul>
5. By what pathways can humans and animals potentially be exposed to the Relevant PFAS?
6. Was AFFF and / or Spent AFFF damaging or potentially damaging to the environment by reason of being a non-naturally occurring

<b>Questions</b>	
	substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so, what was the nature of the environmental damage or potential environmental damage?
7.	Was the AFFF and / or Spent AFFF causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above), the properties of the Relevant PFAS, and/or by reason of other characteristics of AFFF and/or Spent AFFF (see Questions 4 and 5 above)?
<b><i>Knowledge of properties of AFFF and Relevant PFAS</i></b>	
8.	If “yes” to Question 6 above, did the Respondent know that AFFF and/or Spent AFFF was damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so: <ul style="list-style-type: none"> <li>a. what was the nature of the actual or potential environmental damage known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
9.	Alternatively, if “yes” to Question 6 above, would a reasonable person in the position of the Respondent have known that AFFF and/or Spent AFFF was damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so: <ul style="list-style-type: none"> <li>a. what was the nature of the actual or potential environmental damage that would have been known to a reasonable person in the position of the Respondent; and</li> <li>b. when would that person have had that knowledge?</li> </ul>
10.	If “yes” to Question 7 above, did the Respondent know that AFFF and/or Spent AFFF was causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent

<b>Questions</b>
<p>AFFF? If so:</p> <ol style="list-style-type: none"> <li>a. what was known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ol>
<p>11. Alternatively, if “yes” to Question 7 above, would a reasonable person in the position of the Respondent have known that AFFF and/or Spent AFFF was causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <ol style="list-style-type: none"> <li>a. what would a reasonable person in the position of the Respondent have known; and</li> <li>b. when would that person have had that knowledge?</li> </ol>
<b>Remediation</b>
<p>12. During the period from 1977 to date, what precautions has the Respondent taken to assess, avoid or reduce any risks associated with use of AFFF on Oakey Base?</p>
<p>13. Without limiting Question 12 above, during the period from 1977 to date, what steps has the Respondent taken to remediate land and water, which has been contaminated with the Relevant PFAS at and around Oakey Base, and when were those steps taken?</p>
<b>Oakey Base</b>
<p>14. Has the Respondent owned and occupied all or part of the land described in [6] of the AACO ASOC since 1969?</p>
<p>15. During the period since 1977 what was the land and water use in the Oakey Relevant Area?</p>
<b>Knowledge</b>

<b>Questions</b>	
16.	Did the Respondent know how the land and waters around Oakey Base were used? If so: <ul style="list-style-type: none"> <li>a. what was known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
17.	Alternatively, would a reasonable person in the position of the Respondent have known how the land and waters around Oakey Base were used? If so: <ul style="list-style-type: none"> <li>a. what would a reasonable person in the position of the Respondent have known; and</li> <li>b. when would that person have had that knowledge?</li> </ul>
18.	Did the Respondent know where the AFFF used at Oakey Base and / or Spent AFFF may flow? If so: <ul style="list-style-type: none"> <li>a. what was known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
19.	Alternatively, would a reasonable person in the position of the Respondent have known where the AFFF used at Oakey Base and / or Spent AFFF may flow? If so: <ul style="list-style-type: none"> <li>a. what would a reasonable person in the position of the Respondent have known; and</li> <li>b. when would that person have had that knowledge?</li> </ul>
20.	Did the Respondent know that its use of AFFF at Oakey Base during the period from 1977 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was damaging or potentially damaging to the environment? If so: <ul style="list-style-type: none"> <li>a. what was the nature of the damage or potential damage known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
21.	Alternatively, would a reasonable person in the position of the Respondent have known that the use of AFFF at Oakey Base in the manner used by the Commonwealth during the period from 1977 to the End Date (including storage, containment and disposal) (see

## Questions

Questions 1 and 2 above) was damaging or potentially damaging to the environment? If so:

- a. what was the nature of the damage or potential damage that would have been known to such a reasonable person; and
- b. when would that person have had that knowledge?

22. Did the Respondent know that its use of AFFF at Oakey Base during the period from 1977 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was causative or potentially causative of adverse health effects in humans? If so:

- a. what was known to the Respondent; and
- b. when did the Respondent have that knowledge?

23. Alternatively, would a reasonable person in the position of the Respondent have known that the use of AFFF at Oakey Base in the manner used by the Commonwealth during the period from 1977 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was causative or potentially causative of adverse health effects in humans? If so:

- a. what would a reasonable person in the position of the Respondent have known; and
- b. when would that person have had that knowledge?

24. Did the Respondent know that AFFF had contaminated the groundwater underneath Oakey Base? If so, when did the Respondent know this?

25. Alternatively, would a reasonable person in the position of the Respondent have known that AFFF had contaminated the groundwater underneath Oakey Base? If so, when would that reasonable person have had that knowledge?

## SECOND STAGE HEARING

### *Precautions*

26. Was the AFFF used at Oakey Base:
- used as an operational requirement;
  - highly effective fire suppression products for, and the most appropriate substance to fight, fuel based fires;
  - protective of life and operational equipment at Oakey Base from fires and potential fires;
  - used in circumstances where no reasonable alternative to AFFF was available from manufacturers during that period?
27. At any time from 1977, were there practical or cost-effective precautions or remediation measures that the Respondent could have taken in relation to the use, storage, containment and disposal of AFFF at Oakey Base?
28. At any time from 1977, did the Respondent fail to take the precautions in Question 26 above at Oakey Base?

### *Extent of contamination and remediation*

29. Where and to what extent have Relevant PFAS emanating from Oakey Base been transmitted to and in the area around Oakey Base, in land, groundwater or surface water, biotic and abiotic matrices from 1977 (such further dates to be specified following the First Stage Hearing and the Hydrology, Hydrogeology and Remediation References)?
30. Where and to what extent will Relevant PFAS emanating from Oakey Base be transmitted to and in the area around Oakey Base, in land, groundwater or surface water, biotic and abiotic matrices in the future (such further dates to be specified following the First Stage Hearing and the Hydrology, Hydrogeology and Remediation References)?
31. Is there no practical or cost-effective way of remediating soil, water, and other aspects of the biotic and abiotic matrices in the Oakey

Relevant Area that contain, or will contain, the Relevant PFAS?
<b><i>EPBC Act</i></b>
32. Was the use of AFFF at Oakey Base in the manner used by the Commonwealth during the period from 1977 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) an “action” of the Respondent for the purposes of s 28(1) of the EPBC Act ( <b>relevant action</b> )?
33. Has the relevant action had, will the relevant action have, or is the relevant action likely to have, a significant impact on the environment within the meaning of s 28(1) of the EPBC Act?
34. Does the relevant action amount to a breach of s 28 of the EPBC Act having regard to the exceptions in s 28(2) of the EPBC Act?
<b><i>Recoverable heads of damage</i></b>

35. Do the categories of loss and damages that may be recovered as a result of any proven:

- a. substantial and unreasonable interference by the Respondent with the use and enjoyment of land;
- b. breach of duty of care by the Respondent; or
- c. contravention of s 28(1) of the EPBC Act by the Respondent,

include:

- d. diminution in the value of land;
- e. loss of opportunity to have acquired property in a different area and obtain the benefit of increases in the market value of that land;
- f. inconvenience, distress and vexation; and
- g. costs of relocating to the land owned by the Landowners.

36. Do the categories of loss and damages that may be recovered as a result of any proven:

- a. substantial and unreasonable interference by the Respondent with the use and enjoyment of land;
- b. breach of duty of care by the Respondent;

include:

- c. aggravated damages; or
- d. exemplary damages?

### SCHEDULE 3

## QUESTIONS OF FACT OR LAW COMMON TO THE CLAIMS OF THE INITIAL TRIAL APPLICANTS AND THE GROUP MEMBERS

### FIRST STAGE HEARING AND SECOND STAGE HEARING

*Bartlett v Commonwealth of Australia*

(Tindal Class Action)

#### Defined Terms

**AFFF** means aspirated Aqueous Film Forming Foam manufactured by 3M company.

**End Date** means the date on which the Respondent ceased using AFFF at Tindal Base.

**EPBC Act** means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

**Relevant PFAS** means perfluorooctane sulfonate (**PFOS**), perfluorooctanoic acid (**PFOA**) and perfluorohexane sulfonate (**PFHxS**).

**Spent AFFF** means AFFF following discharge, or the same commingled with combustion by-products created during firefighting and fire-suppression.

**Tindal Base** means RAAF Base Tindal in the Northern Territory.

**TDL FASOC** means the Further Amended Statement of Claim filed on 29 August 2019 in *Bartlett v Commonwealth* (**Bartlett Proceeding**).

**TDL Relevant Area** means the Relevant Area as defined in [1(a)(i)] of the TDL FASOC.

Questions	
<b>FIRST STAGE HEARING</b>	
<i>Use and Properties of AFFF</i>	
1.	What has been the nature and volume of the Respondent’s use of AFFF at Tindal Base during the period from 1987 to the End Date?
1A.	What is the End Date?
2.	What has been the Respondent’s methods for storage, containment and disposal of Spent AFFF at Tindal Base during the period from 1987 to the End Date?
3.	Did the AFFF used at Tindal Base during the period from 1987 to the End Date, and Spent AFFF, contain the Relevant PFAS? If so, in what approximate quantities or proportions?
4.	What were the properties of the Relevant PFAS in relation to: a. solubility and interaction with water; b. persistence in soil, water, and biota (including humans); c. mobility and ability to migrate significant distances with little attenuation; and d. toxicity.

<b>Questions</b>	
5.	By what pathways can humans and animals potentially be exposed to the Relevant PFAS?
6.	Was AFFF and / or Spent AFFF damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above), the properties of the Relevant PFAS (see Questions 4 and 5 above), and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so, what was the nature of the environmental damage or potential environmental damage?
7.	Was the AFFF and / or Spent AFFF causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above), the properties of the Relevant PFAS (see Questions 4 and 5 above), and/or by reason of other characteristics of AFFF and/or Spent AFFF?
<b><i>Knowledge of properties of AFFF and Relevant PFAS</i></b>	
8.	<p>If “yes” to Question 6 above, did the Respondent know that AFFF and/or Spent AFFF was damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <ul style="list-style-type: none"> <li>a. what was the nature of the actual or potential environmental damage known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
9.	<p>Alternatively, if “yes” to Question 6 above, would a reasonable person in the position of the Respondent have known that AFFF and/or Spent AFFF was damaging or potentially damaging to the environment by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <ul style="list-style-type: none"> <li>a. what was the nature of the actual or potential environmental damage that would have been known to a reasonable person in the position of the Respondent; and</li> </ul>

<b>Questions</b>	
b.	when would that person have had that knowledge?
10.	<p>If “yes” to Question 7 above, did the Respondent know that AFFF and/or Spent AFFF was causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <p>a. what was known to the Respondent; and</p> <p>b. when did the Respondent have that knowledge?</p>
11.	<p>Alternatively, if “yes” to Question 7 above, would a reasonable person in the position of the Respondent have known that AFFF and/or Spent AFFF was causative or potentially causative of adverse health effects in humans by reason of being a non-naturally occurring substance, containing the Relevant PFAS (see Question 3 above) and the properties of the Relevant PFAS (see Questions 4 and 5 above) and/or by reason of other characteristics of AFFF and/or Spent AFFF? If so:</p> <p>a. what would a reasonable person in the position of the Respondent have known; and</p> <p>b. when would that person have had that knowledge?</p>
<b>Remediation</b>	
12.	During the period from 1987 to date, what precautions has the Respondent taken to assess, avoid or reduce any risks associated with use of AFFF on Tindal Base?
13.	Without limiting Question 12 above, during the period from 1987 to date, what steps has the Respondent taken to remediate land and water, which has been contaminated with the Relevant PFAS at and around Tindal Base, and when were those steps taken?

<b>Questions</b>
<b><i>Tindal Base</i></b>
14. Has the Respondent owned and occupied all or part of the land described in [5] of the TDL FASOC since 1987?
15. During the period since 1987 what was the land and water use in the Tindal Relevant Area?
<b><i>Knowledge</i></b>
16. Did the Respondent know how the land and waters around Tindal Base were used? If so: <ul style="list-style-type: none"> <li>a. what was known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
17. Alternatively, would a reasonable person in the position of the Respondent have known how the land and waters around Tindal Base were used? If so: <ul style="list-style-type: none"> <li>a. what would a reasonable person in the position of the Respondent have known; and</li> <li>b. when would that person have had that knowledge?</li> </ul>
18. Did the Respondent know where the AFFF used at Tindal Base and / or Spent AFFF may flow? If so: <ul style="list-style-type: none"> <li>a. what was known to the Respondent; and</li> <li>b. when did the Respondent have that knowledge?</li> </ul>
19. Alternatively, would a reasonable person in the position of the Respondent have known where the AFFF used at Tindal Base and / or

## Questions

Spent AFFF may flow? If so:

- a. what would a reasonable person in the position of the Respondent have known; and
- b. when would that person have had that knowledge?

20. Did the Respondent know that its use of AFFF at Tindal Base during the period from 1987 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was damaging or potentially damaging to the environment? If so:

- a. what was the nature of the damage or potential damage known to the Respondent; and
- b. when did the Respondent have that knowledge?

21. Alternatively, would a reasonable person in the position of the Respondent have known that the use of AFFF at Tindal Base in the manner used by the Commonwealth during the period from 1987 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was damaging or potentially damaging to the environment? If so:

- a. what was the nature of the damage or potential damage that would have been known to such a reasonable person; and
- b. when would that person have had that knowledge?

22. Did the Respondent know that its use of AFFF at Tindal Base during the period from 1987 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was causative or potentially causative of adverse health effects in humans? If so:

- a. what was known to the Respondent; and
- b. when did the Respondent have that knowledge?

## Questions

23. Alternatively, would a reasonable person in the position of the Respondent have known that the use of AFFF at Tindal Base in the manner used by the Commonwealth during the period from 1987 to the End Date (including storage, containment and disposal) (see Questions 1 and 2 above) was causative or potentially causative of adverse health effects in humans? If so:
- a. what would a reasonable person in the position of the Respondent have known; and
  - b. when would that person have had that knowledge?
24. Did the Respondent know that AFFF had contaminated the groundwater underneath Tindal Base? If so, when did the Respondent know this?
25. Alternatively, would a reasonable person in the position of the Respondent have known that AFFF had contaminated the groundwater underneath Tindal Base? If so, when would that reasonable person have had that knowledge?

## SECOND STAGE HEARING

### *Precautions*

26. Was the AFFF used at Tindal Base:
- used as an operational requirement;
  - highly effective fire suppression products for, and the most appropriate substance to fight, fuel based fires;
  - protective of life and operational equipment at Tindal Base from fires and potential fires;
  - used in circumstances where no reasonable alternative to AFFF was available from manufacturers during that period?
27. At any time from 1987, were there practical or cost-effective precautions or remediation measures that the Respondent could have taken in relation to the use, storage, containment and disposal of AFFF at the Tindal Base?
28. At any time from 1987, did the Respondent fail to take the precautions in Question 27 above at the Tindal Base?

### *Extent of contamination and remediation*

29. Where and to what extent have Relevant PFAS emanating from Tindal Base been transmitted to and in the area around Tindal Base, in land, groundwater or surface water, biotic and abiotic matrices from 1987 (such further dates to be specified following the First Stage Hearing and the Hydrology, Hydrogeology and Remediation References)?
30. Where and to what extent will Relevant PFAS emanating from Tindal Base be transmitted to and in the area around Tindal Base, in land, groundwater or surface water, biotic and abiotic matrices in the future (such further dates to be specified following the First Stage Hearing and the Hydrology, Hydrogeology and Remediation References)?
31. Is there no practical or cost-effective way of remediating soil, water, and other aspects of the biotic and abiotic matrices in the Tindal Relevant Area that contain, or will contain, the Relevant PFAS?



- a. substantial and unreasonable interference by the Respondent with the use and enjoyment of land;
- b. breach of duty of care by the Respondent; or
- c. contravention of s 28(1) of the EPBC Act by the Respondent,

include:

- d. diminution in the value of land;
- e. loss of opportunity to have acquired property in a different area and obtain the benefit of increases in the market value of that land;
- f. inconvenience, distress and vexation; and
- g. costs of relocating to the land owned by the Landowners.

36. Do the categories of loss and damages that may be recovered as a result of any proven:

- a. substantial and unreasonable interference by the Respondent with the use and enjoyment of land;
- b. breach of duty of care by the Respondent; or

include:

- c. aggravated damages; or
- d. exemplary damages?