



**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE**

COMMERCIAL COURT  
GENERAL COMMERCIAL LIST

Case: S ECI 2020 02588

No. S ECI 2020 02588 Filed on: 10/11/2020 06:32 PM

B E T W E E N

**Lynden and Geoffrey Iddles**

Plaintiffs

-and-

**Fonterra Australia Pty Ltd (ABN 52 006 483 665)  
& Ors according to the Schedule**

Defendants

**DEFENCE**

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Date of document: 10 November 2020

Filed on behalf of: the Defendants

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Unless otherwise defined below, in this Defence the Defendants (**Fonterra**) adopt the defined terms in the Plaintiffs' Amended Statement of Claim dated 8 September 2020.

In this pleading:

- (A) **Western region** means western Victoria and South Australia;
- (B) **Northern region** means northern Victoria and southern New South Wales (not including Farmers who supplied the Fonterra milk processing plant in Wagga Wagga);
- (C) **Eastern region** means eastern Victoria;
- (D) **Southern region** means Tasmania;
- (E) **Regions** means the regions identified in subparagraphs (A) to (D) above;
- (F) **2015/16 Season** means the milk-supply season from 1 July 2015 to 30 June 2016.

In response to the Amended Statement of Claim dated 8 September 2020, the Defendants say as follows:

**PART A – PARTIES AND GROUP MEMBERS**

***Plaintiffs***

1. As to paragraph 1, they:
  - (a) admit subparagraphs (a) and (b);
  - (b) deny subparagraph (c), and say that the Plaintiffs supplied milk to Fonterra Milk as EMSA Farmers as defined at paragraph 4.23(b) below.

***Particulars***

*The Plaintiffs entered into an Incentive EMSA with a ‘GroPlan’ incentive (as referred to at paragraphs 4.24(a)(vi) and 4.26(b)(vi) below) with Fonterra Milk on 28 August 2014 for an approximate term of three years.*

***Group Members***

2. They do not plead to paragraph 2 as there are no allegations pleaded against them.
3. They do not plead to paragraph 3 as there are no allegations pleaded against them.

***Defendants***

4. As to paragraph 4:
  - (a) they admit subparagraphs (a) to (d);
  - (b) they admit subparagraph (e) in relation to Fonterra Australia and Fonterra Milk, and otherwise deny the allegations therein;
  - (c) subject to subparagraph (b) above, they admit subparagraph (f).

**PART B – RELEVANT CONTRACTUAL ARRANGEMENTS AND DEALINGS**

- 4.1 As to the relevant contractual arrangements relating to the 2015/16 Season, the Defendants advance the allegations set out in paragraphs 4.2 to 4.32 below.

## Part B.1 – Relevant Contractual Arrangements

### Milk Supply Agency Agreement between Fonterra Milk Australia Pty Ltd and Bonlac Supply Company Ltd

- 4.2 On or about 28 September 2012 Fonterra Milk entered into a Milk Supply Agency Agreement (**MSAA**) with Bonlac Supply Company Ltd (**BSC**).
- 4.3 Subject to reference at trial to the full terms and effect of the MSAA, this written agreement contained the following terms and conditions:
- (a) **Benchmark Price** means, subject to clause 1.4, for a Milk Season, the milk price paid by VLMP expressed in terms of a per kilogram of milk solids (that is, the total milk price paid or payable in respect of that Milk Season divided by the total milk solids supplied in that Milk Season, expressed in kilograms) (clause 1.1);
  - (b) **Fonterra** means Fonterra Co-operative Group Limited (clause 1.1);
  - (c) **Fonterra Milk Handbook** means, in respect of a Milk Season, the “Fonterra Australia Milk Supply Handbook” issued by Fonterra Milk for that Milk Season, as amended by Fonterra Milk during that Milk Season provided that Fonterra Milk may not make such an amendment (without BSC’s consent) if the amendment relates to (a) the construct of the Quality Standards, (b) the construct of the Incentive Based Pay System and/or (c) the Milk Purchase Terms (clause 1.1);
  - (d) **Milk Price** means the price Fonterra Milk must pay for milk purchased as contemplated by this Agreement, set in accordance with clauses 5.4 and 6 (clause 1.1);
  - (e) **Milk Purchase Terms** means the terms on which Fonterra Milk purchases milk from Qualifying Farmers (clause 1.1);
  - (f) **Milk Season** means a period of 12 calendar months from 1 July to the next following 30 June (clause 1.1);
  - (g) **Qualifying Farmer** means (a) a Dairy Farmer who supplied milk to Fonterra Milk or Fonterra Australia (through BSC as agent) immediately prior to the Change Date [1 January 2013] and (b) a Dairy Farmer who commences to supply Fonterra Milk

(with Fonterra Milk's consent) through Bonlac Supply Company as agent on or after the Change Date, in each case whilst there is Continuous Supply and where the person has not ceased to be a Qualifying Farmer under clause 5.5 (clause 1.1);

- (h) **VLMP** means at a point in time, subject to clause 1.4, the volume leading milk processor in Victoria (clause 1.1);
- (i) the parties agree that, as at 1 July 2012, the VLMP is Murray Goulburn Co-operative Co Ltd together with all of its Related Bodies Corporate (clause 1.4(a));
- (j) Bonlac Supply Company must in accordance with this Agreement and any written instructions from time to time from Fonterra Milk acquire on behalf of and as agent for, or arrange for milk to be made available for sale to, Fonterra Milk (clause 4.1);
- (k) Subject to clause 7.2, Fonterra Milk must acquire all milk acquired from Qualifying Farmers as contemplated by clause 4.1 (clause 4.2);
- (l) Subject to clauses 4.4 to 4.7, Fonterra Milk must pay to Qualifying Farmers a Milk Price for milk supplied during a Milk Season that is not less than the Benchmark Price for that Milk Season excluding the effect of any material anomaly (clause 4.3(a)) (**MSAA Benchmark Price Term**);
- (m) The calculation of the Benchmark Price by Fonterra Milk must be provided to BSC for its comments, under a process that is consistent with that which has applied up to the Change Date, provided that the consent of BSC to the calculation is not required (clause 4.3(b));
- (n) During June or July each calendar year Fonterra Milk must advise BSC of: (i) the Opening Milk Price; and (ii) Fonterra Milk's forecast of the final Milk Price, for the Milk Season that begins on 1 July that year (clause 5.4);
- (o) Fonterra Milk may adjust the Milk Price applicable for all or part of a Milk Season (clause 6.1(b)).

## Fonterra's "Price Risk Management" system – Fixed Base Milk Price terms

- 4.4 In about early 2015, as part of Fonterra's "Price Risk Management" system, Fonterra:
- (a) informed suppliers of its Fixed Base Milk Price program under which suppliers could lock in between 10 to 70 per cent of their expected milk solids for the 2015/16 Season for which they would receive a fixed price, and which would provide suppliers with the advantage of greater certainty as to milk price regardless of where the farmgate milk price ended up at the close of the season and any price decreases; and
  - (b) invited its existing milk suppliers to lodge tenders for the supply of a portion of their anticipated milk volumes for the 2015/16 Season at a fixed price (**Fixed Base Milk Price applicants**).

### *Particulars*

*Information concerning the Fixed Base Milk Price program was made available to Farmers in around mid-April 2015 via the Dairy Web (a web-based communication platform through which Fonterra shared written information and communications with Farmers from time to time) and through Area Managers upon request, and included a brochure entitled "Introducing Fixed Base Milk Price", an Information Booklet entitled "Price Risk Management 2015/16", a document titled "Fixed Milk Base Price (FBMP) 2015/16: Application Rules" and a document entitled "Fixed Milk Base Price (FBMP) Agreement" containing the terms and conditions for a Fixed Base Milk Price agreement.*

- 4.5 Fonterra informed Fixed Base Milk Price applicants that the following terms and conditions, inter alia, would apply to the supply of milk under this part of Fonterra's "Price Risk Management" system:
- (a) **FBMP Agreement** means the Fixed Base Milk Price Agreement document together with the Standard Terms and the Rules (clause 7.1);
  - (b) The **Monthly FBMP Fat Volume** is set out in Appendix 1 to the FBMP Agreement, as quoted in kilograms of fat (page 1);
  - (c) The **Monthly FBMP Protein Volume** is set out in Appendix 1 to the FBMP Agreement, as quoted in kilograms of protein (page 1);
  - (d) The **Monthly FBMP Fat Price** is set out in Table 2 of Appendix 1 of the FBMP Agreement, as quoted in AUD per kilogram of fat (page 1);

- (e) The **Monthly FBMP Protein Price** is set out in Table 2 of Appendix 1 of the FBMP Agreement, as quoted in AUD per kilogram of protein (page 1);
- (f) **Monthly Delivered Fat Volume** for a month means the total kilograms of fat delivered to Fonterra during that month under the FBMP Agreement, taking into account the operation of clause 4.1(b) as appropriate (clause 7.1);
- (g) **Monthly Delivered Protein Volume** for a month means the total kilograms of protein delivered to Fonterra during that month under the FBMP Agreement, taking into account the operation of clause 4.1(b) as appropriate (clause 7.1);
- (h) **Monthly Amount Payable** means the amount a supplier will ultimately be paid for delivering any of the Monthly Delivered Fat Volume or Monthly Delivered Protein Volume, as appropriate, taking into account clauses 1 and 2 (clause 7.1);
- (i) Throughout the 2015/16 Milk Year the supplier agrees to deliver to Fonterra from the Specified Farm all Milk produced there of which only the Monthly FBMP Fat Volumes and Monthly FBMP Protein Volumes come within the operation of the FBMP Agreement (clause 1.1);
- (j) Subject to clauses 1.4 and 2, in respect of the Monthly Delivered Fat Volume, the Monthly Amount Payable for any given month shall equal the product of the Monthly FBMP Fat Price for that month multiplied by the Monthly Delivered Fat Volume for that month (clause 1.2);
- (k) Subject to clauses 1.4 and 2, in respect of the Monthly Delivered Protein Volume, the Monthly Amount Payable for any given month shall equal the product of the Monthly FBMP Protein Price for that month multiplied by the Monthly Delivered Protein Volume for that month (clause 1.3).

### ***Particulars***

*All Fixed Base Milk Price applicants were provided with a copy of the applicable terms and conditions by which the supplier would be bound.*

*The Monthly FBMP Fat Volume (or Protein Volume) was the volume of fat (or protein) agreed to be supplied to Fonterra by a supplier in each month pursuant to the FBMP Agreement.*

*The Monthly FBMP Fat Price (or Protein Price) was the monthly price agreed to be paid by Fonterra to a supplier for fat (or protein) supplied pursuant to the FBMP Agreement.*

- 4.6 On or about 9 June 2015, Fonterra:
- (a) notified each of the Fixed Base Milk Price applicants whether the application had been accepted;
  - (b) if the application had been accepted, notified the applicant of:
    - (i) an average farmgate milk price of \$5.80 per kg/MS upon which the fixed base milk price had been declared, and the applicable fixed milk price that would apply for that supplier for the 2015/16 Season (**Fixed Base Milk Price**); and
    - (ii) the quantity of their anticipated milk volumes for the 2015/16 Season to which the Fixed Base Milk Price would apply;
  - (c) provided a copy of the written agreement pursuant to which milk was to be supplied (**Fixed Base Milk Price Agreement**).

***Particulars***

*Letters provided to successful applicants on or about 9 June 2015.*

- 4.7 The Fixed Base Milk Price Agreements included the following terms:
- (a) The terms set out at paragraph 4.5 above;
  - (b) **Standard Terms** means the ‘Standard Terms and Conditions for the Purchase of Cow’s Milk’ as set out in the Milk Supply Handbook, as applicable from time to time (clause 7.1);
  - (c) **Rules** means the “Fixed Milk Base Price (“FBMP”) 2015/16: Application Rules”;
  - (d) **Milk Supply Handbook** means Fonterra’s ‘Milk Supply Handbook’ applicable to the 2015/16 Milk Year, as amended by Fonterra from time to time (clause 7.1);
  - (e) **Opening Price Letter** means the letter the supplier receives from Fonterra outlining the 12 monthly prices for each of fat and protein which the supplier will receive for the 2015/16 Milk Year (clause 7.1);
  - (f) **Standard Supply Agreement** means an agreement for the supply of Milk by the supplier to Fonterra in accordance with the applicable Opening Price Letter and

Standard Terms (including all applicable Step Ups and/or Price Decreases) (clause 7.1);

- (g) Milk delivered by a supplier under the agreement is still subject to quality demerits – so that only Milk that meets the quality requirements will be subject to the Fixed Base Milk Price Agreement (clause 1.4(a));
- (h) The supplier may receive additional payments for the Monthly Delivered Fat Volume and Monthly Delivered Protein Volume if these delivered volumes meet the criteria set out under ‘Production Payments’ contained in the Milk Supply Handbook (clause 1.4(b));
- (i) Nothing in the Fixed Base Milk Price Agreement limits the imposition of all (or any) applicable levies, charges or other payments or commitments that apply to the supplier with regard to the supply of Milk to Fonterra, as set out in the Standard Supply Agreement or any other contract between the supplier and Fonterra (clause 1.4(c)); and
- (j) To the extent that any Milk delivered by the supplier is subject to the Fixed Base Milk Price Agreement, it will not come under the operation of any other agreement between the supplier and Fonterra concerning the delivery of Milk by the supplier (clause 4.1).

#### **Fonterra’s “Price Risk Management” system – Fixed Milk Price Range terms**

4.8 In about early 2015, as part of Fonterra’s “Price Risk Management” system, Fonterra also:

- (a) informed suppliers of its Fixed Milk Price Range program under which suppliers could lock in between 10 to 70 per cent of their expected milk solids for the Season for which they would receive a price for their milk that was not less than a fixed minimum price, and subject to a fixed maximum price, and which would provide suppliers with greater certainty as to price regardless of where the farmgate milk price ended up at the close of the 2015/16 Season;
- (b) informed suppliers that the fixed minimum price would apply where the minimum price was above the Opening Price announced by Fonterra, and for any period where the farmgate milk price exceeded the minimum price that supplier would be paid that higher price provided it did not exceed the fixed maximum price;



- (c) invited eligible suppliers to lodge tenders for the supply of a portion of their anticipated milk volumes for the 2015/16 Season at a range of set prices (**Fixed Milk Price Range applicants**).

***Particulars***

*Information concerning the Fixed Milk Price Range program was made available to Farmers in around mid-April 2015 via the Dairy Web, in a Media Release dated 16 April 2015 and through Area Managers upon request, and included a brochure entitled "Introducing Fonterra Milk Price Range", an Information Booklet entitled "Price Risk Management 2015/16", a document titled "Range 2015/16: Application Rules" and a document entitled 'Range Agreement' containing the terms and conditions for a Range Price Milk agreement.*

- 4.9 Fonterra informed Fixed Milk Price Range applicants that the following terms and conditions, inter alia, would apply to the supply of milk under this part of Fonterra's "Price Risk Management" system:
- (a) **Range Agreement** means this document together with the Standard Terms and Rules (clause 7.1);
  - (b) The **Monthly Range Fat Volume** is set out in Appendix 1 to the Range Agreement, as quoted in kilograms of fat (page 1);
  - (c) The **Monthly Range Protein Volume** is set out in Appendix 1 to the Range Agreement, as quoted in kilograms of protein (page 1);
  - (d) The **Monthly Range Minimum Fat Price** and **Monthly Range Maximum Fat Price** are set out in Table 2 of Appendix 1 of the Range Agreement;
  - (e) The Monthly Range Minimum Protein Price and Monthly Range Maximum Protein Price are set out in Table 2 of Appendix 1 of the Range Agreement;
  - (f) **Monthly Delivered Fat Volume** for a month means the total kilograms of fat delivered to Fonterra during that month under the Range Agreement, taking into account the operation of clause 4.1(b) as appropriate (clause 7.1);
  - (g) **Monthly Delivered Protein Volume** for a month means the total kilograms of protein delivered to Fonterra during that month under the Range Agreement, taking into account the operation of clause 4.1(b) as appropriate (clause 7.1);

- (h) **Monthly Amount Payable** means the amount a supplier will ultimately be paid for delivering any of the Monthly Delivered Fat Volume or Monthly Delivered Protein Volume, as appropriate, taking into account clauses 1 and 2 (clause 7.1);
- (i) **Monthly Farmgate Fat Price** means the Monthly Fat Price as advised to a supplier in the 2015/16 Milk Year Opening Price Letter amended for all Step Ups and/or Price Decreases announced by Fonterra for fat in relation to Milk delivered in the 2015/16 Milk Year (page 1);
- (j) **Monthly Farmgate Protein Price** means the Monthly Protein Price as advised to a supplier in the 2015/16 Milk Year Opening Price Letter amended for all Step Ups and/or Price Decreases announced by Fonterra for protein in relation to Milk delivered in the 2015/16 Milk Year (page 1);
- (k) Throughout the 2015/16 Milk Year the supplier agrees to deliver to Fonterra from the Specified Farm all Milk produced there of which only the Monthly Range Fat Volumes and Monthly Range Protein Volumes come within the operation of the Range Agreement (clause 1.1);
- (l) Subject to clauses 1.4 and 2, in respect of the Monthly Delivered Fat Volume:
  - (i) if the Monthly Farmgate Fat Price for any given month is less than the Monthly Range Minimum Fat Price for that month, then the Monthly Amount Payable for that month is the product of the Monthly Range Minimum Fat Price for that Month multiplied by the Monthly Delivered Fat Volume for that month (clause 1.2(a)); or
  - (ii) if the Monthly Farmgate Fat Price for any given month is greater than the Monthly Range Maximum Fat Price for that month, then the Monthly Amount Payable for that month is the product of the Monthly Range Maximum Fat Price for that month multiplied by the Monthly Delivered Fat Volume for that month; or (clause 1.2(b));
  - (iii) if clauses 1.2(a) or (b) above do not apply, then the Monthly Amount Payable for that month is the product of the Monthly Farmgate Fat Price for that Month multiplied by the Monthly Delivered Fat Volume for that month (clause 1.2(c)).

- (m) Subject to clauses 1.4 and 2, in respect of the Monthly Delivered Protein Volume:
- (i) if the Monthly Farmgate Protein Price for any given month is less than the Monthly Range Minimum Protein Price for that Month, then the Monthly Amount Payable for that month is the product of the Monthly Range Minimum Protein Price for that Month multiplied by the Monthly Delivered Protein Volume for that month (clause 1.3(a)); or
  - (ii) if the Monthly Farmgate Protein Price for any given month is greater than the Monthly Range Maximum Protein Price for that month, then the Monthly Amount Payable for that month is the product of the Monthly Range Maximum Protein Price for that month multiplied by the Monthly Delivered Protein Volume for that month; or (clause 1.3(b));
  - (iii) if clauses 1.3(a) or (b) above do not apply, then the Monthly Amount Payable for that Month is the product of the Monthly Farmgate Protein Price for that Month multiplied by the Monthly Delivered Protein Volume for that month (clause 1.3(c)).
- (n) When Fonterra announces a Step Up or Price Decrease which affects the Monthly Farmgate Fat Price and/or Monthly Farmgate Protein Price, the supplier may receive a retrospective payment as necessary to ensure that clauses 1.2 and 1.3 are complied with (clause 1.5).

### ***Particulars***

*All Fixed Range Price applicants were provided with a copy of the applicable terms and conditions by which the supplier would be bound.*

*The Monthly Range Fat Volumes (or Protein Volume) was the volume of fat (or protein) agreed to be supplied to Fonterra by a supplier in each month pursuant to the Range Agreement.*

*The Monthly Range Fat Price (or Protein Price) was the monthly price agreed to be paid by Fonterra to a supplier for fat (or protein) supplied pursuant to the Range Agreement.*

*The Monthly Range Minimum Fat Price (or Protein Price) and Monthly Range Maximum Fat Price (or Protein Price) were the minimum and maximum monthly prices agreed to be paid by Fonterra to a supplier for fat (or protein) pursuant to the Range Agreement.*

- 4.10 On or about 9 June 2015, Fonterra:
- (a) notified each of the Fixed Milk Price Range applicants whether the application had been accepted; and
  - (b) if the application had been accepted, notified the applicant of:
    - (i) the average minimum farmgate milk price of \$5.54 per kg/MS with the cap at \$6.06Kg/MS upon which the fixed milk price range had been declared, and the applicable price floor and price cap that would apply for that supplier for the 2015/16 Season (**Fixed Milk Price Range**); and
    - (ii) the portion of their anticipated milk volumes for the 2015/16 Season to which the Fixed Milk Price Range would apply;
  - (c) provided a copy of the written agreement pursuant to which milk was to be supplied (**Milk Price Range Agreement**).

***Particulars***

*Letters provided to successful applicants on or about 9 June 2015.*

- 4.11 The Milk Price Range Agreements included the following terms:
- (a) The terms set out at paragraph 4.9 above;
  - (b) **Standard Terms** means the ‘Standard Terms and Conditions for the Purchase of Cow’s Milk’ as set out in the Milk Supply Handbook, as applicable from time to time (clause 7.1);
  - (c) **Rules** means the “Milk Price Range 2015/16 (‘Range 15/16’): Application Rules”;
  - (d) **Milk Supply Handbook** means Fonterra’s ‘Milk Supply Handbook’ applicable to the 2015/16 Milk Year, as amended by Fonterra from time to time (clause 7.1);
  - (e) **Opening Price Letter** means the letter the supplier receives from Fonterra outlining the 12 monthly prices for each of fat and protein which the supplier will receive for 2015/16 Milk Year (clause 7.1);
  - (f) **Standard Supply Agreement** means an agreement for the supply of Milk by the supplier to Fonterra in accordance with the applicable Opening Price Letter and

Standard Terms (including all applicable Step Ups and/or Price Decreases) (clause 7.1);

- (g) Milk delivered by a supplier under the Range Agreement is still subject to quality demerits – so that only Milk that meets the quality requirements will be subject to the Range Agreement (clause 1.4(a));
- (h) The supplier may receive additional payments for the Monthly Delivered Fat Volume and Monthly Delivered Protein Volume if these delivered volumes meet the criteria set out under ‘Production Payments’ contained in the Milk Supply Handbook (clause 1.4(b));
- (i) Nothing in the Range Agreement limits the imposition of all (or any) applicable levies, charges or other payments or commitments that apply to the supplier with regard to the supply of Milk to Fonterra, as set out in the Standard Supply Agreement or any other contract between the supplier and Fonterra (clause 1.4(c)); and
- (j) To the extent that any Milk delivered by the supplier is subject to the Range Agreement, it will not come under the operation of any other agreement between the supplier and Fonterra concerning the delivery of milk by the supplier (clause 4.1).

**2015/16 Season – offers sent to other milk suppliers in the Eastern and Western regions**

4.12 In or about late June 2015, in respect of the 2015/16 Season Fonterra sent the following documents to milk suppliers in the Eastern region (being eastern Victoria) and Western region (being western Victoria and South Australia):

- (a) an Opening Price Letter to potential milk suppliers in the Eastern and Western regions (**Opening Price Letter – EW**); and
- (b) a copy of the Fonterra Australia Milk Supply Handbook Victoria and Tasmania for the 2015/16 Season (**2015/16 Handbook**), the appendix of which contained the standard terms and conditions for supplying milk to Fonterra (**2015/16 STCs**).

- 4.13 The Opening Price Letter – EW, the 2015/16 Handbook and the 2015/16 STCs identified the terms and conditions on which Fonterra was prepared to receive milk from milk suppliers in the Eastern and Western regions (**EW Supply Handbook Agreements**).
- 4.14 Subject to reference at trial to the full terms and effect of the Opening Price Letter – EW, this letter contained the following statements (or statements to the following effect):
- (a) “All references to Fonterra in this letter are to Fonterra Australia Pty Ltd or Fonterra Milk Australia Pty Ltd, but any member of the Fonterra Co-operative Group Limited group is authorised to deal with suppliers to Fonterra Australia Pty Ltd or Fonterra Milk Australia Pty Ltd as agent and any action by, or correspondence from, any such member is binding on suppliers to Fonterra Australia Pty Ltd and Fonterra Milk Australia Pty Ltd as though it was by, or from, the relevant entity” (footer – pp. 1-3).
  - (b) The opening farmgate milk price for the 2015/16 Season was \$5.60kg/MS (p. 1) (**Opening Price**).
  - (c) In respect of the 2015/16 Season Fonterra forecast a closing average farmgate milk price ranging from \$5.80kg/MS to \$6.00kg/MS (p. 1) (**Closing Range**).
  - (d) In respect of the Milk Solids Opening Prices for the 2015/16 Season, Fonterra offered to pay to milk suppliers in the relevant regions the prices set out on p. 3, with such prices taking effect on 1 July 2015 (p. 3).
  - (e) Further details of pricing are included in the Fonterra Australia Milk Supply Handbook Victoria and Tasmania 2015/16, and is enclosed (“Special notes” – p. 3).
  - (f) Prices are subject to adjustment in accordance with the 2015/16 Handbook and any other arrangement in place between Fonterra and each milk supplier (“Special notes” – p. 3).
  - (g) “As the dairy industry has experienced in past seasons, pricing can be adjusted up or down during the season” (“Special notes” – p. 3).
  - (h) “Any pricing changes will be carefully considered” (“Special notes” – p. 3).

4.15 Subject to reference at trial to the full terms and effect of the 2015/16 Handbook, this document contained the following statements (or statements to the following effect):

- (a) The 2015/16 Handbook:
  - (i) “Details the requirements of milk supply for dairy farmers supplying raw milk for processing at a Fonterra facility located in Victoria or Tasmania. It covers suppliers located in Victoria, Tasmania, South Australia and New South Wales, however excludes dairy farmers supplying raw milk for processing at Fonterra Wagga Wagga” (section 2.1);
  - (ii) “Contains the standard terms and conditions for supplying milk to Fonterra, as set out in the Appendix to this handbook” (that is, the 2015/16 STCs) (section 2.1);
  - (iii) “Is binding on both Fonterra and suppliers” (section 2.1);
  - (iv) “Will apply to the season starting 1 July 2015 and will continue to have effect until Fonterra publishes a new version or advises you of changes in writing” (section 2.1);
  - (v) “Is subject to any other terms and conditions relating to the supply of your milk that Fonterra and you agree in writing. In this regard, if you have a formal supply agreement with Fonterra, the terms of that agreement take precedence, followed by the terms of our ‘opening price letter’ each season (and any update to that), and finally the terms of this handbook. If you do not have a formal supply agreement with Fonterra, the terms of our ‘opening price letter’ each season (and any update to that) take precedence over the terms of this handbook” (section 2.1).
- (b) “Supplier” means all farmers/farm businesses supplying milk to Fonterra (section 2.2).
- (c) “Season” means the 12 month period commencing each 1 July (section 2.2).
- (d) “Fonterra” means Fonterra Australia Pty Ltd, Fonterra Milk Australia Pty Ltd and/or Fonterra Brands (Australia) Pty Ltd, each of which is ultimately a wholly owned subsidiary of Fonterra Co-operative Group Limited, a New Zealand company (section 2.2).

- (e) BSC acts as an agent for Fonterra for milk supply in Victoria and Tasmania and works proactively with Fonterra to further suppliers' interests and to negotiate the terms of supply for the milk which BSC shareholders supply to Fonterra (section 3.2).
- (f) A supplier is required, inter alia, to hold a licence under the relevant State dairy regulatory authority and meet all conditions described in the licence and the relevant legislation (section 3.4).
- (g) "Fonterra's primary pricing system for suppliers to its sites in Victoria and Tasmania is the system that applies to Bonlac Supply Company Limited ("BSC") and its shareholders" (section 10.1).
- (h) BSC, which has more than 1,300 dairy farmer shareholders in Victoria and Tasmania, acts as an agent for Fonterra for milk supply. Fonterra has a Milk Supply Agency Agreement (**MSAA**) with BSC (section 10.1).
- (i) The MSAA "provides a framework for milk supply and pricing between Fonterra and BSC's shareholders (as suppliers), together with milk collection and other services. It does not specify prices, as these are determined by Fonterra having regard to prevailing market conditions each season. Under the agreement, Fonterra purchases all milk that meets minimum quality standards and other requirements from BSC's shareholder suppliers under a uniform basis for setting the price for milk by applicable supply region" (section 10.1).
- (j) Under the MSAA, "Fonterra has committed to pay BSC's shareholder suppliers a price which (taking into account any interest payable on the Unsecured Capital Note held by BSC) is not less than the bundled return paid by the major dairy processor in Victoria. The agreement does not oblige BSC's shareholders to supply Fonterra; however it does offer them security of having a buyer at a competitive price" (**Handbook MSAA Statement**) (section 10.1).
- (k) The MSAA "also obliges Fonterra to offer Tasmanian suppliers the same price as their Victorian counterparts" (section 10.1).
- (l) "Fonterra pays its suppliers a price for milk that is set annually for each season. The season runs from 1 July to 30 June each year. Prior to the beginning of each



season, Fonterra writes to suppliers detailing the opening fat and protein prices for the coming season. These prices are subject to change (including through step-ups)” (section 10.2).

- (m) “Fonterra encourages all suppliers to look at the production data for their own farm, including production patterns, milk composition, volume and quality, to ensure they understand how the payment system will apply to them individually” (section 10.2).
- (n) “The Victorian and Tasmanian dairy manufacturing industry (which includes Fonterra), generally operates a pricing system whereby an opening price is provided with effect from the beginning of the season based on an estimate of the expected market returns for the season” (section 10.3).
- (o) “As the season progresses, farmgate milk prices can be increased as an outcome of Fonterra’s bi-monthly reviews. These price increases are referred to in the industry as ‘step-ups’ and are generally backdated and paid retrospectively for milk supplied from the beginning of the season” (section 10.3).
- (p) “Retrospective payments will only be made to suppliers who are supplying milk to Fonterra at the time the payment is made, or to suppliers who have retired from farming during the current season. They will not be made to suppliers who otherwise cease to supply milk to Fonterra during the season” (section 10.3).
- (q) “Fonterra may, at its discretion, increase prices without making retrospective payments. This would be communicated to suppliers with the timeframe and terms of the price increase being clearly defined” (section 10.3).
- (r) “Price increases are by no means guaranteed. Any increases will be paid at Fonterra’s discretion when, in Fonterra’s judgement, the returns to Fonterra from the international and domestic dairy markets are such that an increase is warranted. In addition to market returns, operating costs, business performance and exchange rates will be important factors in determining the opening price and any subsequent changes to this price” (section 10.3).
- (s) “Fonterra can also implement a mid-season price decrease, although this is rare. Since Fonterra was formed in 2001 a mid-season price decrease has only been

implemented once (in 2008/09 during the height of the global financial crisis). Fonterra recognises a price decrease can cause significant difficulty to farming businesses and seeks to avoid any decrease wherever possible” (section 10.3).

- (t) “Fonterra’s opening prices are its considered estimate for a given season based on information then available to it. Any changes to prices will be carefully considered and communicated to suppliers before being implemented” (section 10.3).

4.16 Subject to reference at trial to the full terms and effect of the 2015/16 STCs, this document contained the following terms and conditions:

- (a) “you and your means the supplier of cows milk or services to us” (clause 1.1(a));
- (b) “Fonterra Company means Fonterra Milk Australia Pty Ltd ABN 12 114 326 448; Fonterra Brands (Australia) Pty Ltd ABN 80 095 181 669; Murrumbidgee Dairy Products Pty Ltd ABN 87 003 114 930; or Fonterra Australia Pty Limited ABN 52 006 483 665 and Fonterra Companies means one or more of them” (clause 1.1(b));
- (c) “Related Company means any company that, directly or indirectly, is controlled by a Fonterra Company or by another company that also controls a Fonterra Company and Related Companies means one or more of them” (clause 1.1(e));
- (d) “These terms apply to all purchases of cows milk and/or services from you. They are in addition to the terms and conditions of any document or agreement (**Other Documents**) between the Fonterra Company and you concerning the sale and supply of cows milk and/or services by you to the Fonterra Company, including the Fonterra Australia Milk Supply Handbook as published by us from time to time” (clause 2.1);
- (e) “Any terms or conditions of supply on any invoice or other document provided by you will be of no effect and will not replace or vary any of these terms or the Other Documents unless we expressly agree in writing” (clause 2.2);
- (f) “You must supply the cows milk and/or services in accordance with these terms and the Other Documents” (clause 3.1);
- (g) “The price is as determined in accordance with the Other Documents (unless otherwise specified by us in writing) and is the only amount we must pay. Unless

otherwise stated in the Other Documents any price is in Australian dollars and is exclusive of all taxes, including goods and services tax (GST), duties, fees or other government levies and charges” (clause 6.1);

- (h) “We will pay for the cows milk delivered or for services provided in accordance with these terms and the Other Documents” (clause 6.3);
- (i) “We may unilaterally amend these terms and the Other Documents at any time and will give you reasonable notice of any amendment that has a material adverse impact on you” (clause 11.1); and
- (j) “These terms and the Other Documents constitute the entire agreement between you and us concerning their subject matter and supersede all previous agreements, arrangements or understandings between you and us concerning that subject matter” (clause 11.7).

4.17 Where a supplier in the Eastern or Western regions began supplying milk to Fonterra on or after 1 July 2015, that supplier thereby accepted the terms and conditions of the EW Supply Handbook Agreement, with such terms and conditions applying as follows:

- (a) to all suppliers who or which were not subject to another written supply agreement, being a written supply agreement other than the documents comprising the EW Supply Handbook Agreement;
- (b) to suppliers subject to another written supply agreement, being a written supply agreement other than the documents comprising the EW Supply Handbook agreement, but only to the extent to which such other written supply agreement did not apply; and
- (c) to suppliers participating in Fonterra’s “Price Risk Management” system, but only to the extent to which the terms and conditions of that system did not apply.

## 2015/2016 – offers sent to other milk suppliers in the Northern and Southern regions

- 4.18 In or about late June 2015, in respect of the 2015/16 Season Fonterra sent the following documents to milk suppliers in the Northern region (being northern Victorian and New South Wales) and Southern region (being Tasmania):
- (a) an Opening Price Letter to potential milk suppliers in the Southern and Northern regions (**Opening Price Letter – NS**); and
  - (b) a copy of the 2015/16 Handbook, the appendix of which contained the 2015/16 STCs.
- 4.19 The Opening Price Letter – NS, the 2015/16 Handbook and the 2015/16 STCs identified the terms and conditions on which Fonterra was prepared to receive milk from milk suppliers in the Northern and Southern regions (**NS Supply Handbook Agreements**).
- 4.20 The terms of the Opening Price Letter – NS were identical to the terms of the Opening Price Letter – EW save that the prices varied slightly between the letters as set for the months of August 2015 and January 2016 (together, **the Opening Price Letters**).
- 4.21 Where a supplier in the Northern or Southern regions began supplying milk to Fonterra on or after 1 July 2015, that supplier thereby accepted the terms and conditions of the NS Supply Handbook agreement, with such terms and conditions applying as follows:
- (a) to all suppliers who or which were not subject to another written supply agreement, being a written supply agreement other than the documents comprising the NS Supply Handbook Agreement;
  - (b) to suppliers subject to another written supply agreement, being a written supply agreement other than the documents comprising the NS Supply Handbook Agreement, but only to the extent to which such other written supply agreement did not apply; and
  - (c) to suppliers participating in Fonterra’s “Price Risk Management” system, but only to the extent to which the terms and conditions of that system did not apply.

## Exclusive Milk Supply Agreements

4.22 In relation to the 2015/16 Season, Exclusive Milk Supply Agreements were available to all eligible Farmers in Victoria and Tasmania, and Fonterra entered into Exclusive Milk Supply Agreements in different terms with a number of suppliers in these regions.

4.23 Each one of these Exclusive Milk Supply Agreements:

- (a) was one of the “Other Documents” to which clause 2.1 of the 2015/16 STCs refers;
- (b) were supply arrangements made by individual contracts with each relevant Farmer (**EMSA Farmer**) on sundry dates between on or about 1 July 2011 and 30 June 2015.

4.24 There were broadly seven categories of Exclusive Milk Supply Agreements:

- (a) Exclusive Milk Supply Agreements with incentives (**Incentive EMSA**), where the incentives could include one or more of;
  - (i) the ‘Interest Free Advance’ incentive;
  - (ii) the ‘Support Crew Max’ incentive;
  - (iii) the ‘Switching Costs’ incentive;
  - (iv) the ‘Price Benchmark Commitment’ incentive;
  - (v) the ‘Cashflow Smoothing’ incentive;
  - (vi) the ‘GroPlan’ incentive,
 and which were based on standard EMSA terms (as described below) (**Standard EMSA terms**); and
- (b) North Fresh EMSA;
- (c) West Fresh EMSA (1 year or 3 year);
- (d) VDL EMSA;
- (e) Mother Liquor EMSA;

- (f) Fixed Base Milk Price Agreements; and
  - (g) Milk Price Range Agreements,
- (together, the **2015/16 EMSA Agreements**).

***Particulars***

*The 2015/16 EMSA Agreements were in writing and were contained in:*

- a. a written document between each EMSA Farmer and the relevant Fonterra company;*
- b. the 2015/16 Handbook; and*
- c. the Opening Price Letter relevant to the EMSA Farmer's region.*

4.25 Subject to reference at trial to the full terms and effect of the Standard EMSA Terms, there were generally terms of Standard EMSA Terms that:

- (a) **Agreement** means this document (including all Schedules and Appendices), together with the Handbook and each Opening Price Letter (in respect of the Season to which it applies) (clause 1.1);
- (b) **Handbook** means, subject to clause 2.3, Fonterra's 'Milk Supply Handbook' as published by Fonterra from time to time and provided to suppliers of Milk to Fonterra, including the standard terms and conditions set out therein (clause 1.1);
- (c) **Opening Price Letter** means, in respect of a Season and subject to clause 2.3, each 'Opening Price Letter for Fonterra Australia' for the region in which the Farm is located (as determined by Fonterra), issued by or on behalf of Fonterra for each Season during the Term and any and all subsequent amendments to it, including Step Ups (as amended), that Fonterra gives notice of in relation to cow's milk supplied to Fonterra during that Season (clause 1.1);
- (d) During the Term, the Supplier will supply all Milk exclusively to Fonterra and will not supply Milk to any other person, permit any 'share farmer' or equivalent to carry on activities at the Farm, or grant any other person any form of right or entitlement over or to any Milk produced at the Farm, except without the prior written consent of Fonterra in its absolute discretion (clause 2.1);

- (e) This Agreement sets out the basis on which the Supplier will exclusively supply to Fonterra, and Fonterra will pay (and provide consideration) for, Milk during the Term. If there is any inconsistency between them, the documents comprising the Agreement will prevail in the following order: first, Appendix B; next, Appendix A; next, the remainder of this document (including all Schedules); next, the Opening Price Letter; and last, the Handbook (typically clause 2.2, though sometimes clause 2.3);
- (f) Fonterra may amend the Handbook from time to time, and or by Step Up or otherwise, alter the terms of the Opening Price Letter during the Season to which the Opening Price Letter applies (including the pricing and benefits provided for therein, as applicable), without the consent of the Supplier provided that Fonterra will subsequently advise the Supplier of such amendments (clause 2.3(a));
- (g) The Supplier has no right to terminate the Agreement as a consequence of the variation to the price that Fonterra pays for cow's milk (as announced in the Opening Price Letter, as applicable) (clause 2.3(b));
- (h) If an amendment or alteration permitted by clause 2.3(a) has a material adverse effect on the Supplier (as demonstrated by the Supplier to Fonterra, acting reasonably), then the Supplier may by notice in writing to Fonterra of not less than 3 months (from the date Fonterra receives such notice) terminate the Agreement (clause 2.3(c));
- (i) Prior to the expiration of the notice period referred to in clause 2.3(c), the Supplier must (on being requested to do so by Fonterra) reasonably negotiate with Fonterra to seek to reach an agreement (in writing) on amendments to the terms of the Agreement having regard to the relevant amendment or alteration that are mutually acceptable to the parties and, if such agreement is reached, the termination notice will cease to be effective and the Agreement will continue on the basis so agreed (clause 2.3(d));
- (j) The agreement constitutes the entire agreement between the parties as to its subject matter (clause 6(a)); and
- (k) The Special Terms of the Standard EMSA Terms (if any) were set out in Appendix B.

4.26 Incentive EMSAs generally contained the same terms as those pleaded at paragraph 4.25 above, and in addition, also generally contained terms as follows:

- (a) In addition to paying the relevant price for Milk in accordance with the Opening Price Letter (subject to the other terms and conditions of this Agreement), Fonterra agrees to provide the Supplier the Incentive for Milk supplied in accordance with the Agreement, in addition to the payments specified in the relevant Opening Price Letter (whilst it applies) (clause 3);
- (b) One or more of the following ‘incentives’ as contained in Appendix A of the individual Incentive EMSA:
  - (i) the ‘Interest Free Advance’ incentive, which generally contained the following terms *inter alia*:
    - A. The interest free advance (**IFA**) is provided by Fonterra as consideration (over and beyond that which is otherwise to be provided in accordance with the Opening Price Letter and Handbook from time to time) for the supply to, and purchase by, Fonterra of Milk in accordance with the Agreement (Appendix A clause 1);
    - B. Subject to clauses 3 and 4, the details of the basis on which the IFA will be made are contained in the ‘Supplier Advance Application Form’ (**SAAF**), which the Supplier must complete in full, execute and deliver to Fonterra (Appendix A clause 2), where the maximum amount available to the Supplier for an IFA, and the period of the IFA, varies between Agreements and are generally listed at Appendix A clause 2 of the specific Agreement;
    - C. If Fonterra agrees to make the IFA it will be subject to the SAAF and clauses 1 to 7 of this document (the ‘Interest Free Advance’ incentive document contained in Appendix A of the relevant Incentive EMSA) (Appendix A, clause 2);
    - D. The Supplier is only entitled to the IFA because of the Supplier’s commitment under the Agreement to exclusively supply all Milk from the Farm to Fonterra for the Term, so that only while the



Supplier is in compliance with all of its obligations under the Agreement, no interest is payable on the IFA and the IFA must be repaid in accordance with the details (Appendix A, clause 3);

(ii) the ‘Support Crew Max’ incentive, which generally contained the following terms *inter alia*:

A. The ‘Support Crew Max’ incentive is a contribution by Fonterra towards costs incurred by the Supplier in obtaining technical or financial advice from an independent third-party consultant (**SCM**), whereby pursuant to the specific terms of the relevant Agreement:

1. Fonterra will reimburse a specified proportion of costs (X%), subject to the maximum described below (Appendix A, paragraph 1(a));
2. the maximum amount that will be reimbursed by Fonterra is specified (X%) (Appendix A, paragraph 1(b)); and
3. Fonterra will reimburse the Supplier not later than the specified time limit (X days) after the Supplier provides a copy of the relevant final invoice and proof of payment, together with all substantiation that Fonterra requests to enable it to establish the relevant advice has been provided in full and amount paid for it qualifies as SCM (Appendix A, paragraph 1(c)).

B. The SCM is provided by Fonterra as consideration (over and above that which is otherwise to be provided in accordance with the Opening Price Letter and Handbook from time to time) for the supply to, and purchase by, Fonterra of Milk in accordance with this agreement (Appendix A, paragraph 1).

(iii) the ‘Switching Costs’ incentive, which was available to Farmers who commenced supply to Fonterra from another processor immediately prior to the commencement of the Term and who were therefore liable to forfeit some payments that would otherwise have been paid by the other processor

for the milk supplied prior to the commencement of the Term, generally contained the following terms *inter alia*:

- A. On condition that the Supplier exclusively supplies all milk (from the Farm) to Fonterra throughout the Term, and establishes to Fonterra's reasonable satisfaction that the Supplier supplied to that processor the volume of cows milk solids set out below over the period set out below, then subject to clause 6, Fonterra will pay the Supplier the amount set out below (as varied between individual Agreements) (Appendix 1, clause 1);
  - B. The Switching Costs are payable by Fonterra as consideration (over and above that which is otherwise to be provided in accordance with the Opening Price Letter and Handbook from time to time) for the supply to, and purchase by, Fonterra of Milk in accordance with the Agreement (Appendix A, clause 2(a));
- (iv) the 'Price Benchmark Commitment' incentive, which generally contained the following terms *inter alia*:
- A. The Milk price that Fonterra pays the Supplier during the period specified in the Agreement (**Period**) will match or exceed the price that the processor specified in the Agreement (as varied between individual Agreements) pays to acquire cow's milk using the criteria identified in the terms of the incentive (Appendix A, clause 1);
  - B. The Period to which the Price Benchmark Commitment will apply is specified at clause 1(a);
  - C. The identity of the processor is specified at clause 1(b);
  - D. The Price Benchmark Commitment is provided by Fonterra as consideration (over and above that which is otherwise to be provided in accordance with the Opening Price Letter and Handbook from time to time) for the supply to, and purchase by, Fonterra of Milk in accordance with the Agreement (Appendix A, clause 2(a)).

- (v) the 'Cashflow Smoothing' incentive, which generally contained the following terms *inter alia*:
- A. Fonterra will make milk payments (as specified in the Table contained within the individual Agreement) to the Supplier, each payment being an 'instalment', in respect of each month set out in the Table, on the assumption that the total volume of Milk Solids for each such month (as set out in the Table) will be supplied to Fonterra by the Supplier in accordance with the Agreement (Appendix 1, clause 1);
  - B. (Subject to clauses 3 to 6 inclusive), the instalments are being provided by Fonterra as full and final consideration (in replacement for that which would otherwise be provided in accordance with the Opening Price Letter and Handbook from time to time) for the supply to, and purchase by, Fonterra of Milk in accordance with the Agreement (Appendix A, clause 2);
  - C. After the conclusion of each Season, Fonterra will (by reference to actual Milk solids delivered by the Supplier during the Season and the terms and conditions of the Agreement) determine the total amount that should have been paid to the Supplier (after all required or permitted deductions and set-offs) and, if that amount is less than the total of the instalments paid thus far, Fonterra will pay the difference to the Supplier. If the amount exceeds the total of the instalments paid thus far, then the Supplier must pay the difference to Fonterra (Appendix A, clause 6);
- (vi) the 'GroPlan' incentive, which generally contained the following terms *inter alia*:
- A. Fonterra will pay the Supplier a GroPlan payment (which amount varied between individual agreements and as specified at clause 1) on the basis that the Supplier will achieve increased Milk supply as expressed in terms of kgs of Milk fat and protein by the date prescribed in the Agreement (**Details**), subject to clauses 3 to 5 (Appendix A, clause 1);

- B. The 'current production', 'target production' and 'date by which target production must be achieved' are specified at clause 1 of Appendix A (as varied between individual agreements);
- C. The GroPlan is provided by Fonterra as consideration (over and above that which is otherwise to be provided in accordance with the Opening Price Letter and Handbook from time to time) for the supply to, and purchase by, Fonterra of Milk in accordance with this Agreement (Appendix A, clause 2);
- D. The GroPlan payment made by Fonterra to the supplier must be used by the supplier solely to seek to achieve the output increase in accordance with the Details (Appendix A, clause 2);
- E. Following the end of any one or more Seasons during the Term, Fonterra may review the Supplier's actual deliveries of monthly Milk solids volumes that meet the requirements of the Agreement against the Details (Appendix A, clause 3);
- F. The Supplier is only entitled to the GroPlan amount because of the Supplier's commitment under the Agreement to exclusively supply all Milk solids from the Farm (including by reference to the increased production described in the Details) to Fonterra for the Term, so that only whilst the Supplier is in compliance with all of its obligations under the Agreement (including for exclusive Milk supply for the Term), is the Supplier entitled to retain the GroPlan amount (Appendix A, clause 6);
- G. If, prior to the Date and prior to the Supplier achieving the target production, the Agreement is terminated due to the Supplier's breach (under clause 5 of Schedule Two of the Agreement) then, notwithstanding the Details, the GroPlan amount previously paid by Fonterra to the Supplier must be immediately refunded by the Supplier to Fonterra on Fonterra giving the Supplier a notice requiring such refund (Appendix A, clause 7(a)); and
- H. Fonterra is entitled to set-off any amounts payable to Fonterra under clauses 5 or 7 above, as applicable, from any amounts payable by Fonterra to the Supplier under the Agreement or under any

other agreement between Fonterra and the Supplier (Appendix A, clause 8).

4.27 North Fresh EMSAs were a unique type of EMSA only available to Farmers in the Northern region which varied in its terms from those terms generally found in standard EMSAs (as pleaded at paragraph 4.25 above) in the following relevant ways, *inter alia*:

- (a) Fonterra may amend the Handbook from time to time, and or alter the terms of (including the pricing and incentives provided for in) the Opening Price letter during the Season to which the Opening Price Letter applies without the consent of the Supplier (clause 2.4(a));
- (b) the North Fresh EMSA did not contain the clause referred to at paragraph 4.25(g) above, but did contain the clause referred to at paragraph 4.25(h) above;
- (c) Fonterra agrees to pay the Supplier the Exclusive Supply Premium (including the Boo\$t Payments) for Milk Supplied in accordance with the Agreement, in addition to the payments specified in the Opening Price Letter (whilst it applies) (clause 3);
- (d) If the Supplier fails to exclusively supply Milk to Fonterra throughout the Term, regardless of whether or not Fonterra exercises its rights under clause 5.1(a), any Exclusive Supply Premium paid or payable in respect of the Term is forfeited and all amounts previously paid by Fonterra are repayable by the Supplier, and Fonterra may offset those amounts against any amount that is or becomes payable by Fonterra to the Supplier (clause 3);
- (e) Fonterra would pay the Supplier an exclusive milk supply premium in accordance with Appendix A, which included the Boo\$t Payments set out in Appendix B (page 1);
- (f) More stringent quality requirements and demerit standards when compared to the Standard EMSA Terms (Appendix C);
- (g) Fonterra will provide a full season average price of \$6.79 per kg, assuming same components and milk supply volume as May 2013-Apr-2014 production for all milk supplied during the 2014/15 Season (Appendix E).

4.28 West Fresh EMSAs (generally 1 year or 3 year Terms) were a unique type of EMSA only available to some Farmers in the Western region which varied in their terms from those terms generally found in Incentive EMSAs (as pleaded at paragraph 30 above) in that they, *inter alia*, included a unique incentive, being the 'Fonterra Premium Milk' incentive, which incentive contained relevant terms *inter alia* that:

- (a) The Supplier would receive premium pricing from Fonterra in connection with the supply of fresh milk (**FMP**) to Fonterra (Appendix A, 'Fonterra Premium Milk' Incentive, clause 1);
- (b) The FMP being provided by Fonterra is provided for the monthly volume of milk solids referred to in Appendix A, 'Fonterra Premium Milk' Incentive, (as varied between individual Agreements) (**Volume**), instead of the price that would otherwise be provided in accordance with the Opening Price Letter and Handbook from time to time, for the supply to, and purchase by, Fonterra of Milk in accordance with the Agreement (Appendix A, 'Fonterra Premium Milk' Incentive, clause 1);
- (c) The Supplier must also supply the remainder of its milk solids from the Farm to Fonterra, with the price payable for all such excess over the Volume (**Excess**) being the amount determined in accordance with the Opening Price Letter and Handbook from time to time (including any Step Ups) (Appendix A, 'Fonterra Premium Milk' Incentive, clause 1);
- (d) On condition that the Supplier exclusively supplies all Milk (from the Farm) to Fonterra throughout the Term, supplies not less than the Volume in each and every month during the Term, and that the requirements in clause 3 are fully complied with, then subject to clause 8, Fonterra will pay the Supplier the prices determined under clauses 4 and 5 (Appendix A, 'Fonterra Premium Milk' Incentive, clause 2); and
- (e) The Supplier acknowledges and agrees that FMP is payable by Fonterra as consideration (in the case of always meeting or exceeding Volume, in substitution for the price that is otherwise to be provided in accordance with the Opening Price Letter and Handbook from time to time) for the supply to, and purchase by,

Fonterra of Milk in accordance with this Agreement (Appendix A, 'Fonterra Premium Milk' Incentive, clause 6).

4.29 The VDL EMSA was a unique EMSA specific to one supplier which varied in its terms from those terms generally found in Incentive EMSAs (as pleaded at paragraph 4.26 above) in the following relevant ways, *inter alia*:

- (a) **Benchmark Price** means, for a Season, the milk price paid by the volume leading milk processor (as identified from time to time by Fonterra) in Victoria (as declared in the final end of season letters sent by that processor to its suppliers), applied to all of the milk supplied to Fonterra during that Season by farmers in Victoria and Tasmania via Bonlac Supply Company Limited (as agent for Fonterra) to derive an average benchmark price expressed in terms of a per kilogram of milk solids amount (clause 1.1);
- (b) Fonterra will pay the Supplier for Milk supplied under the Agreement each Season a price that is not less than the Benchmark Price (clause 3.1(a));
- (c) The Supplier will supply all Milk exclusively to Fonterra during the Term of the Agreement and will not supply Milk to any other person or grant any other person any form of right or entitlement over or to any Milk produced at the Farms during the Term except with prior written consent of Fonterra at its discretion (clause 2.1, cf the corresponding general term referred to at paragraph 4.25(d) above);
- (d) Fonterra may amend the Handbook from time to time, and or alter the terms of (including the pricing and incentives provided for in) the Opening Price letter during the Season to which the Opening Price Letter applies without the consent of the Supplier (clause 2.3, cf the corresponding general term referred to at paragraph 4.25(f) above);
- (e) The VDL EMSA did not contain the clauses referred to at paragraph 4.25(g) and (h) above.

4.30 The Mother Liquor EMSA was a unique EMSA which varied in its terms from those terms generally found in Incentive EMSAs (as pleaded at paragraph 4.26 above) in that it *inter alia* incorporated special terms for an agreement that Fonterra supply the relevant Supplier with cheese by-products.

4.31 The Fixed Base Milk Price Agreement incorporated terms *inter alia* as referred to in paragraphs 4.5 and 4.7 above, and relevantly for this type of agreement:

- (a) price step-ups or decreases did not apply directly to milk supplied pursuant to the agreement, and were only relevant to the calculation of the Settlement Amount as (generally) set out in clause 2 of the individual agreement;
- (b) the agreement typically did not contain the term referred to at paragraph 4.25(j) above, but did incorporate the similar term at clause 11.7 of the 2015/16 STCs; and
- (c) the agreement typically did not contain the terms referred to at paragraph 4.25(g) and (h) above.

4.32 The Milk Price Range Agreement incorporated terms *inter alia* as referred to in paragraphs 4.9 and 4.11 above, and relevantly for this type of agreement:

- (a) price step-ups or decreases conditionally applied to milk supplied by a Farmer pursuant to this agreement to the extent that any price step-up or decrease could not rise or fall above or below the agreed monthly minimum and maximum range prices as stated in the relevant agreement, and were also relevant to the calculation of the Settlement Amount as (generally) set out in clause 2 of the agreement.
- (b) the agreement typically did not contain the term referred to at paragraph 4.25(j) above, but did incorporate the similar term at clause 11.7 of the 2015/16 STCs; and
- (c) the agreement typically did not contain the terms referred to at paragraph 4.25(g) and (h) above.

## **Part B.2 – Setting of the opening farmgate milk price for the 2015/16 Season**

4.33 For the purpose of setting the opening farmgate milk price for the 2015/16 Season (as identified in the Opening Price Letters), and for the purpose of forecasting the closing price range (**forecast Closing Range**) Fonterra had regard to various matters, including:

- (a) the opening prices and closing ranges announced by other processors, including Murray Goulburn, Bega/Tatura and Australian Consolidated Milk (**ACM**);



- (b) the existence of the MSAA Benchmark Price Term;
- (c) Fonterra's estimate of what price Murray Goulburn would likely pay for the season, by reference to all information available to it, including Murray Goulburn's publicly available statements and information, and estimated commodity prices and exchange rates for the season;
- (d) the competitive dynamics of the market, including the potential impact of announcing a particular opening price on Fonterra's ability to compete against other processors for milk supply;
- (e) the impact on Fonterra's profit and loss, including by reference to estimated commodity prices, operating costs, business performance and exchange rates.

### ***Particulars***

*As to subparagraph (a), prior to Fonterra announcing its opening farmgate milk price:*

- (i) *Murray Goulburn had announced an opening price of \$5.60/kg/MS and a forecast closing price of \$6.05/kg/MS for the Southern Milk region; 'Opening Price Circular 2015/16: Southern Milk Region' dated 24 June 2015*
- (ii) *Bega/Tatura had announced an opening price of \$5.60/kg/MS;*
- (iii) *ACM had announced an opening price of \$5.75 - \$6.00 kg/MS.*

*As to subparagraph (b), Fonterra refers to and repeats paragraph 4.3 above.*

*As to subparagraph (c), the information available to Fonterra included:*

- a. *On 18 February 2015, in response to critical articles written by Joe Aston of the Australian Financial Review titled 'Murray Goulburn's Gary Helou quiet as a mouse' dated 9 February 2015 and 'Skimming Murray Goulburn's Coles Strategy' dated 17 February 2015, Murray Goulburn released a media statement wherein it responded to the allegation that MG was paying its farmers too much for their milk by stating 'In relation to our milk payments, we are proud of the role MG plays as the leading dairy processor and co-operative of the Australian dairy industry. We are proud of our capacity to maintain the \$6 per kilogram farmgate milk price in the face of the recent collapse in global dairy prices'.*
- b. *Murray Goulburn's ASX prospectus dated 1 May 2015 and Supplementary Prospectus dated 29 May 2015;*
- c. *MG's announcements contained in the 'Opening Price Circular 2015/16: Southern Region' dated 24 June 2015 and 'News Release' of same date;*
- d. *the fact that in previous seasons, Murray Goulburn had maintained high prices, notwithstanding that the international milk commodities market was experiencing adverse conditions.*

**Part B.3 – Communications with suppliers from August 2015**

- 4.34 On or about 7 August 2015 Fonterra sent an email to Farmers in which they, *inter alia*:
- (a) advised Farmers of ‘another disappointing GDT result’ that week, which marked the tenth consecutive fall in GDT and was the lowest point in the history of the Global Dairy Trade Price Index;
  - (b) advised Farmers that Fonterra had forecast a total payout available to its farmers in New Zealand for the 2015/16 Season of \$4.25-\$4.35, which was ‘an incredibly tough time’ for Fonterra NZ farmers and reflected ongoing challenges being experienced in the global market; and
  - (c) advised Farmers that Fonterra was analysing how those conditions were impacting the Australian market and undertaking its July price review.
- 4.35 On or about 13 August 2015 Fonterra sent a letter to Farmers (the **July Price Review Letter**) in which they *inter alia*:
- (a) advised Farmers that the Australian farmgate price and forecast Closing Range for the 2015/16 Season were placed under review, given the challenging conditions and extreme volatility which was impacting domestic and global dairy markets;
  - (b) advised Farmers that Fonterra was holding its farmgate milk price of \$5.60 kg/MS whilst its full year price was under review;
  - (c) stated that the GDT price index had fallen for the tenth consecutive time in the previous week, and that the global market had dropped 20 per cent since the release of the Opening Price and was now at its lowest level in the last decade;
  - (d) warned that the domestic market was not immune to global headwinds and that the issue was not isolated to Fonterra;
  - (e) advised Farmers that it had updated its full year commodity price forecasts to model the Australian product mix, and that the outlook remained very tough;
  - (f) warned Farmers that whilst it was holding the farmgate milk price at \$5.60 kg/MS at that stage, they needed to prepare for the possibility of a stepdown in the milk price in the 2015/16 Season.

- 4.36 On 13 August 2015 Fonterra sent a ‘Supplier Announcement’ email to Farmers which:
- (a) effectively repeated the matters in paragraph 4.35(a) to (f) above, and further;
  - (b) warned Farmers that there was a possibility of a step down in the months ahead;
  - (c) advised Farmers of the possibility of such a step down so that it could enable them to prepare for difficult times ahead.
- 4.37 From around 13 August 2015, Fonterra made available to Farmers via the Milk Supply Team revised income estimates which differed from the forecast in the Opening Price Letter.

### ***Particulars***

*In the 2015/16 Season there were three income estimate spreadsheets produced by Fonterra which were used by the Milk Supply Team to assist in the provision of income estimates to Farmers. They were:*

- a. At the beginning of the 2015/16 Season, a spreadsheet which could be used by Farmers (with the assistance of the Milk Supply Team if necessary) to generate income estimates based on the milk prices forecast in the Opening Price letter and on information specific to particular Farmers (the **Initial Income Estimates**);*
- b. Produced on or about 7 August 2015, a spreadsheet which could be used by Farmers (with the assistance of the Milk Supply Team if necessary) to generate income estimates on the basis that the price of \$5.60/kg/MS would remain for the rest of the 2015/16 Season and there would be no price step-ups as initially forecast in the Opening Letter, which spreadsheet also contained competitor tabs to produce a like-for-like estimate for Farmers; and*
- c. Produced on or about 7 August 2015, a spreadsheet which could be used by Farmers (with the assistance of the Milk Supply Team if necessary) to generate income estimates on the basis of hypothetical price step-downs in either September 2015, October 2015 or November 2015, to prices of either \$5.60, \$5.40, \$5.20, \$5.00 or \$4.80 kg/MS, (together the **Revised Income Estimates**)*

*Copies of the said spreadsheets may be inspected by appointment at the offices of the Defendants’ solicitors.*

- 4.38 On 14 August 2015, Fonterra sent an email to Farmers in which they:
- (a) reiterated that the market was extremely volatile;
  - (b) advised Farmers that there was a strong possibility of a step down in price for the 2015/16 Season; and

- (c) urged Farmers to work on contingency planning now, in the event that a price reduction may occur.
- 4.39 On 24 August 2015, Fonterra Group CEO Theo Spierings was quoted in a news article warning that the price of \$5.60 kg/MS was too high and did not reflect a collapse of global prices for key dairy commodities.
- 4.40 On or about 6 October 2015 Fonterra sent a letter to Farmers (the **September Price Review Letter**) which:
- (a) advised Farmers that Fonterra was holding the farmgate milk price of \$5.60 kg/MS for the 2015/16 Season;
  - (b) advised Farmers that following from its advice in early August (in the July Price Review Letter), whilst the short term demand outlook remained uncertain, an anticipated contraction in supply had helped to rebalance the market to some extent;
  - (c) stated, as was the case, that the last three GDT events had seen an increase from the historic lows reported in the July Price Review Letter;
  - (d) advised that Fonterra was now more confident in delivering against the Opening Price than it had been in August, however, product mix remained a challenge;
  - (e) warned Farmers that given the extreme moves in the market, Fonterra was not yet in position to provide an updated closing range;
  - (f) warned Farmers that they should budget conservatively, with the Opening Price as a guideline.
- 4.41 On 6 October 2015 Fonterra sent a 'Supplier Announcement' email to Farmers which:
- (a) reminded Farmers that it had warned them in early August that the Opening Price was under pressure due to extremely challenging market conditions;
  - (b) effectively repeated the matters in paragraph 4.40(a) to (f) above.

- 4.42 On or about 6 October 2015 Fonterra made available to Farmers on Dairy Web the ‘October Market Outlook slideshow’, which *inter alia*:
- (a) advised Farmers that there was a continuation of the imbalance which existed between supply and demand;
  - (b) advised Farmers that the global economic outlook was mixed, with weak global milk demand continuing;
  - (c) generally regarding dairy prices, in early August GDT prices were at 13-year lows, but that prices increased through the rest of August and September and were up 63% from the lows experienced in August.
- 4.43 On or about 30 November 2015 Fonterra sent a letter to Farmers (the **November Price Review Letter**) which:
- (a) advised Farmers that Fonterra was then holding the farmgate milk price of \$5.60 kg/MS for the 2015/16 Season;
  - (b) advised Farmers that after a slight recovery in the GDT index in September, the market remained volatile although Fonterra then expected that supply and demand would move towards balance;
  - (c) advised Farmers that the outlook for dairy commodities remained flat for the remainder of the calendar year, but that it supported the consensus view that prices would move up through the first half of next year;
  - (d) warned Farmers that local product mix was a continuing challenge for Fonterra;
  - (e) warned Farmers that given the ongoing market volatility, it would continue to monitor conditions and recommended that Farmers budgeted conservatively, using the Opening Price as their guideline for the closing range.
- 4.44 On 30 November 2015 Fonterra sent a ‘Supplier Announcement’ email to Farmers which effectively repeated the matters in paragraph 4.43(a) to (e) above.

- 4.45 On or about 3 February 2016 Fonterra sent a letter to Farmers (the **January Price Review Letter**) which:
- (a) advised Farmers that Fonterra was holding the farmgate milk price of \$5.60 kg/MS for the 2015/16 Season, and further advised them that the forecast Closing Price was remaining at \$5.60 kg/MS without a material market recovery;
  - (b) advised Farmers that any subsequent improvement to a \$5.60 kg/MS price would require a material market recovery;
  - (c) stated that the ongoing global supply and demand imbalance continued to weigh on the market, and that whilst analysts were continuing to predict a price recovery, the timeframe for supply and demand rebalancing had been pushed out;
  - (d) warned Farmers that the Australian dairy industry was not immune to the global factors described therein, and that the impact was somewhat insulated owing to the domestic dairy industry;
  - (e) stated that the market outlook was in line with what Fonterra saw unfolding in the middle of the previous year.
- 4.46 On 3 February 2016 Fonterra sent a ‘Supplier Announcement’ email to Farmers which effectively repeated the matters in paragraph 4.45(a) to (e) above.
- 4.47 On or about March 2016 Fonterra made available to Farmers on Dairy Web the ‘March Market Outlook slideshow’ which, *inter alia*:
- (a) advised Farmers that increased supply from the European Union and higher than forecasted New Zealand production was keeping commodities low; and
  - (b) advised Farmers that weaknesses in demand continued to characterise the market, with both traditional and emerging markets being weak.
- 4.48 On or about 4 April 2016 Fonterra sent a letter to Farmers (the **March Price Review Letter**) which:
- (a) advised Farmers that Fonterra was holding the farmgate milk price of \$5.60 kg/MS;

- (b) stated that as signalled in January, it anticipated a forecast closing price of \$5.60 kg/MS, subject to no further material market fluctuations;
- (c) warned Farmers that dairy market volatility had continued through the first quarter of 2016, with SMP and WMP prices still sitting just above the record lows seen the previous year, and oversupply continuing to be an issue globally;
- (d) warned Farmers that it remained concerned about the short-term outlook, particularly given the recent currency movements;
- (e) warned Farmers that the timeframe for a rebalancing of supply and demand had moved out, with recovery largely being dependent on production reducing around the world and particularly in Europe.

4.49 On 5 April 2016 Fonterra sent a ‘Supplier Announcement’ email to Farmers which effectively repeated the matters in paragraph 4.48(a) to (e) above.

#### **Part B.4 – The price revision and associated matters**

4.50 On 5 May 2016, Fonterra announced that it had revised the current average farmgate milk price from \$5.60kg/MS to \$5.00kg/MS (**Revised 2015/16 FMP**).

#### ***Particulars***

*The announcement was made by means including:*

- (A) *Email from Matt Watt to Farmers at 10:22am on 5 May 2016 (**Revised 2015/16 FMP Email**);*
- (B) *SMS text message to Farmers sent around 10am on 5 May 2016;*
- (C) *Letter to Farmers, posted in DairyWeb, on 5 May 2016 (**Revised 2015/16 DairyWeb notice**);*
- (D) *A media release on 5 May 2016 titled “Fonterra Australia revises milk price for May and June 2016 and introduces support loan”.*

4.51 The average farmgate milk price ultimately paid by Fonterra for the 2015/16 Season was \$5.13kg/MS, being an 8.4% reduction from the Opening Price.

4.52 In announcing and implementing the Revised 2015/16 FMP, Fonterra had regard to, *inter alia*:

- (a) Murray Goulburn's announced opening price and forecast closing price, and the revised farmgate milk price announced by Murray Goulburn on 27 April 2016;
- (b) Fonterra's obligations under the MSAA Benchmark Price Term;
- (c) the price of dairy products in international markets and prevailing currency exchange rates;
- (d) the impact of Fonterra's milk price on the profitability of its milk and ingredients division, including the significant financial losses incurred in that division during the current and previous seasons as a result of its milk price, which loss would have been greater for the 2015/16 Season but for the Revised 2015/16 FMP;
- (e) the competitive dynamics of the market, including the milk prices being offered by other processors and the impact of a lower milk price on the volume of milk supply that Fonterra might receive from Farmers;
- (f) the impact on Farmers, which Fonterra sought to address through the measures set out in paragraphs 4.53, 4.54 and 4.56 below.

4.53 At the same time as announcing the Revised 2015/16 FMP Fonterra announced, as was the case, that:

- (a) to support farm production for the remainder of the season, Fonterra would offer a support loan pursuant to which Farmers would be able to borrow up to 60c/kg MS based on actual milk that was supplied to Fonterra in May and June for the 2015/16 Season (**Support Loans**);
- (b) the Support Loans would require no repayments in the 2016/17 Season, and the Support Loans would be repayable by Farmers over three years from the start of the 2017/18 Season;
- (c) for the following seasons, Fonterra's minimum benchmark price would be calculated exclusive of the deductions Murray Goulburn was applying to its own farmgate milk price in the following seasons to recoup the MSSP Payments.



***Particulars***

*The Defendants refer to and repeat subparagraphs (A), (C) and (D) to the particulars under paragraph 4.50.*

- 4.54 Subject to reference to the entire Support Loans Terms and Conditions at trial, there were terms of the Support Loans that:
- (a) a Farmer could borrow an amount from Fonterra Australia Pty Ltd which was based on the volume of milk solids that Farmer supplied to Fonterra in May and June 2016 (**the principal amount**) (cl 1.1);
  - (b) the principal amount available to a Farmer was capped at \$0.60 for each kilogram of milk solids (kg/MS) that the Farmer supplied to Fonterra between 1 May 2015 to 30 April 2016, less any amounts which Fonterra had separately advanced to that Farmer and which remained outstanding (**loan cap**) (cl 1.2);
  - (c) the principal amount would be calculated and paid in two separate payments. The first advance would be paid on or around 15 June 2016, and would be an amount of \$2.74 per kg/fat and \$6.85 per kg/protein supplied by the Farmer in May 2016, provided that if that amount was higher than the loan cap, then the first advance would be limited to the amount of the loan cap (**first instalment**) (cl 1.3(a)). The second advance would be paid on or around 15 July 2016, and would be an amount of \$2.74 per kg/fat and \$6.85 per kg/protein supplied by the Farmer in June 2016, provided that if that amount, when aggregated with the first instalment, added to a figure higher than the loan cap, then the amount would be reduced so that the aggregate of both amounts did not exceed the loan cap (**second instalment**) (cl 1.3(b));
  - (d) at its absolute discretion, Fonterra could agree to increase the loan cap (cl 1.6);
  - (e) subject to clause 2.5, the loan would not bear any interest until 1 July 2017 (cl 2.1);
  - (f) subject to clause 2.3, the initial interest rate to apply to the loan from 1 July 2017 would be 3.95% per annum (cl 2.2);
  - (g) Fonterra could, at its discretion, change the interest rate from time to time to reflect the sum of the published wholesale inter-bank lending rate at the time, and its direct

borrowing costs above the published wholesale inter-bank lending rate, up to a maximum of 0.5% per annum (cl 2.3);

- (h) Fonterra would deduct interest amounts from milk payments (and any other amount payable by Fonterra to the Farmer), or it could capitalise the interest monthly (cl 2.4);
- (i) If the loan became repayable prior to 1 July 2017, it could charge interest on the outstanding amount of the Loan from the date all or part of the Loan became repayable, until the date it was repaid at a rate to be determined by Fonterra and notified to the Farmer at the relevant time (cl 2.5);
- (j) repayment of the loan was required to be made in 36 monthly instalments in accordance with the payment schedule (to be provided by Fonterra to the Farmer prior to July 2017), commencing on or around the time that the Farmer was paid his or her July 2017 milk cheque (cl 3.2).

***Particulars***

*The Support Loans were in writing contained in the Fonterra Australia Support Loan Terms and Conditions document.*

4.55 At the same time as announcing the Revised 2015/16 FMP, Fonterra also organised and informed Farmers about a series of “supplier meetings” to be held in each region across the month of May, where Farmers could speak directly to Fonterra representatives about the revised price, and it held those meetings.

4.56 On or about 13 May 2016, Fonterra announced additional support measures for autumn calvers, which they applied, the effect of which was to pay those Farmers an additional \$2.50kg/MS for milk supplied in May and June 2016.

***Particulars***

*On 13 May 2016 at 9.30am Fonterra sent a text message to Farmers confirming that additional measures had been announced to help address autumn calving rates and referring Farmers to the announcement on Dairy Web.*

*On 13 May 2016 at 9.40am Matt Watt sent an email to Farmers confirming that Fonterra had spoken to its Farmers following the announcement of the Revised 2015/16*

*FMP and had listened to concerns that the price step-down had disproportionately affected autumn calvers, and as a result was introducing additional measures for those Farmers by way of an offset payment of \$2.50 kg/MS to be paid to autumn calvers in July and August 2016, based on the milk supplied by that Farmer in May and June 2016.*

*The communications made in relation to the autumn calvers support announcement also included:*

- a. Email from Matt Watt to Farmers on 13 May 2016 at 3.59pm, attaching a 'Farmer Q&A' document containing further details of the support measures;*
- b. Public Media release dated 13 May 2016 – 'Fonterra Announces Support for Autumn Calving Suppliers.pdf'*

4.57 The Revised 2015/16 FMP was announced, and applied, by Fonterra in circumstances which included:

- (a) under the 2015/16 Handbook Agreements and 2015/16 EMSA Agreements Fonterra was permitted to undertake a mid-season price-step down, and this fact was clearly disclosed, and they refer to and repeat paragraphs 4.14 to 4.16, 4.20 and 4.25 to 4.26 above;
- (b) the fact that milk price step down provisions were common in the industry, with the market leader Murray Goulburn also having such a provision;
- (c) the same pricing system that allowed the step down in the 2015/16 Season had far more commonly resulted in step up payments in other seasons;
- (d) Fonterra was obliged by the MSAA Benchmark Price Term, or treated it as requiring Fonterra, to pay Farmers not less than the benchmark price paid by Murray Goulburn across the 2015/16 Season;
- (e) Murray Goulburn had revised its forecast milk price for the 2015/16 Season from \$5.60 kg/MS to a range of \$4.75 to \$5.00 kg/MS;
- (f) Fonterra had, during the 2015/16 Season, warned Farmers of the risk of a price drop, and they refer to and repeat paragraphs 4.34 to 4.49 above;

- (g) from August 2015 Fonterra had made available to Farmers the Revised Income Estimates and they refer to and repeat paragraph 4.37 above;
- (h) Fonterra offered Farmers a low-interest Support Loan, which was not repayable until 2017, to assist them with the immediate financial impact of the step-down, and they refer to and repeat paragraphs 4.53 to 4.54 above;
- (i) Fonterra arranged meetings with Farmers to discuss the Revised 2015/16 Price, and they sought to address concerns raised during those meetings and they refer to and repeat paragraphs 4.55 to 4.56 above;
- (j) the fact that all or many Farmers:
  - (i) could choose to enter into an agreement with Fonterra, and if so, which type of agreement to enter into;
  - (ii) could have entered into one of Fonterra's price risk management agreement options, being the Fixed Base Milk Price Agreements or the Milk Price Range Agreements as a result of which milk supplied pursuant to those arrangements would not have been impacted by the 2015/16 Revised FMP, and they refer to and repeat paragraphs 4.4 to 4.11 above;
  - (iii) could have negotiated terms with Fonterra prior to entering into any agreement, including negotiating which incentive (if any) they wished to include in any EMSA Agreement;
- (k) the price step-down was only an 8.4% reduction across the 2015/16 Season;
- (l) the global market conditions affected dairy farmers around the world, with Fonterra NZ's farmer suppliers in New Zealand receiving a price of only NZ\$3.90 kg/MS in the 2015/16 Season;
- (m) in 2014/15, Fonterra's Australian business lost approximately \$200 million, of which \$58 million was lost from the ingredients division (which is impacted by milk prices paid by Fonterra), and in 2015/16, prior to the Revised 2015/16 FMP being announced, it was forecast that there would be a significant operating loss for the ingredients business, which loss would have been greater without the Revised 2015/16 FMP;

- (n) the 2015/16 Revised FMP was announced as soon as practicable after Fonterra had determined that it should apply.

## **PART C – THE PLAINTIFFS’ CONTRACT CLAIMS**

### ***Handbook Farmers***

5. As to paragraph 5, the Defendants:
- (a) refer to and repeat the matters pleaded in paragraphs 4.12 to 4.21 above and admit that by contracts made in standard terms with each of the Handbook Farmers at various times throughout the 2015/16 Season, the relevant Fonterra company to which a Farmer supplied milk agreed to acquire milk from each Handbook Farmer during the 2015/16 Season; and
  - (b) otherwise deny the allegations.
6. As to paragraph 6, they refer to and repeat the matters pleaded in paragraphs 4.12 to 4.21 above and subject to this they:
- (a) admit that section 2.1 of the 2015/16 Handbook contained a term to the general effect alleged in subparagraph (a);
  - (b) admit that section 10.2 of the 2015/16 Handbook contained a term to the general effect alleged in subparagraph (b);
  - (c) as to subparagraph (c) they deny that the Considered Estimates term was a term of the 2015/16 Handbook Agreement and they otherwise deny the allegations in subparagraph (c);
  - (d) as to subparagraph (d):
    - (i) with respect to subparagraph (d)(i), they:
      - A. refer to and repeat paragraph 4.15(j) above;
      - B. further:
        1. say that the Handbook MSAA statement provided Farmers with information about the MSAA between BSC and Fonterra Milk;

2. deny that the Handbook MSAA statement created any obligation between Fonterra and any Farmer, and further or alternatively deny that the Handbook MSAA statement created any obligation on Fonterra to do anything not required under Fonterra Milk's obligations to BSC under the MSAA;
  - (ii) otherwise deny subparagraph (d)(i);
  - (iii) they deny subparagraph (d)(ii);
  - (iv) they otherwise deny the allegations;
- (e) as to subparagraph (e):
  - (i) they say that the 2015/16 Handbook contained a statement to the effect that Fonterra's Milk Supply Team could provide pricing information based on each supplier's farm, taking into account information provided by the supplier;
  - (ii) they otherwise deny the allegations in subparagraph (e);
- (f) they admit that section 10.3 of the 2015/16 Handbook contained a term to the general effect alleged in subparagraph (f);
- (g) they admit that section 10.3 of the 2015/16 Handbook contained a term to the general effect alleged in subparagraph (g);
- (h) they admit that section 10.3 of the 2015/16 Handbook contained a term to the general effect alleged in subparagraph (h);
- (i) they admit that clause 11.1 of the 2015/16 STCs contained a term to the general effect alleged in subparagraph (i);
- (j) they deny subparagraph (j);
- (k) they admit subparagraph (k) and say further that Handbook Farmers were entitled to cease supplying Fonterra at any time upon the provision of written notice;

- (l) as to subparagraph (l):
  - (i) they admit that the Standard Terms and Conditions provided that the terms set out in the 2015/16 Handbook and any Other Documents constituted the entire agreement between the Handbook Farmers and Fonterra concerning the subject matter of the said documents (Standard Terms and Conditions, cl 11.7); and
  - (ii) they otherwise deny subparagraph (l);
- (m) as to subparagraph (m):
  - (i) they refer to and repeat paragraphs 4.12 to 4.14 and 4.18 to 4.20 above and otherwise deny the allegations therein;
  - (ii) they say further that, in the Opening Price Letter Fonterra:
    - A. stated that the forecast Closing Range was a forecast on the basis of an anticipated recovery in global prices in the first half of 2016 and the continued softening of the Australian Dollar (Opening Price Letter);
    - B. stated that the Opening Price and forecast Closing Range were more cautious than in recent seasons;
    - C. referred to Fonterra's commitment to ensure the price offered was both competitive and deliverable;
    - D. stated that it had introduced a simpler pricing structure which was designed to make farm margin management easier and to improve cash flow on farm, and that Farmers would continue to see this transparency from it;
    - E. warned Farmers that:
      - 1. the global environment was particularly volatile, and that since December 2014 it had seen commodity prices decrease due to increased global production and a resulting oversupply

of dairy commodities, which coincided with weakening demand which had a local impact;

2. global conditions were challenging;
  3. prices were subject to adjustment in accordance with the 2015/16 Handbook and any other arrangement in place between Fonterra and the Farmer; and
  4. as the dairy industry had experienced in past seasons, pricing could be adjusted up or down during the season, and that any pricing change would be carefully considered.
7. As to paragraph 7:
- (a) they refer to and repeat paragraphs 4.12 to 4.21, 4.34 to 4.49 and 5 to 6 above;
  - (b) where the 2015/16 Handbook applied, and to the extent that the 2015/2016 Handbook applied, they say further in respect of the 2015/16 Season that:
    - (i) the Farmer supplied milk to the relevant Fonterra company pursuant to the 2015/16 Handbook;
    - (ii) the relevant Fonterra company made payments to the Farmer in accordance with the terms of the 2015/16 Handbook;
    - (iii) where the Farmer had supplied relevant information, the relevant Fonterra company provided 2015/16 Income Estimates to that Farmer pursuant to the 2015/16 Handbook;
    - (iv) Fonterra reviewed farmgate milk prices on a bi-monthly basis, or more frequently as needed, and such reviews examined, *inter alia*, the conduct of Fonterra's competitors in the Regions, domestic demand and prices for dairy products, international demand and prices for dairy products, and the value of the Australian dollar against the US dollar in foreign exchange markets;
  - (c) admit that they made payments to Handbook Farmers consistently with subparagraphs (e)(i) to (iii);



- (d) otherwise deny paragraph 7.

***EMSA Farmers***

- 8. As to paragraph 8:
  - (a) they refer to and repeat paragraphs 4.22 to 4.32 above;
  - (b) they say further that, where the relevant Fonterra company entered into one of the 2015/16 EMSA Agreements (as identified in paragraphs 4.24 to 4.32 above), that agreement governed the supply of milk during the 2015/16 Season;
  - (c) otherwise they deny the allegations contained therein.
- 9. As to paragraph 9, subject to reference to the full terms and effect of each of the 2015/16 EMSA Agreements at trial, they refer to and repeat paragraphs 4.22 to 4.32 above and:
  - (a) admit that some of the 2015/16 EMSA Agreements contained terms to the effect alleged in subparagraph (a), but say further that:
    - (i) not all 2015/16 EMSA Agreements contained an Appendix A or an Appendix B;
    - (ii) not all 2015/16 EMSA Agreements contained Schedules; and
    - (iii) not all 2015/16 EMSA Agreements contained terms which provided that the Appendix to the 2015/16 Handbook (being the Standard Terms and Conditions) would apply in the order of priority specified by the Plaintiffs' at subparagraph (a);
  - (b) they admit that there were generally terms of 2015/16 EMSA Agreements to the effect alleged at subparagraph (b);
  - (c) they admit that some of the 2015/16 EMSA Agreements contained terms to the effect alleged in subparagraph (c);
  - (d) they admit that the 2015/16 EMSA Agreements generally contained terms to the effect alleged in subparagraph (d);
  - (e) they admit that some of the 2015/16 EMSA Agreements contained terms to the effect alleged in subparagraph (e);

- (f) as to subparagraph (f):
    - (i) they deny that the Reasonable Step-downs Term is an implied term of any one of the 2015/16 EMSA Agreements;
    - (ii) they say further that:
      - A. EMSA Farmers had, alternatively were treated by the Defendants as having, the benefit of the MSAA Benchmark Price Term;
      - B. they refer to and repeat the express terms of the 2015/16 EMSA Agreements (relevant to any particular Farmer) pleaded at paragraphs 4.25 to 4.32 above;
      - C. they refer to and repeat subparagraph (g)(i) below; and
      - D. they refer to and repeat the express terms of the 2015/16 Handbook Agreements pleaded at 4.12 to 4.21;
    - (iii) they otherwise deny subparagraph (f);
  - (g) as to subparagraph (g):
    - (i) they admit that the terms set out in the documents described at paragraph 9(a) of the Amended Statement of Claim (but noting the matters pleaded at paragraphs 4.25 to 4.32 above) constituted the entire agreement between the parties concerning the subject matter of the said documents; and
    - (ii) they otherwise deny subparagraph (g);
  - (h) as to subparagraph (h), they refer to and repeat paragraph 6(m) above;
  - (i) deny subparagraph (i).
10. As to paragraph 10, they:
- (a) refer to and repeat paragraphs 4.22 to 4.32, 4.34 to 4.49 and 8 to 9 above;

- (b) where a particular EMSA applied, and to the extent that a particular EMSA applied, they say further in respect of the 2015/16 Season that:
  - (i) the Farmer supplied milk to the relevant Fonterra company pursuant to that EMSA;
  - (ii) the relevant Fonterra company made payments to the Farmer in accordance with the terms of that EMSA;
  - (iii) where a particular EMSA applied, and if the Farmer had supplied relevant information, the relevant Fonterra company provided 2015/16 Income Estimates to the supplier pursuant to that EMSA;
- (c) Fonterra reviewed farmgate milk prices on a bi-monthly basis, or more frequently as needed, and such reviews examined, *inter alia*, the conduct of Fonterra's competitors in the Regions, domestic demand and prices for dairy products, international demand and prices for dairy products, and the value of the Australian dollar against the US dollar in foreign exchange markets;
- (d) admit that they made payments to EMSA Farmers consistently with subparagraphs (e)(i) to (iii);
- (e) otherwise deny paragraph 10.

***Alleged breach of contracts – Considered Estimates Term***

- 11. As to paragraph 11, they:
  - (a) refer to and repeat paragraph 4.33 above;
  - (b) otherwise deny the matters alleged therein.
- 12. As to paragraph 12, they refer to and repeat paragraphs 6(c), 9(i) and 11 above and deny the matters alleged therein.

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- 13. As to paragraph 13, subject to reference at trial to the full terms and effect of the relevant ASX announcement, they:
  - (a) admit subparagraph (a);

(b) as to subparagraph (b), say that, in the same announcement to the ASX, Murray Goulburn said in substance that:

- (i) it was introducing the MSSP to provide a support payment to its MG Farmers;
- (ii) the MSSP was a payment 'above the actual FY16 FMP' such that suppliers would receive the 'cash equivalent of \$5.47 kg/MS' (page 4, MG April ASX Announcement);
- (iii) it would fund the difference between the final milk price of between \$4.75 and \$5.00 kg/MS and the equivalent price of \$5.47 kg/MS with a combination of cash on balance sheet and additional borrowings (the **MSSP Payments**);
- (iv) to recover the MSSP Payments and its cash funding cost, it would deduct a fixed amount from future milk payments over the next three financial years (page 4, MG April ASX Announcement); and

(c) otherwise deny subparagraph (b).

14. As to paragraph 14, they:

- (a) admit that Murray Goulburn announced the deductions, suspension of deductions, cessation of deductions and refund of deductions as alleged in subparagraphs (a), (b) and (c); and
- (b) otherwise deny the allegations.

14.1 In further answer to paragraph 14, they refer to and repeat paragraph 13 above, and they say further that:

- (a) on or about 24 August 2016, Murray Goulburn announced its financial results for the year ended 30 June 2016;
- (b) in that announcement, Murray Goulburn informed the ASX that:
  - (i) its final farmgate milk price for the 2015/16 Season was \$4.80 kg/MS;

- (ii) in calculating profits for the purpose of calculating payments under its “Profit Sharing Mechanism”, Murray Goulburn used the ‘Actual Weighted Average Southern Milk Region FMP’ of \$4.76 kg/MS;
- (c) Murray Goulburn made other statements to the effect that its final farmgate milk price for the 2015/16 Season was \$4.80 kg/MS;
- (d) the average final farmgate milk price paid to MG Farmers in respect of the 2015/16 Season was \$4.80 kg/MS, and such price is and was the relevant price of Murray Goulburn for the purpose of any obligation connected with the following:
  - (i) the MSAA Benchmark Price Term; and
  - (ii) the Overall Price Match Term as alleged (which term is denied);
- (e) the MSSP Payments did not (and do not) bear on the calculation of the actual farmgate milk price that Murray Goulburn paid to the MG Farmers in respect of the 2015/16 Season, rather the MSSP Payments constituted an advance or prepayment on the milk prices payable in respect of seasons subsequent to the 2015/16 Season; and
- (f) the MSSP Payments (and any deductions or refunds made in respect of the MSSP Payments after the end of the 2015/16 Season) did not affect the relevant price of Murray Goulburn for the 2015/16 Season for the purpose of any obligation connected with the following:
  - (i) the MSAA Benchmark Price Term; and
  - (ii) the Overall Price Match Term as alleged (which term is denied).

***Alleged breach of contracts – Reasonable Step-downs Term***

15. As to paragraph 15:

- (a) they admit that Fonterra made an announcement generally to the effect alleged in subparagraph (a), and say further that they also announced that *inter alia*:
  - (i) Fonterra has been committed to meeting its pricing obligations under the MSAA, even while its product mix and global commodity price volatility

- had continued to be challenging and did not support the price of milk that was being paid;
- (ii) the balance between available dairy exports and imports had been unfavourable for more than 18 months, compounded by recent strengthening of the Australian dollar;
  - (iii) the matters pleaded at subparagraph (i) above had come at a time when Fonterra's product mix had been challenged by the disruptive events at Stanhope and Darnum;
  - (iv) Farmers would be able to borrow up to 60 c/kg/MS based on actual milk supplied to Fonterra in May and June of the 2015/16 season by way of a Support Loan;
  - (v) the Support Loan would require no repayments in the 2016/17 season, however there would be a reduction of \$0.02 per kg/MS for the farmgate milk price paid in that season to reflect interest that would otherwise have been payable to Farmers participating in the loan scheme during the 2016/17 Season;
  - (vi) the Support Loan would be repayable by Farmers over three years from the start of the 2017/18 Season; and
  - (vii) for the following seasons, Fonterra's minimum benchmark price would be calculated exclusive of the deductions Murray Goulburn was applying to its own farmgate milk price in the following seasons to recoup the MSSP Payments;

***Particulars***

*Email from Matt Watt to Farmers dated 5 May 2016 with identical statement made available to Farmers via Dairy Web on the same date, letter to Farmers dated 9 May 2016, and document titled "Milk Price Revision and Fonterra Australia Support Loan Q&A for suppliers" dated May 2016.*

- (b) as to subparagraph (b), they:
    - (i) say that the reduced average annual price was effected for each Farmer from the time at which that Farmer was paid for milk supplied on and after 5 May 2016;
    - (ii) otherwise deny the matters alleged therein.
16. As to paragraph 16:
- (a) as to subparagraph (a):
    - (i) they admit that, since the start of the 2015/16 Season, they had been making milk supply payments to Farmers in accordance with the Opening Price Letter and the Price Schedule, save as in relation to milk supply payments made to those EMSA Farmers who were party to a Fixed Base Milk Price Agreement, Milk Price Range Agreement or any other 2015/16 EMSA Agreement containing an incentive which relevantly modified the milk payments due to that EMSA Farmer;
    - (ii) they say further that they refer to and repeat paragraphs 4.25 to 4.32 above and say that in the 2015/16 Season Fonterra made milk supply payments to EMSA Farmers who were party to a Fixed Base Milk Price Agreement, Milk Price Range Agreement or other relevant 2015/16 EMSA Agreement in accordance with the relevant terms of those agreements;
    - (iii) they otherwise deny subparagraph (a);
  - (b) they refer to and repeat paragraphs 4.34 to 4.49 above, and otherwise deny subparagraph (b);
  - (c) as to subparagraph (c):
    - (i) despite request from the Defendants, the Plaintiffs have not provided particulars in relation to each of the alleged Four Variables at any particular point in time and the Plaintiffs have said that particulars may be provided following the completion of discovery and experts' reports, and in these circumstances the allegation is vague and embarrassing;

- (ii) subject to subparagraph (i) above, they do not admit that there had been no material adverse change in the Four Variables, and they reserve their right to plead further if and when proper particulars are provided;
  - (d) as to subparagraph (d), they refer to and repeat paragraph 4.52 above and otherwise deny the matters alleged therein.
17. As to paragraph 17:
- (a) as to subparagraph (a), they:
    - (i) say that formal notice of the Revised 2015/16 FMP to Farmers on 5 May 2016 was provided to suppliers prior to effecting it;
    - (ii) otherwise deny the matters alleged therein and say further that:
      - A. Farmers were on notice of the possibility of a mid-season price decrease by the terms of the agreements and documents referred to in paragraphs 4.12 to 4.21, 4.25 to 4.32, and 4.34 to 4.49 above;
      - B. they had warned Farmers of the risk and potential for a mid-season price decrease and they refer to and repeat paragraphs 4.15(s) and 4.35 to 4.39 above;
      - C. as a result of Murray Goulburn's consistent signalling that it could maintain its opening price and closing range for the 2015/16 Season, and as a result of Murray Goulburn not having provided any prior warning prior of the Murray Goulburn revision, neither Farmers nor Fonterra had any notice or warning that Murray Goulburn would lower its prices on 27 April 2016.

### ***Particulars***

*As to (ii)(C), Fonterra refers to:*

1. *ABC news article titled 'Devondale Murray Goulburn talks to dairy farmers at Mystery Creek' dated 11 June 2015 (updated 22 June 2015), wherein Director of Murray Goulburn John Pyne is quoted remarking that Murray Goulburn had 'moved towards value adding rather than commodity market reliance', and that it was 'expecting to offer farmers a similar milk price to last season and [was] confident [it could] achieve that, despite outside factors which may influence the final price';*



2. *Stock and Land news article titled 'Milk Price Unity' dated 1 July 2015, wherein Managing Director of Murray Goulburn Gary Helou is sourced remarking that Murray Goulburn's resilient pricing reflected its product mix being shifted away from commodity products to less volatile premium quality ready to consume dairy foods, and is quoted remarking 'Combining with our continuing focus on reducing cost in the business and driving efficiencies, the execution of this strategy has supported MG's ability to pay a strong FMP';*
  3. *Murray Goulburn's ASX announcements 'News Release' and 'Presentation' dated 31 August 2015;*
  4. *Sydney Morning Herald news article titled 'Murray Goulburn says farmer payout 'affordable', sales drop 1.5 per cent' dated 31 August 2015, wherein Mr Helou is quoted remarking 'Murray Goulburn will continue to monitor the situation closely and will update the market as soon as circumstances materially change', and is referred to as having defended Murray Goulburn's price, by saying 'We're paying our farmers ... what we can afford to pay them and this year [2014/15] it was \$6 plus net profit after tax of \$21 million'. He is also quoted as stating that Murray Goulburn's gearing was 'conservative', and that it was 'achieving strong growth in the face of a strong decline' in commodity prices, because the cooperative was shifting away from producing commodity products. He is also quoted as stating 'we think the market has bottomed'.*
  5. *Murray Goulburn's ASX announcement 'Half Year Financial Results News Release' dated 29 February 2016;*
  6. *The Australian news article titled 'Global Food: MG Boss says higher milk price can be sustained' dated 21 April 2016, reporting comments made by Mr Helou at the Global Food Forum the previous day; and*
  7. *Murray Goulburn's ASX announcements 'Management Changes' and 'Trading and FY16 Outlook Update' dated 27 April 2016.*
- (b) they deny subparagraph (b), and refer to and repeat subparagraph (a) above;
- (c) as to subparagraph (c), they:
- (i) say that the revised FMP had the effect of reducing Fonterra's weighted average milk price for the 2015/16 Season from \$5.60 kg/MS to \$5.13 kg/MS, representing an 8.4% reduction;
  - (ii) refer to and repeat paragraphs 4.53 to 4.54, and 15(a)(v) above;

- (iii) otherwise deny subparagraph (c);
  - (d) as to subparagraph (d), they:
    - (i) refer to and repeat subparagraphs (c)(i) and (ii) above;
    - (ii) otherwise deny the matters alleged therein;
  - (e) as to subparagraph (e), they:
    - (i) refer to and repeat subparagraphs (c) and (d) above;
    - (ii) otherwise deny the matters alleged therein;
  - (f) they deny subparagraph (f) and they refer to and repeat subparagraphs (a) to (e) above, and paragraphs 4.14(f) to (g), 4.15(s) and 4.53 to 4.56 and subparagraphs 17(a) and (e) above;
  - (g) they deny subparagraph (g) and say further that they refer to and repeat subparagraphs (a) to (f) above.
18. As to paragraph 18, they refer to and repeat paragraphs 6(c) and 6(j), 9(f) and 9(i), 11, and 15 to 17 above and deny the matters alleged therein.
19. As to paragraph 19, they:
- (a) admit that Fonterra's Closing Price for the 2015/16 Season was \$5.13 kg/MS and otherwise deny the allegations in subparagraph (a);
  - (b) as to subparagraph (b):
    - (i) they refer to and repeat the allegations in paragraphs 13 to 14.1 above; and
    - (ii) otherwise deny the allegations in subparagraph (b).
20. They deny paragraph 20 and refer to and repeat paragraphs 6(d), 9(i) and 19 above.

***Alleged Breach of contracts – loss and damage***

21. They deny paragraph 21.

**PART D – ALLEGED MISLEADING AND DECEPTIVE CONDUCT**

22. As to paragraph 22, they:

- (a) refer to and repeat paragraphs 4.14 to 4.15, 4.18 to 4.20 and 6 above;
- (b) say further that:
  - (i) in the 2014/15 Season they set an Opening Price of \$5.80 kg/MS with a forecast Closing Range of \$6.10 to \$6.30 kg/MS, and at the conclusion of that Season the final average milk price was \$6.00 kg/MS;
  - (ii) in July 2015, representatives of Fonterra conducted meetings with Farmers in all Regions at which those representatives of Fonterra provided information concerning the Opening Price and related matters;
  - (iii) the information provided at such meetings was consistent with the information set out in a document titled “Supplier Meeting Q&A West, North & East Regions” (dated 16 July 2015); and
- (c) otherwise deny the allegations.

23. As to paragraph 23, they:

- (a) refer to and repeat paragraphs 4.34 to 4.49 and 22 above; and
- (b) say further that:
  - (i) in addition to the communications pleaded in paragraphs 4.34 to 4.49 above, in the period between 29 June 2015 to 4 May 2016, Fonterra provided other information to Farmers concerning the Opening Price and related matters, including the risk that the Closing Price would fall below the Closing Range, being the estimate provided in the Opening Letters (**Additional information**);
  - (ii) the Additional information was provided in different ways, including by way of text messages, statements and videos published on Fonterra’s websites, statements published in the media, and statements made at meetings with suppliers;

- (iii) they will refer at trial to the full terms and effect of the relevant communications by which Fonterra provided the Additional information; and
  - (c) subject to subparagraphs (a) and (b) above, admit that prior to 5 May 2016:
    - (i) Fonterra held its farmgate milk price of \$5.60kg/MS
    - (ii) Fonterra did not revise or withdraw the Opening Price;
  - (d) otherwise deny the allegations.
24. As to paragraph 24:
- (a) they refer to and repeat paragraphs 22 and 23 above;
  - (b) as to the allegations relating to the Handbook Farmers, they:
    - (i) refer to and repeat paragraphs 4.12 to 4.21, 4.33 to 4.49, 5 to 7, 11 to 13 and 16 above;
    - (ii) otherwise deny the allegations, including the allegations to the effect that Fonterra made the “Pricing Representations” to these Farmers;
  - (c) as to the allegations relating to the EMSA Farmers, they:
    - (i) refer to and repeat paragraphs 4.4 to 4.49 and 8 to 16 above;
    - (ii) otherwise deny the allegations, including the allegations to the effect that Fonterra made the “Pricing Representations” to these Farmers; and
  - (d) they otherwise deny each and every allegation.
- 24.1 In further answer to the allegations in paragraph 24, as to Fonterra’s statements concerning the forecast Closing Range, they say that Fonterra had reasonable grounds for such statements.

***Particulars***

*The grounds included:*

- (i) *the facts and matters pleaded in paragraph 4.33 above;*

(ii) *the facts and matters identified in Fonterra's document titled "Opening Milk Price 2016" (dated 26 June 2015).*

25. As to paragraph 25, they:

- (a) refer to and repeat paragraphs 22 to 24.1 above; and
- (b) otherwise deny each and every allegation.

26. As to paragraph 26, they:

- (a) refer to and repeat paragraphs 22 to 25 above;
- (b) otherwise deny each and every allegation.

27. As to paragraph 27:

- (a) as to the allegations in subparagraphs 27(a) to (f):
  - (i) in respect of the financial year ended 30 June 2015, they say that:
    - A. international prices for all dairy products remained low, in particular the prices for skim milk powder (**SMP**) and whole milk powder (**WMP**);
    - B. such low prices were due to abundant supply and reduced demand, including a decline in Chinese demand for dairy products;
    - C. the Russian Federation's ban on imports continued to restrict dairy trade, affecting exports from the European Union and countries such as the United States and Australia;
    - D. the export of a diverse range of products to different markets had helped to protect Australian dairy product exporters from international price volatility;
    - E. Australian exports of SMP to Asian markets, excluding China, had increased above the levels achieved in the financial year ended 30 June 2014;
    - F. strong consumption growth was expected across several markets in the Middle East and Asia;

- (ii) they say further that:
    - A. in the financial year ended 30 June 2015, the Australian domestic market consumed around 60% to 65% of milk produced in Australia, and this level of domestic consumption had helped to protect the Australian dairy industry from international price volatility;
    - B. in the financial year ended 30 June 2015, dairy demand through Australia food service and supermarket channels remained robust;
    - C. in the financial year ended 30 June 2015, there had been a decline in the value of the Australian dollar against the US dollar in foreign exchange markets, and this decline had helped to maintain the farmgate milk prices paid by domestic processors to farmers in the relevant regions;
    - D. on 23 June 2015, Bega Cheese (Tatura Milk Industries) announced an Opening Price of \$5.60kg/MS;
    - E. on 24 June 2015, Murray Goulburn announced an Opening Price of \$5.60 kg/MS and a forecast final FMP of \$6.05 kg/MS;
    - F. on or about 25 June 2015, Australian Consolidated Milk (ACM) announced an Opening Price of \$5.75 - \$6.00 kg/MS;
    - G. on 26 June 2015, Warrnambool Cheese & Butter Company Holdings Ltd (**WCB**) announced an Opening Price of \$5.60 kg/MS;
    - H. on 29 June 2015, Murray Goulburn also released its product disclosure statement to the ASX confirming that it was confident to pay the prices it had announced;
  - (iii) they otherwise do not admit the allegations;
- (b) as to the allegations in subparagraph (g), they:
- (i) refer to and repeat subparagraph (a) above;
  - (ii) otherwise do not admit the allegations;

- (c) as to the allegations in subparagraph (h), they:
- (i) refer to and repeat subparagraphs (a) and (b) above;
  - (ii) say further that, as at 29 June 2015, Fonterra appreciated or considered that:
    - A. there would be a recovery in global dairy product prices in the first half of 2016;
    - B. in the financial year ended 30 June 2015, in the relevant regions, there was a high level of competition among processors for the acquisition of raw milk from suppliers;
    - C. in respect of the financial year ended 30 June 2016, Fonterra's ability to retain existing suppliers and attract new suppliers would affect its business performance;
    - D. Fonterra's ability to retain existing suppliers and attract new suppliers would depend, in part, on the farmgate milk prices it offered compared with the farmgate milk prices offered by its competitors in the relevant regions;
    - E. in the financial year ended 30 June 2015, Fonterra's and its competitors' returns would be affected by the value of the Australian dollar against the US dollar in foreign exchange markets;
    - F. that exposure to the value of the Australian dollar against the US dollar would continue in the financial year ended 30 June 2016;
    - G. Bloomberg had forecast a decline in the value of the Australian dollar against the US dollar, thereby improving Fonterra's and its competitors' returns;
    - H. this forecasted decline in the value of the Australian dollar against the US dollar, if it occurred, would offset the effects of any reductions in international demand and international prices;
    - I. this forecasted decline in the value of the Australian dollar against the US dollar, if it occurred, would support the payment of farmgate milk prices at, or above, the level announced by Murray Goulburn, WCB and Fonterra (among others);

- (iii) otherwise deny the allegations;
- (d) as to the allegations in subparagraph (i), they:
- (i) refer to and repeat subparagraphs (a) to (c) above;
  - (ii) say further that:
    - A. insofar as there was a risk that Fonterra would not be able to hold the Opening Price (including the monthly Price Schedules) for the whole of the 2015/16 Season (**Opening Price risk**);
    - B. insofar as there was a risk that Fonterra's Closing Price for the 2015/16 Season would sit below the Opening Price (**Closing Price risk**);
    - C. Fonterra disclosed the Opening Price risk and the Closing Price risk in the 2015/16 Handbook and other communications with Farmers in the relevant regions, and they refer to and repeat paragraphs 4.14(f), 4.14(g) and 4.15(s) above;
    - D. such risks had existed in seasons preceding the 2015/16 Season;
  - (iii) otherwise deny each and every allegation.
28. As to paragraph 28, they:
- (a) refer to and repeat paragraph 27 above;
  - (b) say further that:
    - (i) in early August 2015, Fonterra had observed a drop in global dairy commodity prices;
    - (ii) having observed this drop, in the first or second week of August 2015, Fonterra's Australian Leadership Team considered revising the Opening Price;
    - (iii) by the July Price Review Letter dated 13 August 2015, Fonterra warned their Australian suppliers that:
      - A. Fonterra's farmgate milk price for the 2015/16 Season was under review;



- B. Fonterra may need to reduce its farmgate milk price for the 2015/16 Season,
- and they refer to and repeat paragraph 4.35 above;
- (c) otherwise deny each and every allegation.
29. As to paragraph 29, they:
- (a) refer to and repeat paragraphs 22 to 28 above;
- (b) say that, at all material times after 13 August 2015, Fonterra had reasonable grounds to maintain the Opening Price and its estimate of the Closing Range (as applicable at the relevant time);

***Particulars***

*The grounds included:*

- (i) *the matters pleaded in paragraph 4.33 above, all of which continued to apply;*
- (ii) *between mid-August 2015 to mid-October 2015, as reflected in the prices published by Global Dairy Holdings Ltd, there was an improvement in global dairy commodity prices;*
- (iii) *from the beginning of the 2015/16 Season up until 27 April 2016, Murray Goulburn stated that it would pay MG Farmers a farmgate milk price of at least \$5.60 kg/MS;*
- (iv) *Murray Goulburn did not revise its farmgate milk price at any point before the MG Price Reduction;*
- (v) *Murray Goulburn did not forewarn the market of the MG Price Reduction;*
- (vi) *Fonterra reasonably expected that Murray Goulburn had capacity to and would pay MG Farmers at least the forecast farmgate milk price of \$5.60 kg/MS.*
- (c) say that, at all material times after 13 August 2015 insofar as the Opening Price risk and the Closing Price risk existed they had disclosed the existence of these risks;
- (d) otherwise deny each and every allegation.

30. As to paragraph 30, they:
- (a) refer to and repeat paragraph 29 above; and
  - (b) subject to the matters pleaded in the preceding subparagraph, admit that Fonterra maintained the Opening Price until 4 May 2016;
  - (c) otherwise deny each and every allegation.
31. As to paragraph 31, they:
- (a) refer to and repeat paragraph 30 above;
  - (b) otherwise deny each and every allegation.
32. As to paragraph 32, they:
- (a) refer to and repeat paragraphs 22 to 30 above;
  - (b) otherwise deny each and every allegation.
33. They deny paragraph 33.
34. They deny paragraph 34.

#### **PART E – ALLEGED UNCONSCIONABLE CONDUCT**

35. As to paragraph 35:
- (a) as to subparagraph (a), they:
    - (i) refer to and repeat paragraphs 4.4 to 4.32;
    - (ii) say further that:
      - A. prior to the commencement of the 2015/2016 Season, Fonterra publicised the arrangements pursuant to which Farmers could seek to guard against decreases in the farmgate milk price in that season;
      - B. during the 2015/2016 Season, all Farmers who or which supplied milk to Fonterra did so under transparent terms and conditions; and

- (iii) otherwise admit the matters alleged therein;
- (b) as to subparagraph (b), they admit that they set the Opening Prices, refer to and repeat paragraphs 4.4 to 4.21 and 4.34 to 4.49 above, and otherwise deny the allegations therein;
- (c) as to subparagraph (c):
  - (i) they admit that the Fonterra Group monitored global dairy markets and forecast dairy commodity prices, and Fonterra had access to that information, which was confidential:
  - (ii) they say further that:
    - A. Fonterra had access to a range of publicly available information concerning prevailing market conditions and international and global dairy markets which were not confidential to it; and
    - B. they communicated regularly with Farmers throughout the 2015/16 Season concerning the information referred to in subparagraph (ii)(A) above, and they refer to and repeat paragraphs 4.34 to 4.49 above;
  - (iii) they otherwise deny subparagraph (c);
- (d) as to subparagraph (d), they:
  - (i) refer to and repeat subparagraph (c) above;
  - (ii) say further that there was a significant amount of global market information that was available at all material times and relatively easy to access, free of charge or via subscription, including:
    - A. Dairy Australia Situation and Outlook Repot;
    - B. Rabobank;
    - C. NZ Agrifax analysis;
    - D. the Dairy Global website;
    - E. Global Dairy Trade;
    - F. Dairy Week;

- (iii) otherwise deny the matters alleged therein;
- (e) as to subparagraph (e), they refer to and repeat subparagraph (d) above and otherwise deny the matters alleged therein;
- (f) as to subparagraph (f):
  - (i) with respect to subparagraph (i), they admit that the location of a farm may affect the potential customers for milk from that farm;
  - (ii) with respect to subparagraphs (ii) and (iii), they:
    - A. refer to and repeat paragraphs 4.22 to 4.32 above;
    - B. otherwise do not admit the matters alleged therein;
    - C. say further that:
      - 1. EMSA Farmers generally agreed to supply Fonterra by way of an EMSA agreement to take advantage of the prices and incentives offered;
      - 2. EMSA Farmers (except for those who were party to Fixed Base Milk Price Agreements, Milk Price Range Agreements or West Fresh EMSAs) were aware and agreed to supply Fonterra on terms which would require them to supply milk to Fonterra even in circumstances where there was a price drop; and
      - 3. Fonterra disclosed to Farmers it was possible that a price-drop would occur in the 2015/16 Season;
  - (iii) as to subparagraph (iv), they:
    - A. admit that some of the Farmers were autumn calvers who generally structured their calving to take advantage of the price incentives offered by Fonterra; and
    - B. admit that those farmers may be affected to a greater degree by price reduction in May and June and they refer to and repeat paragraph 4.56 above;
  - (iv) they otherwise deny subparagraph (f);

- (g) as to subparagraph (g), they:
- (i) refer to and repeat paragraphs 4.22 to 4.32 above;
  - (ii) otherwise deny the matters alleged therein and say further that:
    - A. prior to the 2015/16 Season, Fonterra had offered Farmers the ability to enter into an Incentive EMSA with a 'GroPlan' incentive, but the GroPlan incentive program was not offered for new agreements with Farmers after March 2015;
    - B. prior to and during the 2015/16 Season, Fonterra made available to Farmers the 'Interest Free Supplier Advance Program';
- (h) as to paragraph (h), they:
- (i) deny that Fonterra did not disclose to Farmers or potential Farmers Fonterra's actual considered estimate of the Opening Prices and/or likely Closing Range, and they refer to and repeat paragraphs 4.14(b) and (c), 4.33 and 4.34 to 4.49;
  - (ii) otherwise deny the matters alleged therein;
- (i) they refer to and repeat paragraphs 4.4 to 4.32, 6(c) and 9(i) above and otherwise deny subparagraph (i);
- (j) they admit subparagraph (j) and refer to and repeat paragraphs 4.2 to 4.32;
- (k) as to subparagraph (k), they:
- (i) deny that the Opening Prices and Closing Range were set for the purpose alleged, and they refer to and repeat paragraph 4.33 above;
  - (ii) deny that Fonterra was obligated to set the Opening Prices and Closing Range in the manner alleged in subparagraph (ii), and they refer to and repeat paragraphs 4.12 to 4.32 above;
  - (iii) say that Fonterra had no obligation to inform Farmers of the matters alleged, which were not the case;
  - (iv) otherwise deny the matters alleged therein;

- (l) as to subparagraph (l):
  - (i) they refer to and repeat subparagraphs (a) to (k) above and admit that insofar as the matters alleged in paragraph 35(a) to (k) were the case as admitted above, those matters were known to Fonterra's senior management;
  - (ii) they otherwise deny subparagraph (l);
- (m) as to subparagraph (m), they:
  - (i) refer to and repeat paragraph 27 above and admit that senior management had or ought reasonably to have had the information referred to in paragraph 27 above;
  - (ii) otherwise deny the matters alleged therein;
- (n) as to subparagraph (n), they:
  - (i) refer to and repeat subparagraphs 27(d) and 35(k) to (m) above;
  - (ii) say further that insofar as there was such a material risk as alleged (which is denied), they refer to and repeat paragraphs 4.34 to 4.49 above;
  - (iii) otherwise deny the allegations;
- (o) as to subparagraph (o), they refer to and repeat subparagraphs (k), (m) and (n) above and otherwise deny the matters alleged therein;
- (p) deny subparagraph (p) and say further that Handbook Farmers could elect to switch the dairy processor they supplied to at any time during a Season;
- (q) as to subparagraph (q), they:
  - (i) admit that:
    - A. prior to March 2015 Fonterra offered the 'GroPlan' program to Farmers, which encouraged Farmers to increase milk production by incentives and which senior management knew about;

- B. in the 2015/16 Season there were some Farmers who had subscribed to the GroPlan prior to March 2015 and whose ‘GroPlan’ had continued through until March 2016.
  - C. during the 2015/16 Season Fonterra offered the ‘Interest Free Supplier Advance’ program prior to Farmers, which senior management knew about; and
  - D. in the 2015/16 Season, some Farmers participated in the ‘Interest Free Supplier Advance’ program;
- (ii) otherwise deny subparagraph (q);
- (r) deny subparagraph (r);
- (s) as to subparagraph (s), they:
    - (i) admit that some Farmers may have had regard to Fonterra’s Opening Prices and Closing Range in making decisions as to the matters alleged in (i) to (v);
    - (ii) say further that Farmers would, or would typically, also have regard to;
      - A. their own analysis of milk prices and likely prices;
      - B. the prices announced by Murray Goulburn as the leading processor;
      - C. the existence of the MSAA Benchmark Price Term or their general understanding that Fonterra had an obligation to “match” Murray Goulburn’s price;
    - (iii) otherwise deny the matters alleged therein;
- (t) as to subparagraph (t), they:
    - (i) admit that Fonterra’s senior management knew or ought to have known of the express content within the 2015/16 Handbook;

- (ii) say that subparagraph (ii) is vague and embarrassing, and subject to this say that:
  - A. in the 2008/09 Season Fonterra implemented two price drops, the first on or about 23 December 2008 and the second on or about 7 January 2009;
  - B. the 23 December 2008 price drop involved a reduction in the farmgate milk price for the month of January 2009 of 7 cents/kg fat and 17 cents/kg protein;
  - C. the 7 January 2009 price drop involved a 9% reduction to the farmgate milk price across the full season from the opening price, or a 32% reduction in the months of February 2009 to June 2009;
- (iii) otherwise deny subparagraph (t);

***Particulars***

*Fonterra announced the 23 December 2008 price step down in its letter of 23 December 2008, a copy of which is available upon request.*

*Fonterra announced the 7 January 2009 price step down in its letter of 7 January 2009, a copy of which is available upon request.*

- (u) as to subparagraph (u):
  - (i) they admit that Fonterra's senior management knew that Farmers were aware of the content of the 2015/16 Handbook;
  - (ii) they admit that many Farmers would have known of the previous price decrease and they refer to and repeat subparagraph (t) above;
  - (iii) they otherwise deny subparagraph (u);
- (v) they deny subparagraph (v);
- (w) as to subparagraph (w), they:
  - (i) admit that Fonterra's senior management anticipated that if Farmers were given notice of any price decrease during a Season some Farmers might seek to switch supply to competitors of Fonterra, depending on the



circumstances including the reasons for the price decrease and the offers available from competitors of Fonterra;

- (ii) otherwise deny subparagraph (w);
  - (x) as to subparagraph (x):
    - (i) they admit that Fonterra's senior management expected that, depending on the number of Farmers who switched or sought to switch to another processor, and the volume of milk that might have otherwise been supplied by those Farmers to Fonterra, those switches might have the effects alleged in subparagraphs (i) and (iii);
    - (ii) they otherwise deny subparagraph (x);
  - (y) they deny subparagraph (y).
36. As to paragraph 36, they:
- (a) refer to and repeat paragraph 4.52 above;
  - (b) otherwise deny the matters alleged therein.
37. As to paragraph 37, they:
- (a) they refer to and repeat paragraphs 4.33, 4.51 to 4.52, 4.57, 17, 23 to 25, 35 and 36 above; and
  - (b) deny the matters alleged therein.
38. As to paragraph 38, they:
- (a) refer to and repeat paragraph 24, 27, 28, 35 and 37 above;
  - (b) admit that Fonterra senior management knew that the later any price decrease was announced, and the larger that price decrease, the greater might be any difficulties experienced by Farmers; and
  - (c) otherwise deny paragraph 38.

39. As to paragraph 39, they refer to and repeat paragraphs 37 and 38 and deny the matters alleged therein.
40. They deny paragraph 40.
41. They deny paragraph 41.
42. They deny paragraph 42.
- 42.1 To the whole of the Amended Statement of Claim, Fonterra say that save for where a defence is pleaded, further and/or particular defences that may be available to Fonterra in respect of a Group Member's claims can only be determined after the Group Member has been identified and in the context of that Group Member's specific claims.

### **COMMON QUESTIONS OF LAW AND FACT**

43. As to paragraph 43, they:
  - (a) admit that the matters in subparagraph (a) give rise to questions of law or fact common to the claims of the Plaintiffs and Group Members, save that they deny that is the case in respect of the matters in subparagraph (a)(i) as the Plaintiffs and the Group Members do not claim that the alleged "Considered Estimates Term" was an implied term;
  - (b) subject to the completion of interlocutory steps, including discovery, do not admit that the matters in subparagraph (b) give rise to questions of law or fact common to the claims of the Plaintiffs and Group Members;
  - (c) deny that the matters in subparagraph (c) give rise to questions of law or fact common to the claims of the Plaintiffs and Group Members and say further that the alleged unconscionable conduct on the part of the Defendants with respect to each Group Member is to be assessed having regard to the individual and personal circumstances of that particular Group Member.

Robert Heath

Paul Liondas

Lucy Dawson

A handwritten signature in blue ink, reading "Arnold Bloch Leibler", positioned above a horizontal dotted line.

**Arnold Bloch Leibler**

Solicitors for the Defendants