HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **Mallonland Pty Ltd ACN 051 136 291**
First Appellant

ME & JL Nitschke Pty Ltd ACN 074 520 228
Second Appellant

and

Advanta Seeds Pty Ltd ACN 010 933 061
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2. ***Duty of care***: The respondent seed manufacturer (**Advanta**) clearly and prominently marked all bags of its 2010/2011 summer season MR43 sorghum seed (as it had for years) with a warning that it did not guarantee the purity of this batch of the product (outside certain tolerances), nor take responsibility for any negligence in the manufacture of the product. The warning invited the purchaser to return the bag, for a refund, if those terms were not acceptable. The seed was contaminated with an "off-type" seed which caused the appellant purchasers loss in the form of decreased revenue, or increased expenditure for their farming enterprises. Prior to the contamination, "off-types" were common, but were easily controlled and did not have a significant impact upon commercial sorghum production. The issue before this Court is: did Advanta owe the appellants a duty to take reasonable care to prevent the appellants suffering economic loss, in circumstances where it had expressly disclaimed responsibility to the appellants, there was no known reliance, and Advanta had little (if any) true appreciation for the risk of loss and its magnitude? (No – see Part V.)

3. ***Limitations***: The planting of contaminated MR43 seed on the land farmed by the appellants had an immediate impact upon the land, which led inevitably and

inexorably to the cash flow losses claimed by the appellants (as is apparent with the benefit of hindsight[1]). The issue is whether actionable damage occurred: (1) when the detriment was suffered, upon planting, or (2) only after the appellants' revenue was lost or cash was spent? (Actionable damage was suffered upon planting – see Part VI.)

Part III: Section 78B notices

4. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

5. The facts stated by the appellants require correction in one respect, and elaboration in another.

6. The appellants define an "off-type" as "a plant genetically related to sorghum used for grain crops, but not itself useable for grain crops" (appellants' submissions (**AS**) [8]). That is not correct, because the term "off-type" includes outcrosses to other varieties of grain sorghum which *are* useable for grain crops. A more appropriate definition is that proposed by the Association of Official Seed Certifying Agencies: "A plant or seed which deviates in one or more characteristics from that which has been described as being usual for the strain or variety".[2] Off-types are not necessarily harmful to commercial sorghum production.[3]

7. The elaboration concerns the bag terms, given their importance to this appeal. In addition to the terms described in AS [12], the terms printed on the bag made clear that: (1) the bag must only be opened if the buyer had read and agreed with the conditions (AJ [129(a)] CAB 141) and (2) the buyer should return the bag if the conditions were not acceptable (AJ [129(b)] CAB 141). The terms were "plain and clear" (AJ [142] CAB 143), and it was "difficult to see how the conditions could have been made more prominent" (AJ [139] CAB 142). The label stated that the product had a "Minimum Purity" of 99%, and a "Maximum Other Seeds" of 0.1% (J [444] CAB 78; AJ [130] CAB 141). There was no direct evidence, or finding at

[1] *Zabic v Alcan Gove Pty Ltd* (2015) 34 NTLR 209 at 220 [47] (Riley CJ, Southwood and Hiley JJ), approved in *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1 (***Alcan Gove***) at 18 [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[2] See Ninth Amended Defence at (DEF.PLE.0001) [1B(d)] (RFM 77); Second Amended Reply at [4] (RFM 146).
[3] Report of Hosking dated 3 July 2019 (PLA.EXP.0014) (**Hosking Report**) at [8.1] (RFM 265).

trial, that the number of off-type seeds exceeded the tolerances printed on the bag (J [454] CAB 80).[4]

Part V: Argument

Summary

8. The Court of Appeal was correct to uphold the finding that no duty of care arose. By its disclaimer, Advanta made clear that it refused to take any relevant responsibility toward the appellants. In light of that stated unwillingness, it also gave the appellants an opportunity to control, indeed avoid, their exposure to the risk of the bags containing a small amount (up to 0.1%) of non-MR43 seed, by returning the bag, for a refund. The appellants did not plead or prove known reliance. The appellants pleaded that Advanta knew or should have known, prior to selling them MR43 in 2010/11, that by 2009 there had been off-types with shattering characteristics present in MR43, but that finding was not made at trial nor sought on appeal. Advanta's knowledge of the risk and its magnitude was limited. Having regard to all of the relevant salient features, this was not a case warranting a departure from the general rule that damages for pure economic loss are not recoverable.[5]

9. Some prefatory observations, developed in more detail below, are apt in relation to the AS.

10. *First*, it is necessary to distinguish between: (1) an implied assumption of responsibility for a thing or matter;[6] (2) the absence of any implied assumption of responsibility;[7] and (3) an express disclaimer of responsibility,[8] as in this case. An express disclaimer of responsibility is not the true obverse of an implied assumption of responsibility, nor synonymous with the bare absence of the assumption of responsibility. The discernment of whatever legal relation might or might not arise between parties in (1) or (2) above necessarily requires the concurrent weighing of

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[4] This is why the appellants' allegation that the label was misleading or deceptive failed.
[5] See *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* (2014) 254 CLR 185 (***Brookfield***) at 200 [22] (French CJ); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 (***Woolcock***) at 530 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (***Perre***) at 219 [101] (McHugh J).
[6] AS [21].
[7] AS [23].
[8] *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 (***Butcher***) at 608 [49] (Gleeson CJ, Hayne and Heydon JJ); see also *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 (***Dederer***) at 356 [79] (Gummow J), 408 [283] (Heydon J agreeing) – in relation to a foreseeable risk, the giving of a warning in relation to the risk is a reasonable response and the law demands no more and no less.

the features giving rise to the assumption, along with other salient features of the position between the parties.[9] An express disclaimer of responsibility goes further – it defines the basis on which the parties are choosing to deal with the matter or thing. The discernment of whether a duty of care might or might not arise must necessarily begin with an assessment of the express disclaimer of responsibility (which was found to be prominent in this case). If the disclaiming of any responsibility occurs in circumstances where the other party has a real, even if sub-optimal, option as to whether to proceed, then that must generally be decisive. Considerations of personal autonomy and the entitlement to protect legitimate interests, point powerfully to this outcome. This is not to say that other features of the parties' dealings should not be considered (which the courts below did), but the significance or salience of them must be assessed in light of how the parties chose to deal with the thing or matter.

11. *Second*, the courts below did not, either literally or in substance, approach the matter on the basis of a disclaimer "overwhelming"[10] other features, but rather approached the matter as described above.[11] That is, the disclaimer of responsibility was a defining feature of the relationship between the parties in relation to the MR43 seed, which powerfully pointed against the imposition of a duty of care. The appellants' suggestion that the disclaimer "overwhelmed" all other features, respectfully, promotes the erroneous approach that all recognised salient features must be considered and given comparable weight in a salient features assessment.[12]

12. *Third*, "mass produced" and "standardised"[13] goods constituting one homogenous "context"[14] for considering whether a duty of care arises (and in contrast to "the context of negligence in providing information and advice"[15]) is both contrary to settled authority in this Court and, respectfully, illusory. It is contrary to the authorities set out at AS [16]. Outside established categories, the law of negligence proceeds by analogical reasoning, based on the principle and policy underlying the precedent cases.[16] Drawing a distinction in pure economic loss cases between

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[9] cf AS [20], [25] and [30].
[10] AS [15], [27] and [33].
[11] See also [20]-[26] below.
[12] See [17] below.
[13] AS [23], [25] and [47].
[14] AS [18] and [24].
[15] AS [20] and [25].
[16] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (***Crimmins***) at 32 [73] (McHugh J).

manufactured goods and the provision of advice has no basis in principle, policy or precedent. It is illusory. The provision of information with the product regarding its nature, use and limitations, in many cases may be as critical to the product being used for its intended purpose as the provision of advice. The point is illustrated by AS [23] that the seed was put into the market "… so that end-users could buy them … according to their description (MR43 seed)." The description of the product included information which could vary from batch to batch, such as the germination rate and seed purity[17] and the basis on which the product was supplied. The description and the disclaimer were inextricably connected.[18]

10 13. *Finally*, the posited distinction between "disclaimer" and "warning" at AS [25]-[28], respectfully, ascribes labels in a way deprecated in this area of jurisprudence.[19] The true principle requires assessing what the disclaiming party was trying to do by the disclaimer, as examined from the point of view of the careful reader.[20]

Recovery for pure economic loss is the exception, not the rule

14. Advanta agrees there is no "general test" for determining the existence or non-existence of a duty of care.[21] This Court takes an incremental approach, examining the cases and their bases in principle and policy, to determine the "salient features" which weigh in favour of or against the imposition of a duty in the present case.[22]

15. Equally, this Court as a matter of principle has consistently treated the recovery of
20 pure economic loss as a special category of case.[23] As McHugh J observed in *Perre*: "even with the demise of the exclusionary rule, courts in most jurisdictions still require a plaintiff in a pure economic loss case to show some special reason why liability should be imposed on the defendant,"[24] and "any potential claimant in a

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[17] J [444] CAB 78, [461] CAB 81, and [466] CAB 82.
[18] Advanta does not accept, as a matter of fact (nor was such finding sought or obtained below) that MR43 is analogous to "standardised mass-produced goods" produced in factories. The MR43 seed in dispute was grown in open fields at the Cavaso Farm (J at [339]-[342] CAB 63). There was no allegation at first instance that MR43 was a mass produced product and the trial judge made no such finding.
[19] *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 569 (Barwick CJ); *Tame v New South Wales* (2002) 211 CLR 317 at 381 [191] (Gummow and Kirby JJ).
[20] *Butcher* at 608 [49] (Gleeson CJ, Hayne and Heydon JJ). See also *Dederer* at 356 [79] (Gummow J), 408 [283] (Heydon J agreeing).
[21] *Brookfield* at 201 [24] (French CJ); AS at [16].
[22] *Crimmins* at 32 [73] (McHugh J).
[23] *Bryan v Maloney* (1995) 182 CLR 609 (***Bryan***) at 619 (Mason CJ, Deane and Gaudron JJ); *Brookfield* at 200 [22] (French CJ).
[24] *Perre* (1999) 198 CLR 180 at 209 [72].

novel situation should affirmatively demonstrate that its loss deserves vindication via the law of negligence."[25]

16. The Court of Appeal was correct to proceed on the basis that imposing a duty of care in the present case would be an expansion[26] or departure from[27] the general rule. It was also correct to find, for the reasons which follow, that no departure was warranted in this case.

Assumption of responsibility as a relevant salient feature

17. The incremental approach based on "salient features" is dynamic – not every factor will apply in each case,[28] and certain factors will assume greater importance in some cases than in others. Consistent with that approach to discerning the legal relations, if any, in relation to a thing or matter, in *Perre* and *Barclay v Penberthy*,[29] a duty was found to arise due to the presence of features *other than* assumption of responsibility.[30] That does not diminish the weight of assumption of responsibility as a salient feature. As the appellants acknowledge,[31] it was an important part of the House of Lords' seminal decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[32] and in this Court's decisions in *Bryan* and *Woolcock*. The importance of assumption of responsibility was affirmed in *Brookfield*, this Court's most recent analogous decision concerning pure economic loss.[33] The concept is important because it raises notions of assumpsit, and the voluntary undertaking of responsibility which could justify the imposition of a duty.[34]

18. Contrary to the appellants' submissions, assumption of responsibility is relevant to economic loss cases for manufactured goods. The House of Lords' decision in *Junior*

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[25] Ibid 213 [83].
[26] AJ [227] CAB 163 (Morrison JA).
[27] AJ [296] CAB 179 (Bond JA).
[28] *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at 676 [104] (Allsop P).
[29] (2012) 246 CLR 258 (***Barclay***).
[30] See [33] below. In both *Barclay* and *Perre*, the Court placed significant weight on the defendant's knowledge, and the plaintiffs' particular vulnerability: see *Barclay* at 284 [43] and [44], and *Perre* at 194-195 [13], 207-208 [67]-[69], 256-258 [211]-[213], 288 [294] and 327 [412]. Note that in *Brookfield* at 233 [143], Crennan, Bell and Keane JJ explained *Barclay* on the basis that there was an assumption of responsibility under the charter contract.
[31] AS [21].
[32] [1964] AC 465 (***Hedley Byrne***).
[33] *Brookfield* at 200 [22] (French CJ), 226 [122], 228 [127]-[128] and 235 [150] (Crennan, Bell and Keane JJ).
[34] *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* (2015) 48 WAR 376 (***Swick***) at 443 [370] (Murphy JA and Edelman J); see also *Bryan* at 627 (Mason CJ, Deane and Gaudron JJ), discussing the undertaking by the builder in that case.

Books Ltd v Veitchi Co Ltd[35] has been explained on the basis that the supplier had assumed a direct responsibility to the building owner.[36] It was also discussed as a relevant salient feature in *Swick*.[37] The case failed on the issue of breach, but the majority (Murphy JA and Edelman J) reviewed the authorities in detail, and noted that: "Beyond cases of assumption of direct responsibility there is limited scope for a duty of care being owed by a manufacturer to non-contracting parties to avoid carelessly inflicting pure economic loss."[38]

19. Advanta did not, either voluntarily or by being "called upon",[39] assume responsibility to the end users of the seed – indeed it expressly stated it accepted no responsibility. It could have done so, by guaranteeing that the product would be free from weed seeds, or by taking steps to learn of each individual farmer's requirements, and undertaking to supply a product meeting those requirements. Instead, as the appellants note, Advanta simply placed its goods into the market.[40] That does not indicate that assumption of responsibility is inapplicable in the present case – to the contrary, it was an applicable feature which pointed against the imposition of a duty.

Disclaimer negating a duty of care is consistent with law and policy

20. The Court of Appeal and trial judge were correct to find that the disclaimer negated any assumption of responsibility in this case. That finding was consistent with authority, and with a proper understanding of the disclaimer in context.

21. One of the inherent features of selling a product through a distributor, as Advanta did, is that the manufacturer has no contractual relationship with the buyer. The manufacturer cannot control, by contract, the terms on which the product is supplied.

22. That poses a problem for manufacturers like Advanta, because the manufacture of seeds is an inherently risky process. It is not possible for any seed manufacturer, however cautious, to eliminate the risk of off-types occurring.[41] Seed production

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[35] [1983] 1 AC 520.
[36] *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507 at 527-528 (Robert Goff LJ).
[37] *Swick* at 449-450 [390]-[392].
[38] *Swick* at 450 [392].
[39] AS [23].
[40] AS [23].
[41] Statement of Barry James Croker signed 11 March 2020 (DEF.LAY.0014) at [72] (RFM 180-181). This evidence was not challenged at trial. See also *Dovuro Pty Ltd v Wilkins* (2000) 105 FCR 476 at 507 [113] (Finkelstein J) and *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 (***Dovuro***) at 321-322 [4] and 324 [13] (Gleeson CJ).

occurs in open fields exposed to nature, and not in a manufacturing plant.[42] As the risk of contamination cannot be eliminated, seed manufacturers implement various strategies designed to bring the level of risk within an acceptable tolerance. As the Court of Appeal noted, the farmers would have readily understood the reference to "tolerances" on the label (AJ [130] CAB 141). Additionally, Advanta took steps to make any purchaser aware that the purity of seeds was not guaranteed, and the degree of liability which Advanta was prepared to accept.

23. The Court of Appeal was correct to consider the lengths Advanta took to ensure the terms were printed on the bags (AJ [140]-[142] CAB 142-143). Whether a defendant assumed or refused responsibility depends on the conduct of the defendant not the plaintiff. However, it is not correct to say the process was entirely "unilateral", or self-defined by Advanta (AS [25], [27]). As the Court of Appeal noted, the bag clearly conveyed that: (1) it should only be opened if the purchaser had read and agreed with the conditions; and (2) the purchaser should return the bag if the conditions were not acceptable (AJ [129(a) and (b)] CAB 141). Like the bank in *Hedley Byrne*, Advanta made clear the basis on which the product was supplied, and that it disclaimed any assumption of a duty. If the farmers were not prepared to take the seed on the bag terms, then they could return the bag, obtain a full refund, and source seed from another supplier. If the farmers chose to open the bag and plant the seed, then they could not disregard the terms on which it was supplied.

24. It was not necessary for Advanta to warn that the bags could contain an off-type with a shattering characteristic. Advanta itself was not aware that the seeds contained an off-type of that kind until well after the seeds had been planted.[43] As the Court of Appeal found, the bag made clear that "the risk of using the product lay with the buyer and that [Advanta] was not accepting any responsibility for loss and damage caused by negligence on its part." (AJ [131] CAB 141). That was sufficient to enable the farmers to make a commercial decision whether to accept that risk.

25. The appellants' building example is not an apt one for these reasons. First, it assumes an assumption of responsibility by the builder, where assumption of responsibility is the precise issue the example seeks to test. Second, whether a duty of care ought to be imposed in building cases has proven to be a contentious issue, making building

[42] See brief description in AJ [20] CAB 119.
[43] J [417] CAB 74 and [474] CAB 83.

cases of measured, if any, utility by way of analogy.[44] Third, the only relevant consideration to test against is the plain, conspicuous language employed by Advanta in this case. Consideration of language, in other cases, provides little assistance.

26. There was no error of principle in finding that the disclaimer negated a duty of care. That finding was consistent with authority, which does not appear to be challenged. It is consistent with this Court's concern to protect the autonomy of the individual, and the ability of businesses to pursue and protect their legitimate business interests.[45] It does not require any "contractual analogy", because there was no suggestion that the bag terms applied to the farmers contractually. Instead, the courts below considered whether the bag terms revealed a disclaimer of any assumption of responsibility, and found that they did (AJ [133] CAB 142; J [205] CAB 45). In any event, in circumstances where the disclaimer assured the grower that the bag could be returned to the distributor and Advanta would ensure a refund if the disclaimer terms were unacceptable, analogies to contract are open.

Salient features do not support a duty of care

Dovuro provides limited assistance regarding salient features

27. Whilst *Dovuro* contains helpful statements of principle, it is not particularly helpful in guiding this Court's application of the salient features in this case, for three reasons. First, *Dovuro* did not involve a disclaimer of the present kind. It cannot provide guidance on where or how that feature should be weighed in the analysis. Second, McHugh J did not state why the duty of a manufacturer extends (without more) to pure economic loss, or cite any authority which would allow that conclusion to be understood. As the Court of Appeal noted (AJ [51], [308], [316] CAB 125, 182, 183-184), there is authority supporting the opposite conclusion at the intermediate appellate level.[46] In any event, McHugh J's conclusion did not involve the application of any salient features. Third, Hayne and Callinan JJ noted that a duty "*could*, in some circumstances" be extended, but not that it necessarily *should*, and their Honours warned that "assumptions about the respective vulnerabilities of

[44] *Sullivan v Moody* (2001) 207 CLR 562 at 579-580 [50] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).
[45] *Perre* at 223-5 [114]-[117] (McHugh J); *Hill v Van Erp* (1997) 188 CLR 159 at 179 (Dawson J).
[46] *Minchillo v Ford Motor Company of Australia* (1995) 2 VR 594 at 595-599 (Brooking J) and 618-619 (Ormiston J, with whom Fullagar J agreed at 595) and *Swick* at 450 [392] (Murphy JA and Edelman J).

experienced large scale farmers and a seed supplier *should not be made too readily*"[47] (emphasis added).

28. The Court of Appeal was correct to regard *Dovuro* as "at best … suggest[ing] that a seed manufacturer might owe a duty of care to end users, in respect of economic loss, in a different factual scenario" (AJ [173] CAB 151).

Knowledge and control of the risk

29. Advanta agrees a defendant's actual knowledge of the relevant risk and its magnitude is a relevant consideration, although it is not always decisive.[48] Here Advanta neither knew nor should have known of a risk of harm of the kind or magnitude suffered by the appellants.

30. Advanta admitted it knew, in 2009, that sorghum off-types had been identified in three varieties of commercial grain sorghum it produced and sold, including MR43 (AJ [24(a)] CAB 120). However, knowledge of the past presence of off-types does not establish awareness of a risk of harm. That is because off-types are not necessarily harmful – they do not express, or express to a lesser extent, the usual characteristics for that variety of plant.[49] The unusual features of this off-type were that: (1) it had a shattering head, which allowed the seed to spread; (2) the fallen seed germinated and grew vigorously; and (3) it persisted in the environment, so that its effects could be felt over many seasons (AJ [4]-[5] CAB 118). There was no evidence that Advanta knew or ought to have known that there was a risk of an off-type in MR43 which could cause damage of the kind and magnitude claimed in this case.

31. The appellants alleged that Advanta should have known of an outbreak of shattercane in the Burdekin region of Queensland in the 1970s, and that there had been off-types with a shattering characteristic in MR43 as early as 2008.[50] However, those allegations were denied,[51] and the trial judge did not make the factual findings sought by the appellants. Instead, the trial judge found that: (1) Advanta only became

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[47] *Dovuro* at 368 [159].
[48] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 561 [28] (Gleeson CJ), 582 [95] (McHugh J) and 596 [145] (Gummow and Hayne JJ).
[49] Ninth Amended Defence (DEF.PLE.0001) at [1B(d)] (RFM 77), admitted in Second Amended Reply at [4] (RFM 146).
[50] Seventh Amended Statement of Claim at [20(f)] (RFM 21) and [20(j)] (RFM 23-24).
[51] Ninth Amended Defence (DEF.PLE.0001) at [20(g)] (RFM 96) and [20(j)] (RFM 97).

aware that the off-types had a shattering characteristic around the end of January 2011 (J [417], [474] CAB 74, 83); (2) the complaints about off-types in the 2008/2009 season did not persist into the 2009/2010 season (J [441] CAB 77); and (3) "[h]ad the 2010/2011 summer season MR43 been the same as the 2008/2009 summer season MR43 or the 2009/2010 summer season MR43, there would have been no significant level of contamination" (J [442] CAB 77).

32. Advanta's only experience of a shattering off-type prior to 2010 suggested that either: (1) it did not grow vigorously; or (2) it did not persist into subsequent seasons. In either case, it would not have posed a serious, persistent threat to growers. Advanta's admissions and knowledge must be viewed in that context. Advanta's admission that it was aware that an off-type with a shattering characteristic could cause "damage" (AJ [22] CAB 119) was not an admission of knowledge of the potential for economic loss of the kind and scope claimed by the appellants. Similarly, the admission that it was reasonably foreseeable that the land could not be used to its full commercial potential during the eradication period (AJ [26] CAB 120) must be viewed in the context that any eradication period would be minimal. Advanta knew that a sorghum off-type with a shattering characteristic would be more difficult to control or eradicate if the plant germinated, matured and dropped seed, and if the farmer continued to grow sorghum (AJ [24] CAB 120). However, without knowledge of the vigorous growth and persistence, this admission is *not* one that it was "difficult and costly to control" (AS [37]), or that it would be "more difficult than any other off-type" (AS [43]).

33. Advanta's limited knowledge of the risk and its magnitude is in stark contrast to the cases identified by the appellants. In *Perre*, the defendant Apand knew of the threat that bacterial wilt posed to growers, that the "major cause of spread" was the use of non-certified seed, and of the potential loss it could cause – both immediate crop losses, and the inability to export potatoes to Western Australia due to the regulation affecting the plaintiffs in that case.[52] It knew that bacterial wilt could be "serious and pernicious" and "cause heavy losses to growers", taking 4-5 years to clear.[53] It knew that the economic impact on a grower with the disease could be "disastrous"[54] and

[52] *Perre* at 256-258 [211]-[212] (Gummow J).
[53] *Perre* at 236 [150] (McHugh J).
[54] *Perre* at 208 [68]-[69], 233 [141] and 236 [150] (McHugh J), 298 [325] (Hayne J) and 311 [363] (Callinan J).

effectively put the growers within 20km of the outbreak out of business.[55] Advanta did not have knowledge of this kind.

34. *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[56] and *Barclay* are both cases involving actual knowledge of a risk of harm to the defendant as an individual. The defendants had knowledge (or ought to have known) that carelessness in their operations (of the dredge and the aeroplane respectively) would affect the plaintiffs in the precise way that occurred. By contrast, Advanta did not have knowledge of every purchaser of its seed, and it had no knowledge prior to 2011 that the off-types would affect the appellants in the way they did.

10 35. Accordingly, there is no basis for affording "heightened significance" (AS [44]) to Advanta's control over the risk. Advanta exercised control over the production process, but its control was not absolute for two reasons. First, as noted above, seed production involves natural, and therefore inherently variable, processes, and it is not possible for any seed manufacturer, however cautious, to eliminate the risk of off-types occurring. Second, by its disclaimer, Advanta warned prospective purchasers that it did not guarantee the purity of the seeds, and that if they were not willing to accept that risk, they should return the product. The appellants' position was therefore markedly different from the plaintiffs in *Perre*, who had no way of appreciating the existence of the risk, or controlling their exposure to it.

20 *Vulnerability*

36. Vulnerability has emerged as an important prerequisite to imposing a duty of care in cases of pure economic loss.[57] Its absence can lead to a finding that no duty was owed, as was the case in *Woolcock*.[58] However, its existence does not of itself inform its significance among the salient features. Thus Morrison JA concluded: "vulnerability was one salient feature to assess in the whole process." (AJ [213] CAB 161). It needed to be weighed against the negation of any assumption of responsibility, the absence of any pleaded known reliance, the limitations on Advanta's knowledge and control of the risk, and the protection of individual autonomy posed by the disclaimer. Having regard to all of those features, it was

[55] *Perre* at 327 [412] (Callinan J).
[56] (1976) 136 CLR 529.
[57] *Woolcock* at 530 [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Perre* at 225 [118] (McHugh J).
[58] *Woolcock* at 533 [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ) and 552 [94] (McHugh J).

appropriate to conclude (as the trial judge and Court of Appeal did) that no duty ought to be imposed.

Indeterminacy

37. Advanta accepts that the purchasers of MR43 were not an indeterminate class. However, the absence of indeterminate liability does not provide a positive basis for finding a duty of care. Indeterminate liability is a policy consideration militating against the imposition of a duty.[59] However, it does not follow that if indeterminacy can be addressed, a duty will necessarily be imposed.[60]

Coherence

10 38. The matters identified in paragraphs 14-37 above provide a sufficient basis to reject a duty in this case. However, Bond JA correctly said that if the liability of manufacturers was to be extended, that should be done by the legislature. That reasoning is consistent with the approach taken by four members of this Court in *Brookfield*. The plaintiff in that case claimed damages for the costs of rectifying latent defects in an apartment building. The *Home Building Act 1989* (NSW) gave certain classes of purchasers statutory warranties in respect of "residential building work". The plaintiff did not qualify for the statutory protection. Crennan, Bell and Keane JJ considered that the enactment of the *Home Building Act* reduced the need to otherwise expand the law to protect consumers.[61] Their Honours observed:

> 20 By enacting the scheme of statutory warranties, the legislature adopted a policy of consumer protection for those who acquire buildings as dwellings. To observe that the *Home Building Act* does not cover claims by purchasers of serviced apartments is not to assert that the Act contains an implied denial of the duty propounded by the respondent. Rather, it is to recognise that **the legislature has made a policy choice to differentiate between consumers and investors in favour of the former. That is not the kind of policy choice with which courts responsible for the incremental development of the common law are familiar**; and to the extent that deference to policy considerations of this kind might be seen to be the leitmotif of this Court's
> 30 decision in *Bryan v Maloney*, **the action taken by the New South Wales**

[59] *Bryan* at 618 (Mason CJ, Deane and Gaudron JJ).
[60] *Perre* at 225 [118] (McHugh J).
[61] *Brookfield* at 230 [134].

> **legislature served to relieve the pressure, in terms of policy, to expand the protection available to consumers**.[62] (emphasis added)

39. Gageler J (as his Honour then was) took a similar approach, concluding: "If legal protection is now to be extended, it is best done by legislative extension of [the existing] statutory forms of protection."[63] The majority in *Swick* observed that this reasoning "also applies to cases involving the liability of manufacturers to ultimate purchasers, where liability is governed by legislation including detailed provisions in the *Australian Consumer Law 2011* (Cth) concerning liability of manufacturers to consumers."[64] As Gummow J noted in *Perre*, the presence of a regulatory regime can be relevant to the existence and scope of a duty of care.[65]

40. As Bond JA observed, the legislature has created statutory protection for certain end-users of manufactured products (AJ [321] CAB 186). Parliament has made a policy decision to differentiate between "consumers"[66] and other purchasers. Those "other purchasers" are not without protection – they are still able to bring claims for misleading or deceptive conduct, as the appellants did in this case. The availability of consumer guarantees, and the protection of s 18 of the *Australian Consumer Law*, reduces the pressure to expand, by common law means, the remedies available in respect of manufacturers. Bond JA's approach was consistent with legislative values influencing the common law rule without, on their own, being determinative.

41. Imposing a duty of care in this case would create two further incoherencies. First, the appellants appear to accept that the disclaimer would be effective if contractual. It would create an incoherence to treat the disclaimer as ineffective simply because it was distributed by an intermediary on a like basis. Second, the sale contracts between Advanta and the distributors (who in turn sold the MR43 to the appellants) expressly limited Advanta's liability, including for negligence (J [121] CAB 26). To adopt the language of *Brookfield*, it would be an anomalous and incoherent result if Advanta was found to owe a greater liability to the farmers than to the distributors to whom the seed was supplied, and by whom Advanta was paid for the product.[67] Such a

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[62] *Brookfield* at 230 [134].
[63] *Brookfield* at 245 [186].
[64] *Swick* at 453 [404]-[408] (Murphy JA and Edelman J).
[65] *Perre* at 239 [160].
[66] *Australian Consumer Law 2011* (Cth) s 3.
[67] *Brookfield* at 214 [69] (Crennan, Bell and Keane JJ).

finding would impede, in an unprincipled and irrational way, that significant part of the supply chain in an efficient market economy that relies upon distributors.

Conclusion: no basis to impose a duty of care

42. The general rule is that damages for pure economic loss are not recoverable, even if that loss is foreseeable, other than in special cases.[68] Those special cases ordinarily involve assumption of responsibility or known reliance. Neither arose in this case. In fact, Advanta expressly disclaimed responsibility in a clear way.

43. Advanta had no knowledge of the pernicious characteristics of the off-type in dispute. Advanta had no knowledge of the appellants individually. The remaining salient features do not warrant the imposition of a duty.

44. The Court of Appeal was correct to find that this was not a special case warranting the imposition of a duty of care.

Part VI: Notice of contention

Summary

45. The appeal should be dismissed on the additional basis that the claims were statute barred.[69] The proceeding was commenced on 24 April 2017. The relevant limitation periods require the claim to be brought within six years of accrual of the cause of action. Accordingly, the question is whether the cause of action accrued – and in particular, whether actionable damage was suffered – prior to 24 April 2011. The answer is yes. That is because damage was immediate and inevitable upon planting of the MR43 seed, which occurred prior to 24 April 2011.

46. The appellants claim damages for financial losses to their farming enterprises as a result of having to eradicate the MR43 off-types from the land. It is clear with the benefit of hindsight that it was the sowing of the MR43 seed on the land used by the appellants which inevitably and inexorably changed their farming practices, increased their expenditure and decreased their income. Accordingly, damage sufficient to complete the cause of action occurred upon planting of the MR43 seed.

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[68] *Woolcock* at 530 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Brookfield* at 200 [22] (French CJ) and 228 [127] (Crennan, Bell and Keane JJ); *Bryan* at 618-619 (Mason CJ, Deane and Gaudron JJ).
[69] Section 10(1) of the *Limitation of Actions Act 1974* (Qld) and s 14(1) of the *Limitation Act 1969* (NSW).

47. The statements in *Wardley* that the plaintiff must suffer "actual" rather than "contingent" damage,[70] and *Hawkins v Clayton* that the cause of action accrues when the plaintiff first suffers damage caused by the defendant's breach of duty,[71] in relation to the commencement of time limits in negligence cases have proved durable[72] as providing a means for ensuring like cases achieve like outcomes, and a principled answer to new factual circumstances. Respectfully, the courts below failed to adhere to the relevant principles in those cases. That limitation periods are applied in a principled way by courts is important to ensure fidelity with the legislative choices they embody and important countervailing interests they protect.[73]

10 *"Damage" and the use of hindsight*

48. What may qualify as actionable damage is a question of fact and degree, and ultimately of policy.[74] As the majority observed in *Wardley*, "the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise interest infringed by the negligent act or omission."[75] It may also require consideration of the "nature of the interest infringed and… the nature of the interference to which it is subjected."[76] In cases of economic loss, damage can crystallise upon the plaintiff suffering a detriment, even if the plaintiff is not required to advance any money until a later date.[77]

49. Hindsight is permitted in determining when a cause of action accrues.[78] *Alcan Gove*
20 illustrates this. Mr Zabic inhaled asbestos fibres working at Alcan's alumina refinery. He subsequently developed malignant mesothelioma, and sued Alcan for damages for personal injury. Alcan argued that the claim was barred under the *Workers Rehabilitation and Compensation Act* (NT), which barred certain claims which had

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[70] *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 (***Wardley***) at 526-527, 532-533 (Mason CJ, Dawson, Gaudron and McHugh JJ) and 537 (Brennan J).
[71] (1988) 164 CLR 539 (***Hawkins***) at 561 (Brennan J), 588 (Deane J) and 599 (Gaudron J).
[72] E.g. *Alcan Gove* at 7 [8] (French CJ, Kiefel, Bell, Keane and Nettle JJ); *Talacko v Talacko* (2021) 272 CLR 478 at 496 [43], 497 [46] and [47] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).
[73] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552-553 (McHugh J) and 544 (Dawson J agreeing); *Price v Spoor* (2021) 270 CLR 450 at 460-461 [14]-[15] (Kiefel CJ and Edelman J), and 481-483 [82]-[83] and [88] (Steward J).
[74] *Alcan Gove* at 7 [8] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[75] *Wardley* at 527 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[76] Ibid.
[77] *Forster v Outred & Co* [1982] 1 WLR 86 at 98 (Stephenson L.J.), 100 (Dunn LJ); *Wardley* at 528-529 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[78] *Zabic v Alcan Gove Pty Ltd* (2015) 34 NTLR 209 at 220 [47] (Riley CJ, Southwood and Hiley JJ), approved in *Alcan Gove* at 18 [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

accrued on or after 1 January 1987. Medical evidence indicated that initial molecular changes occurred to Mr Zabic's mesothelial cells between 1974 and 1977. However, his mesothelial tumour did not develop until 2013 or 2014.

50. Mr Zabic conceded that it would not have been possible, immediately prior to 1 January 1987, to state that the changes to his mesothelial cells would probably lead to the development of malignant mesothelioma. However, he contended that it was clear from what had happened subsequently that the abnormalities *did in fact* lead to that condition.

51. Mr Zabic lost at trial, but succeeded in the Court of Appeal. The Court of Appeal held that: "… the appellant's exposure to asbestos caused changes in his mesothelial cells well prior to 1987 and those changes were the start of a process that resulted in the appellant suffering from malignant mesothelioma."[79] Hindsight established that the changes to the mesothelial cells constituted compensable damage, because those changes "constituted a significant contributing factor to the final result".[80]

52. The High Court unanimously upheld this result, concluding:

> Given that with the benefit of hindsight it can be seen that initial mesothelial cell changes occurred shortly after the respondent's inhalation of asbestos fibres, **and that they were bound to and did lead inevitably and inexorably to the malignant mesothelioma from which he now suffers, the respondent's cause of action in negligence accrued when those initial mesothelial cell changes occurred** and, as the Court of Appeal held, damages for the mesothelial tumour from which he now suffers are recoverable in that cause of action.[81] (emphasis added)

Appellants were inevitably and inexorably harmed upon planting of the seed

53. The reasoning in *Alcan* ought to be applied in this case. The interest infringed was the appellants' financial interest in the lost cash flows as a result of the loss of productivity of the land, or increased costs of farming, or both (AJ [230(e)], [264] and [265] CAB 164 and 172). That interest was immediately, irrevocably harmed when the seed was sown. With the benefit of hindsight, the planting of the seed was bound to, and did, lead inevitably and inexorably to the financial losses now claimed by the appellants. It was inevitable that once the contaminated MR43 was planted,

[79] *Zabic v Alcan Gove Pty Ltd* (2015) 34 NTLR 209 at 215 [20] (Riley CJ, Southwood and Hiley JJ).
[80] Ibid at 222 [56].
[81] *Alcan Gove* at 20 [48] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

the farming practices of the appellants were going to have to change, that their sorghum yields would decrease and that they would have to increase their expenditure on herbicides and/or labour to deal with the off-type. Even if, after discovering the off-types, the appellants decided to do nothing and spend no money on herbicides or roguing, a financial loss would still be inevitable because their sorghum yields would drop. That is because the off-type competed with the normal sorghum and grew vigorously (AJ [4] CAB 118).

54. The same result is reached if one looks at the nature of the interference. The nature of the interference was "the disruption caused by having to deal with the product of the contaminated seed" (AJ [266] CAB 172). That interference occurred at the time of planting. From the moment the seed was planted, that disruption was inevitable.

Inevitability was supported by the evidence

55. There was ample support for a finding of inevitability in the evidence. The parties' agronomy experts, Mr McDonald and Mr Hosking, agreed that shattercane competed with the hybrid plants for moisture in the soil.[82] Mr McDonald's evidence was that if nothing was done, sorghum farming would eventually become impossible.[83] Mr Hosking thought that the problem would become worse year on year unless completely eradicated in the first year, which he did not regard as possible.[84] Mr Sommervaille, an expert in weed management, agreed with Mr Hosking that shattercane germinated over a longer period than ordinary sorghum, and accordingly additional measures such as inter-row spraying with glysophate and roguing, not ordinarily employed by most farmers, would be required in order to control the infestation.[85] The effect of this evidence is that (1) the off-type immediately competed with the remaining sorghum crop, and needed to be dealt with; and (2) it could only be dealt with by changing farming practices (which would come at an additional cost).

[82] Report of McDonald dated 31 October 2019 (**McDonald Report**) (DEF.EXP.0046) at 38 (RFM 371). See also the Hosking Report (PLA.EXP.0014) at [17.3] (RFM 277).
[83] McDonald Report (DEF.EXP.0046) at 8-9 (RFM 341-342).
[84] Hosking Report (PLA.EXP.0014) at [10.6] (RFM 267) and [11.5] (RFM 269-270).
[85] Joint Report of Somervaille and Hosking dated 4 December 2019 (JOI.EXP.0001 / PLA.EXP.0001) at [8] (RFM 452) and [39] (RFM 454).

Loss was inevitable and not contingent

56. The loss was not contingent or speculative because it is clear (again, using the benefit of hindsight) that there was no appreciable chance that the loss could be avoided.[86] Unlike the indemnity in *Wardley*, which was contingent upon the Bank issuing a demand, there were no further events or contingencies which had to be satisfied before the necessity to pay arose. That was the certain result if the appellants intended to continue operating their farming enterprises profitably. It is immaterial that the appellants may not have realised that the seed was contaminated prior to 24 April 2011 (AJ [269] CAB 172). Time begins to run when damage first accrues, even if the plaintiff is not aware of it.[87]

57. The matter may be tested by asking whether the appellants could have commenced their claim on 23 April 2011. They undoubtedly could. The appellants could have led evidence about the future loss of income and/or increased expenditure that would occur as the inevitable result of the detrimental impact of the off-type on their land. Alternatively, they could have led evidence about the cost of restoring their land to its condition before the infestation.[88] The quantification of the appellants' claims may be less certain, and therefore less accurate, if the quantification exercise is carried out before the expenses are actually occurred.[89] However, difficulty in assessment does not require a conclusion that *no* measurable loss has been suffered.[90] The law does not require a plaintiff to wait until its final loss is suffered, or the assessment is straightforward, before a claim can be commenced; the corollary of that is a plaintiff cannot suspend time running until then either.

58. In a hypothetical trial of this claim, the judge would have, on the appellants' cashflow case, discounted the future loss of cashflow[91] for relevant risks and arrived

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[86] Cf *Segal v Fleming* [2002] NSWCA 262 at [25]-[26] (Hodgson JA).
[87] *Hawkins* at 587-588 (Deane J); *Wardley* at 540 (Deane J); *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 782–783 (Lord Pearce).
[88] As to the latter see *Hansen v Gloucester Developments Pty Ltd* [1992] 1 Qd R 14 at 15 (Williams J with whom Shepherdson J agreed) and at 24-26 (Ambrose J). See also *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC & Ors* [2020] 4 All ER 807 at 861 [199] and [200] per the Court.
[89] *Wardley* at 527 and 532 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[90] *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman) (No 2)* [1997] 1 WLR 1627 at 1632 (Lord Nicholls of Birkenhead); see also *Winnote Pty Ltd (In Liq) v Page* (2006) 68 NSWLR 531 at 542 [61] (Mason P).
[91] Or performed some similar exercise.

at a net present value of the future cashflows.[92] Indeed, this was how the appellants claimed damages for the period 2020 to 2026.[93]

59. The learned trial judge found, and the Court of Appeal upheld, that the appellants and sample group members suffered no loss before 24 April 2011 because there was no allegation or evidence that before that date they made any increased cash outflow or expenditure or suffered any loss of cash inflow or income.[94] On such an approach, the action or inaction of the plaintiff, post the defendant's negligent conduct, would be determinative of when time began to run on such negligent conduct. Respectfully, such an approach must be in error. Two farmers who sowed the same MR43, on the same day and experienced like off-types in the 2010/2011 season would have different limitation periods depending on when they chose to start spending to respond to the off-type, harvested or sold their crops. Respectfully, that is exactly the fickle and inconsistent outcome in relation to limitation statutes that this Court's reasoning in *Wardley* and *Hawkins* has been astute to avoid.

60. This Court should instead find that actionable damage occurred upon the planting of the seed prior to 24 April 2011. The planting of the seed was an immediate detriment to the appellants, which led inevitably and inexorably to the losses claimed in the proceeding. Accordingly, the appellants' claims were out of time.

Part VII: Estimate of time required

61. Advanta estimates that it will require no more than 3 hours to present its oral argument.

Dated 9 January 2024

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[92] J [494] CAB 87. This approach to assessment is one which judges are very familiar: see for example *Todorovic v Waller* (1981) 150 CLR 402 (personal injury) and *Connector Park Pty Ltd v RV Pty Ltd* [2018] TASFC 13 at [240] (Geason J, Martin AJ and Marshall AJ) (loss of opportunity). Mere difficulty in assessing the quantum of a loss does not mean there has not been a loss.
[93] J [523] CAB 92.
[94] J [495] and [496] CAB 87; AJ [267] CAB 172, [270] CAB 173, and [331] CAB 187-188.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **Mallonland Pty Ltd ACN 051 136 291**
First Appellant

ME & JL Nitschke Pty Ltd ACN 074 520 228
Second Appellant

and

Advanta Seeds Pty Ltd ACN 010 933 061
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of the Practice Direction No. 1 of 2019, the Respondent sets out below a list of statutes and statutory instruments referred to in the Respondent's submissions.

No.	Description	Version	Provision
1.	*Australian Consumer Law* (*Competition and Consumer Act 2010* (Cth), Schedule 2)	Compilation No 107 (in force 23 February 2017 to 22 August 2017).	s 3 s 18
2.	*Limitation Act 1969* (NSW)	Reprint current as at 17 March 2017 (in force 17 March 2016 to 30 June 2018). The limitation period for tort was the same in the version in force from 6 July 2009 to 6 July 2012.	s 14(1)
3.	*Limitation of Actions Act 1974* (Qld)	Reprint current as at 5 March 2017 (in force 5 March 2017 to 2 March 2020). The limitation period for tort was the same in Reprint No. 2D, which was in force from 14 October 2010 to 1 July 2011.	s 10(1)