



**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: 30/09/2020 02:25 PM

B E T W E E N

Geoffrey and Lynden Iddles

Plaintiffs

-and-

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

Defendants

AMENDED STATEMENT OF CLAIM

Filed in accordance with orders made on 21 September 2020 by the Honourable Justice Nichols

Date of document: ~~8 September 2020~~ 17 June 2020

Filed on behalf of: The plaintiffs

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PART A – PARTIES AND GROUP MEMBERS

Plaintiffs

1. The Plaintiffs (Geoffrey and Lynden **Iddles**):
 - (a) are natural persons;
 - (b) at all material times owned and operated a dairy farm at Strathmerton in North-East Victoria; and
 - (c) during the period 1 July 2015 to 30 June 2016 supplied dairy milk to the Defendants (together and severally **Fonterra**) as Handbook Farmers as defined in paragraph 2 below.

Particulars

A copy of the Fonterra Australia Milk Supply Handbook applying from 1 July 2015 is available for inspection at the offices of the Plaintiffs' solicitors.

*So far as the Plaintiffs are able to say prior to discovery, receipts and payments for the said supplies were issued by the Second Defendant (**Fonterra Milk**) on behalf of all Defendants.*

Group members

2. The Plaintiffs commence this proceeding on their own behalf and on behalf of all persons who:
- (a) during the milk-supply season (**Season**) from 1 July 2015 to 30 June 2016 (**2015 Season**) supplied milk to Fonterra from farms located in Victoria, Tasmania, South Australia, or New South Wales pursuant to:
 - (i) a “Fonterra Australia Milk Supply Handbook” (~~but not the Fonterra Australian “Milk Supply Handbook – Wagga Wagga”~~) (~~such persons being Handbook Farmers~~); and / or
 - (ii) a Fonterra Australia “Exclusive Milk Supply Agreement” ~~or other formalized agreement relating to the supply of milk~~ (**EMSA**) (such persons being **EMSA Farmers**); and
 - ~~(b)~~ (b) as at 5 May 2016 continued to supply milk, or had committed to supply milk, during the 2015 Season as described in 2(a); and
 - ~~(c)~~ (c) were not a director or officer of Fonterra during the period from 1 June 2015 to 31 July 2016, or a related entity of such a director or officer (within the meaning of the Corporations Act); and
 - ~~(d)~~ (d) are not a justice of the High Court of Australia, the Supreme Court of Victoria or the Federal Court of Australia;
- (together **Group Members**).

Particulars

Particulars of the Fonterra Australia Milk Supply Handbook and the EMSA are provided below.

3. As at the time of commencement of this proceeding there are seven or more Group Members.

Defendants

4. Each of the Defendants:
- (a) is and at all material times was a company incorporated according to law;

- (b) is able to be sued in its corporate name and style;
- (c) is and was at all material times a wholly-owned subsidiary of Fonterra Co-operative Group Limited (**Fonterra NZ**);
- (d) was part of the corporate group known as the Fonterra Group (**Fonterra Group**); and
- (e) as part of the Fonterra Group, at all times referred to below carried on a business, *inter alia*, purchasing and processing dairy milk produced by dairy farmers located in Victoria, New South Wales, South Australia and Tasmania and selling dairy products, and still carries on the said business;
- (f) carried and carries on the said business in trade or commerce within the meaning of the *Australian Consumer Law* set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), as applicable pursuant to:
 - (i) section 131 of the *CCA*;
 - (ii) section 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic);
 - (iii) section 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas); or
 - (iv) section 28 of the *Fair Trading Act 1987* (NSW);
 as in force after 1 January 2011 (severally, the **ACL**).

PART B – CONTRACT CLAIMS

Handbook Farmers

5. By contracts made in standard terms with each of the Handbook Farmers on sundry dates on or about 1 July 2015 (**2015 Handbook Agreements**), Fonterra agreed to acquire milk from each Handbook Farmer during the 2015 Season.

Particulars

*The said agreement was made by Fonterra upon terms that “Fonterra” when referred to in the agreement “means” the First Defendant (**Fonterra Australia**), the Second Defendant (**Fonterra Milk**) “and/or” the Third Defendant (**Fonterra Brands**): 2015 Handbook cl.2.2 (definition of “Fonterra”).*

The 2015 Handbook Agreements were partly in writing and partly to be implied.

In so far as the terms were in writing they were contained in:

- a. *the “Fonterra Australia Milk Supply Handbook” (2015 Handbook) applying from 1 July 2015; and*

b. the “opening price letter” issued by Fonterra to Handbook Farmers on or about 29 June 2015 (**Opening Price Letter**);

sample copies of which may be inspected by appointment at the offices of the Plaintiffs’ solicitors.

In so far as the terms were to be implied, they are implied in order to give business efficacy to the said agreements.

The Opening Price Letter:

(i) was on the letterhead of “Fonterra Australia”, a “member of the Fonterra Co-operative Group” and signed by Ms Swales, Managing Director, Fonterra Australia and Matt Watt, National Milk Supply Manager; and

(ii) stated *inter alia* that “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.”

6. There were terms of the 2015 Handbook Agreements that or to the effect that, *inter alia*:
- (a) save that the terms of the Opening Price Letter took precedence over the terms of the 2015 Handbook, the 2015 Handbook was binding on Fonterra and Farmers (as defined in paragraph 15): 2015 Handbook cl.2.1;
 - (b) prior to the beginning of the 2015 Season, Fonterra would write to each Handbook Farmer detailing the opening fat and protein prices for the coming Season (expressed as “dollars per kilogram of milk solids” or “\$kg/MS”)¹(**Opening Prices**): 2015 Handbook cl.10.1 and Opening Price Letter;

Particulars

So far as the Plaintiffs are able to say prior to discovery and receipt of experts’ reports, the Opening Prices notified in the Opening Price Letter (and in corresponding letters in other seasons) were calculated by Fonterra as a weighted average of the aggregate of the farmer specific “farmgate milk

¹ Note, all subsequent references to milk prices in this Statement of Claim shall be in the denomination “kg/MS” unless specified otherwise.

prices” (**FMPs**) that Fonterra expected to pay to all Farmers (whether Handbook Farmers or EMSA Farmers) over the course of the coming season.

The FMPs for a specific farmer were in turn calculated:

- a. by reference to “**base**” milk prices forecast on a monthly basis for the coming season and identified in the Opening Price Letter; where
- b. the base milk prices constituted prices to be paid per kilogram for each of milk-fat and milk-protein in the milk supplied by the Farmer (levels of fat and protein being matters of “composition” within the meaning of the 2015 Handbook), identified in letters sent to Farmers at or about the time of the Opening Price Letter (**Price Schedule**).

The actual FMP received by each Handbook Farmer in each month during a season (**Monthly Price**) depended on:

- i. the base price (being the specific prices for each of fat and protein as per the Price Schedule, adjusted by any subsequent step-ups or price decreases);
- ii. the yield of milk-fat and milk-protein (measured as kg);
- iii. the volume of milk supplied;
- iv. the month of supply (and Fonterra offered higher prices outside of the spring months, in particular to provide an incentive to Farmers – “**autumn calvers**” – to schedule herd-lactation during autumn);
- v. transport and other charges associated with milk collection;
- vi. assessed quality of the milk; and
- vii. milk supply incentives;

(2015 Handbook cl.10.2, 10.4, 10.8-13).

The Plaintiffs are unable to say, prior to completion of discovery and receipt of expert reports, by what calculation Fonterra aggregated and adjusted the estimates of FMPs to be paid to Farmers to derive the Opening Price stated in each year’s Opening Price Letter, but say the Opening Price is customarily regarded by Farmers as the proxy or shorthand statement of the benchmark price by reference to which their individual Price Schedule will be applied by Fonterra, such that:

- A. a higher stated Opening Price implies more favourable rates in the Price Schedule, and a lower stated Opening Price implies less favourable rates; and further

B. where Fonterra announces a later “step up” or “step down” in the Opening Price, a higher quantum of the adjustment implies a greater shift (in a like direction) in the actual FMPs payable to Farmers according to the Price Schedule; and further

C. Farmers are typically aware of the relationship between the specific milk price they will be paid and the aggregated FMP, which could be higher or lower (materially in some cases)

Accordingly:

C. the Opening Price(s), while not a direct statement of the actual FMP payable to any given Farmer for any given supply, is the industry-accepted benchmark for indicating movements in the base calculation of individual Farmers’ FMPs; and

D. “Opening Price” where used in this statement of claim in relation to the 2015 Season means the weighted-average annual price identified as the Opening Price and, when used in relation to particular months, means the corresponding monthly price identified in the Price Schedule sent with, or about the time of, the Opening Price Letter.

Further particulars may be provided following the completion of discovery and receipt of expert reports.

(c) the Opening Prices:

(i) would be Fonterra’s considered estimate for the Season based on information then available to Fonterra and based on market returns for the season, operating costs, business performance and exchange rates (together **Four Variables**): 2015 Handbook cl.10.3; and

(ii) together with any subsequent changes to the Opening Prices – would be set by Fonterra as an outcome of bi-monthly reviews conducted by it, and having regard to prevailing market conditions: 2015 Handbook cl.10.1, 10.3;

(the **Considered Estimates** Term);

Particulars

So far as the Plaintiffs are able to say, the “prevailing market conditions” was a reference to the Four Variables defined in paragraph 6 (c)(i) above.

(d) Fonterra was committed to pay Handbook Farmers a final season price that:

- (i) was not less than the “bundled return” paid by “the major dairy processor in Victoria”, being Murray Goulburn Co-operative Co Ltd (**Murray Goulburn**): 2015 Handbook cl.10.1; and
 - (ii) satisfied the requirement in (i) in respect of the total returns over the whole course of the Season, and not necessarily by matching the Murray Goulburn price at every time during the Season;
- (the **Overall Price Match** Term);
- (e) Fonterra provided a “Milk Supply Team” to assist Farmers by providing *inter alia* financial information and advice, including “income estimations and budgets”, to Farmers (**Income Estimates**): 2015 Handbook cl.3.3, 10.2 (p.34);

Particulars

*The 2015 Season Income Estimates were provided to Farmers on or about 14 July 2015 or on request, usually via a letter to each Farmer from Fonterra’s National Milk Supply Manager, Matt Watt (**Mr Watt**) which:*

- a. detailed the Farmer’s milk volume supply profile, and butterfat and protein supply profile;*
- b. set out for each Farmer, by reference to the Opening Price Letter, the monthly base price, step-ups, production and quality bonus, less charges, arriving at a total \$kg/Ms per month for each Farmer, and total milk revenue for each month;*
- c. stated that or to the effect that the Income Estimates letter was ‘intended to assist [Farmer] in getting an accurate estimate of the projected income for your farm and, in turn, be in a position to maximise your profitability’;*
- d. stated that or to the effect that the Income Estimates letter was ‘based on our view of the current market conditions, and is inclusive of all payment incentives including the \$5.60 Opening FMP and three step-ups, two each of \$0.08 fat and \$0.20 protein, and one of \$0.04 fat and \$0.10 protein (**Forecast Step-ups**). The step ups combined are reflective of our current forecast closing position of \$5.80-\$6.00 and are contingent on an expected recovery in global commodity prices in the first half of 2016’.*

Copies of the Income Estimates letter provided to the Plaintiffs may be inspected by appointment at the offices of the Plaintiffs’ solicitors.

- (f) prices paid from time to time during the Season (being the FMPs) may be increased as an outcome of Fonterra’s bi-monthly reviews (**Step-ups**), but were not guaranteed and, where paid, might not be paid retrospectively: 2015 Handbook cl.10.3;
- (g) Fonterra may implement a mid-season price decrease (**Price Decrease**) but would avoid a decrease wherever possible: 2015 Handbook cl.10.3;
- (h) any changes to Opening Prices would be carefully considered and communicated by Fonterra to Farmers before being implemented: 2015 Handbook cl.10.3 and Opening Price Letter;
- (i) any amendment to the Handbook or the Opening Price Letter would be given with reasonable notice, where there would be a material adverse impact on a farmer: appendix to the 2015 Handbook (“*Standard Terms and Conditions for the Purchase of Cow Milk*”) (**Handbook Appendix**) cl.11.1;
- (j) any Price Decreases would be implemented:
 - (i) only where warranted by a deterioration in the Four Variables, relative to Fonterra’s considered estimate as to those Four Variables as at the date of issue of the Opening Price Letter;
 - (ii) only with prospective effect, and not with the effect of clawing back to Fonterra (and stripping from Farmers) the economic value of higher FMPs paid earlier in the Season;
 - (iii) upon reasonable notice to Handbook Farmers; further or alternatively;
 - (iv) in reasonable amounts, or in a sequence of reasonable amounts (**decrements**); to avoid causing uncalled for significant financial difficulty to Handbook Farmers’ farming businesses (the **Reasonable Step-downs** Term);
- (k) any Handbook Farmer proposing or intending to cease supply must give Fonterra notice in writing: 2015 Handbook cl.3.11;
- (l) save as to implied terms, the terms set out in the 2015 Handbook and any “Other Documents” (within the meaning of the 2015 Handbook) constituted the entire agreement between the Handbook Farmers and Fonterra concerning the subject matter of the said documents: 2015 Handbook Appendix cl.11.7; and
- (m) the Opening Price for the 2015 Season was \$5.60 with a forecast range of the average annual price at the end of the Season (**Closing Price**) (to be calculated according to the same methodology as the Opening Price, but incorporating Forecasted Step-ups) (**Closing Range**) of \$5.80 to \$6.00: Opening Price Letter.

Particulars

The terms alleged in (a) to (d)(i), (e) to (i) and (k) to (l) were in writing in the 2015 Handbook.

The terms alleged in (d)(ii) and (j) are to be implied to give business efficacy to the 2015 Handbook Agreements and, in the case of (d)(ii), from the manner of calculation of the “bundled return” paid by Murray Goulburn.

The term alleged in (m) was in writing in the Opening Price Letter.

The opening base milk prices (also known as Milk Solids Prices) for the 2015 Season, set out in cl.10.4 of the 2015 Handbook, were set by reference to a “Spring Price” as shown in Annexure A Table 1. The actual opening base prices payable (reflecting a “Spring Price” of \$3.06 kg/MS for fat and \$7.65 kg/MS for protein) were as shown in Annexure A Table 2 and were set out in an attachment to the Opening Price Letter. Copies of the 2015 Handbook and the Opening Price Letter may be inspected by appointment at the offices of the Plaintiffs’ solicitors.

7. Pursuant to the 2015 Handbook Agreements:

- (a) Fonterra in or about July 2015, and at various times between then and May 2016, provided Income Estimates to Handbook Farmers, reflecting the Opening Prices;
- (b) each of the Handbook Farmers supplied milk to Fonterra during the 2015 Season;
- (c) so far as the Plaintiffs are able to say prior to discovery, Fonterra monitored and considered the Four Variables via (*inter alia*) its bi-monthly reviews;
- (d) Fonterra issued periodic updates to Handbook Farmers maintaining prices and future price guidance at the Opening Prices; and
- (e) from July 2015 to April 2016, Fonterra made payments to the Handbook Farmers for milk supplies, which prices were:
 - (i) calculated according to the Opening Price Letter;
 - (ii) consistent with the Price Schedule; and
 - (iii) consistent with (but not necessarily identical to) the Income Estimates provided by Fonterra’s Milk Supply Team to Handbook Farmers in or about July 2015, and thereafter.

Particulars

The monthly payments from July 2015 to April 2016 were calculated and made at the rates set out for the corresponding months in Annexure A Tables 1 and 2.

The actual payments varied relative to the Income Estimates depending on, inter alia, actual volumes and compositions of milk produced.

EMSA Farmers

8. By contracts made in standard terms with each of the EMSA Farmers:
- (a) on sundry dates known to Fonterra but not yet known to the Plaintiffs; and
 - (b) upon terms applying to the 2015 Season;
- (the said agreements, as applying to the 2015 Season, being **2015 EMSAs**), Fonterra agreed to acquire milk from each EMSA Farmer during the 2015 Season.

Particulars

So far as the Plaintiffs are able to say prior to discovery, the EMSAs were entered by Fonterra Milk but upon terms that:

- (i) Fonterra Australia was authorised to act on behalf of Fonterra Milk “including by issuing communications and amending (or agreeing to amend) the [EMSA]”: EMSA p.1 (definition of “Fonterra”); and*
- (ii) the Handbook Agreement (being an agreement entered by each of the Defendants) formed part of the EMSA: EMSA cl.2.2.*

The 2015 EMSAs were partly in writing and partly to be implied.

In so far as they were in writing the EMSAs were contained in:

- a) *standard-form “Exclusive Milk Supply Agreement[s]” issued by Fonterra between 2013 and 2015 inclusive;*
- b) *the 2015 Handbook; and*
- c) *the Opening Price Letter;*

sample copies of which may be inspected by appointment at the offices of the Plaintiffs’ solicitors.

In so far as the terms were to be implied they are implied in order to give business efficacy to the EMSAs.

9. There were terms of the 2015 EMSAs that or to the effect that, *inter alia*:
- (a) the documents comprising the written terms of the 2015 EMSAs were, and would be applied in the following order of priority:

- (i) Appendix B to the EMSA;
 - (ii) Appendix A to the EMSA;
 - (iii) the remainder of the EMSA including the Schedules;
 - (iv) the Appendix to the 2015 Handbook (being the Standard Terms);
 - (v) the Opening Price Letter;
 - (vi) the remainder of the 2015 Handbook: 2015 EMSAs cl.2.2;
- (b) during the 2015 Season the EMSA Farmer would supply all milk exclusively to Fonterra: 2015 EMSAs cl.2.1;
- (c) Fonterra may by Step-up, Price Decrease or otherwise alter the terms of the Opening Price Letter during the Season without the consent of the EMSA Farmer, provided that Fonterra will subsequently advise the EMSA Farmer of such amendment: 2015 EMSAs cl.1.1 (definition of Opening Price Letter), cl.2.3;
- (d) subject to cl.2.3(c), the Farmer had no right to terminate the 2015 EMSA Agreement as a consequence of a Step-up or Price Decrease: 2015 EMSAs cl.2.3(b)(i)(A);
- (e) if a Price Decrease (*inter alia*) had a material adverse effect on the EMSA Farmer (as demonstrated by the EMSA Farmer to Fonterra, acting reasonably) the EMSA Farmer may by notice in writing to Fonterra of not less than three (3) months (from the date Fonterra receives such notice) terminate the 2015 EMSA Agreement: 2015 EMSAs cl.2.3(c);
- (f) any Price Decrease would be implemented:
- (i) only where warranted by a deterioration in the Four Variables, relative to Fonterra's considered estimate as to the said Variables as at the date of issue of the Opening Price Letter;
 - (ii) only with prospective effect, and not with the effect of clawing back to Fonterra (and stripping from EMSA Farmers) the economic value of higher farmgate milk prices paid earlier in the Season;
 - (iii) upon reasonable notice to EMSA Farmers; further or alternatively;
 - (iv) in reasonable amounts, or in a sequence of reasonable amounts;
- to avoid causing significant financial difficulty to EMSA Farmers' farming businesses (being the **Reasonable Step-downs** Term) [*and hereafter, unless the context otherwise requires, references to that Term are references to the Term as applicable under either the 2015 Handbook Agreements or the 2015 EMSAs*];

- (g) save as to implied terms, the terms set out in the documents in (a) above constituted the entire agreement between the parties concerning the subject matter of the said documents: 2015 EMSAs cl.6; Standard Terms cl.11.7;
- (h) the Opening Price for the 2015 Season was \$5.60 with a forecast Closing Range of \$5.80 to \$6.00: Opening Price Letter; and
- (i) in the absence of any inconsistent term in a prevailing document listed in (a) above – without limiting the incorporation of terms from the 2015 Handbook:
 - (i) the Considered Estimates Term; further or alternatively;
 - (ii) the Overall Price Match Term;
 applied to the 2015 EMSAs.

Particulars

The terms alleged in (a) to (e) and (g) were in writing in the 2015 EMSA Agreements.

The term alleged in (f) is to be implied to give business efficacy to the 2015 EMSA Agreements.

The terms alleged in (i) formed part of the EMSA Agreements by operation of the priority rules referred to in (a) and the terms of the 2015 Handbook.

As to the Opening Price and the term alleged in paragraph (h), the Plaintiffs refer to and repeat the particulars to paragraph 6 above.

10. Pursuant to the 2015 EMSAs:

- (a) Fonterra’s Milk Supply Team in or about June 2015 and at various times up to May 2016 provided Income Estimates to EMSA Farmers, reflecting the Opening Prices;
- (b) each of the EMSA Farmers supplied milk to Fonterra during the 2015 Season;
- (c) so far as the Plaintiffs are able to say prior to discovery, Fonterra monitored the Four Variables via (*inter alia*) its bi-monthly reviews;
- (d) Fonterra issued periodic updates to EMSA Farmers, maintaining prices and future price guidance at the Opening Prices; and
- (e) from July 2015 to April 2016, Fonterra made payments to the EMSA Farmers for milk supplies:
 - (i) calculated according to the Opening Price Letter;
 - (ii) consistent with the Price Schedule; and

- (iii) consistent with (but not necessarily identical to) the Income Estimates provided by Fonterra's Milk Supply Team to EMSA Farmers in or about July 2015.

Particulars

The Plaintiffs refer to and repeat the particulars set out under paragraph 7 above.

Breach of contracts – Considered Estimates Terms

11. Fonterra set the Opening Prices for the 2015 Season:
- (a) for the purpose (or purposes including the substantial purpose) of matching or exceeding, from the commencement of the 2015 Season, the opening price and forecast closing range then being offered to dairy farmers by Murray Goulburn, in order to attract milk supply; and
 - (b) not as Fonterra's considered estimate of the likely prices for the 2015 Season, estimated by reference to the Four Variables.

Particulars

The said purpose was intended by the directors or executives of Fonterra responsible for setting or approving the Opening Prices, the full identities of whom are known to Fonterra but not presently known to the Plaintiffs, but who likely included Ms Judith Swales, the Managing Director of Fonterra (Ms Swales) and Mr Watt.

12. In the premises set out in paragraph 11, Fonterra breached the Considered Estimates Term in each of:
- (a) the 2015 Handbook Agreements; and
 - (b) the 2015 EMSAs.

April 2016 – Murray Goulburn price revision

13. On or about 27 April 2016, Murray Goulburn announced publicly that or to the effect that:

- (a) it had revised its forecast farmgate milk price payable to its milk suppliers (being the equivalent of the Closing Range for Farmers supplying Fonterra) from \$5.60 to a range of \$4.75 to \$5.00 (the **Murray Goulburn Revision**);
- (b) to mitigate the effect of the Murray Goulburn Revision on its 2015 Season milk suppliers (**MG Farmers**), Murray Goulburn was introducing a “Milk Supply Support Package” (**MSSP**) by which it would:
 - (i) treat a component of payments for milk during the 2015 Season as MSSP payments so that the ongoing total or “cash” milk price being paid by Murray Goulburn was \$5.47, to support the cash flows of MG Farmers for the 2015 Season; and
 - (ii) recover (**recoup**) the cost of the MSSP payments via a levy deducted from payments otherwise due for future supplies of milk from MG Farmers over the following three seasons, calculated by reference to the volume of milk supplied in those subsequent seasons, and applied only to the pool of farmers supplying milk to Murray Goulburn in those subsequent seasons.

Particulars

Murray Goulburn announcement to the Australian Securities Exchange on 27 April 2016 (MG April ASX Announcement). A copy of the said announcement may be inspected by appointment at the offices of the Plaintiffs’ solicitors.

14. Murray Goulburn:

- (a) from the commencement of the 2016 Season until about October 2016 deducted MSSP recoupments from milk supply payments made by it to MG Farmers;
- (b) in or about October 2016 suspended deductions in respect of MSSP recoupments, and extended the period for recoupment from three (3) to six (6) years; and
- (c) on or about 2 May 2017, announced that deductions in respect of MSSP recoupments would cease from July 2017, and it would refund deductions already taken in the period July to September 2016;

with the result that the actual price received by MG Farmers in respect of the 2015 Season (equivalent to the Closing Price for Farmers supplying Fonterra) was \$5.53.

Breach of contracts – Reasonable Step-downs Term

15. On or about and from 5 May 2016 Fonterra:
- (a) announced to Handbook Farmers and EMSA Farmers (unless the context otherwise requires, **Farmers**) that or to the effect that:
 - (i) Fonterra had revised the FMP, meaning that the weighted average annual 2015 Season price would be reduced from \$5.60 (being the Opening Price) to \$5.00;
 - (ii) the revision would be effected by paying an average FMP for supplies in May and June 2016 of \$1.91 (comprising \$1.16 fat and \$2.89 protein) plus production and quality incentives;

(May 2016 Price Decrease Announcement); and
 - (b) commenced to give immediate effect to the revision in (a) **(May 2016 Price Decrease)**.

Particulars

The May 2016 Price Decrease was announced by email from Mr Watt on 5 May 2016 and confirmed in a letter dated 9 May 2016 from Fonterra to Farmers. Sample copies of the email and letter are available for inspection at the offices of the Plaintiffs' solicitors.

The composition of the May 2016 Price Decrease was as shown in Annexure B. Further particulars may be provided following discovery and receipt of expert reports.

16. At the time of the May 2016 Price Decrease Announcement:
- (a) Fonterra had, since the start of the 2015 Season, been making milk supply payments to Farmers in accordance with the Opening Price Letter, the Price Schedule and the Income Estimates;
 - (b) Fonterra had, since the start of the 2015 Season, alternatively 13 August 2015, maintained its forecast for a Closing Price at least equal to the Opening Price;
 - (c) there had been no material adverse change in the Four Variables since the date of the Opening Price Letter, alternatively 13 August 2015; and
 - (d) Fonterra made the May 2016 Price Decrease Announcement in response to and prompted by an announcement by Murray Goulburn that Murray Goulburn was reducing the FMP price that Murray Goulburn paid to MG Farmers.

Particulars

As to (a), copies of the income statements and payment receipts for the Plaintiffs are available for inspection at the offices of the Plaintiffs' solicitors.

As to (b), statements holding the Opening Price as a forecast of the Closing Price were contained in, inter alia:

- a. a price review announcement dated 13 August 2015;*
- b. a “Watt Happened” video update dated 1 September 2015;*
- c. a “Watt Happened” video update dated 1 October 2015;*
- d. a price review announcement dated 6 October 2015;*
- e. a supplier announcement dated 30 November 2015;*
- f. an email circular to Farmers dated 3 February 2016;*
- g. a letter to Farmers dated 4 April 2016;*
- h. income estimates provided to farmers during the 2015 season;*

sample copies of which may be inspected by appointment at the offices of the Plaintiffs’ solicitors.

As to (d), Fonterra regarded Murray Goulburn as the industry “price setter” and had a policy of adhering to the Murray Goulburn price without independent analysis.

17. Further, the May 2016 Price Decrease was effected:

- (a) without prior notice to Farmers;
- (b) without reasonable notice to Farmers;
- (c) in one reduction of:
 - (i) around 72% for May (when measured as the step-down from the \$6.46 Price Estimate forecast to the \$1.83 actual price paid), and 70% for June (\$6.93 to \$2.09); and
 - (ii) around 70% (when measured as the step-down from the Price Schedule for May and June, to the prices actually paid in May and June, for each of fat and protein);
- (d) with the effect that the prices now payable for May and June 2016:
 - (i) were below the Spring Price, being the lowest price contemplated in the Handbook;
 - (ii) were below the reasonable contemporaneous market price for the Farmers’ milk;
 - (iii) were substantially below production costs for milk; and

- (e) in the premises in (d) – with a retrospective effect, in that it stripped from Farmers the economic value of the higher FMPs paid by Fonterra earlier in the Season;
- (f) in a manner that was, by reason of (a) to (e), likely to cause significant financial difficulty to:
 - (i) Farmers’ farming businesses; and further or alternatively;
 - (ii) the farming businesses of Farmers who were “autumn calvers”;
- (g) in a manner that was, by reason of (a) to (f), likely to cause significant personal distress to Farmers.

Particulars

As to (a), the Price Decrease was implemented with immediate effect such that even milk supplies delivered earlier in the morning of 5 May 2016 were affected, i.e., the Price Decrease was notified subsequent to the supply by those Farmers.

*As to (b), Farmers required not less than 12 weeks’ notice of a Price Decrease in order to swap to other milk purchasers, alternatively to manage the process of causing cows to stop lactating (**dry off**), to run out or cancel cattle-feed supply and agistment arrangements, and to conduct an orderly sell-down of herds upon terms avoiding “fire sale” prices.*

As to (c), the actual Step-downs for the Monthly Prices from the Price Schedule in respect of the Plaintiffs are set out in Annexure B. Particulars relating to individual group members will be provided following the trial of common questions and discovery in relation to those group members, or otherwise as the Court may direct.

As to (d), the Victorian average costs of milk production in the 2015 Season were: \$6.18 kg/MS for the Northern Region, \$6 kg/MS for the South Western Region and \$5.55 for Gippsland.

As to (f), particulars of loss and damage are provided under paragraph 21 below.

As to (g), Fonterra’s knowledge of the likelihood of personal distress to Farmers is to be inferred from p.34 of the 2015 Handbook and because the emotional impacts on Farmers from financial difficulties associated with low commodity prices or price uncertainties were notorious in the dairy industry.

Further particulars may be provided following discovery and receipt of expert reports.

- (a) paragraph 16, Fonterra breached:
 - (i) the Considered Estimates Term and
 - (ii) the Reasonable Step-downs Term; and
- (b) paragraph 17, Fonterra breached the Reasonable Step-downs Term.

Breach of contracts – Overall Price Match Term

19. By reason of the implementation of the May 2016 Price Decrease, the Closing Price paid by Fonterra to Farmers for the 2015 Season was:
- (a) \$5.13; and
 - (b) less than the price (corresponding to Closing Price) paid by Murray Goulburn to MG Farmers for the 2015 Season, referred to in paragraph 14 above.

Particulars

The Closing Price was reported in a Fonterra email to Farmers dated 22 September 2016⁸ entitled “Annual Results”.

20. In the premises set out in the preceding paragraph, Fonterra breached the Overall Price Match Term.

Breach of contracts – loss and damage

21. By reason of the breaches alleged in paragraphs 12, 18 and 20, the Plaintiffs and some or all of the Farmers suffered loss and damage.

Particulars

(i) By reason of the breach of the Considered Estimates Term in paragraph 12, Farmers planned and conducted their farming operations during the 2015 Season according to Income Estimates (prepared by Fonterra’s Milk Supply Team) and budgets that materially overestimated the milk-supply revenues likely to be available to Farmers. Farmers inter alia:

- 1. increased herd sizes,*

2. *planned milk-production schedules (which require planned inseminations of cows months ahead of the intended dates for milk supplies),*
3. *entered feed, agistment and other supply-side contracts, and*
4. *undertook capital expenditure –*

that they would not have planned, entered or undertaken if the Opening Prices had been prepared in accordance with the Considered Estimates Term. By reason of the said expenditures, the Farmers incurred costs that they would not have incurred (or incurred to the same extent) if the Opening Price (and consequential Price Schedules and Income Estimates) had been prepared in accordance with the Considered Estimates term.

(ii) By reason of the breach of the Considered Estimates Term in paragraph 16, Farmers suffered reduced revenue relative to cost, and thereby lost profit.

(iii) By reason of the breach of the Reasonable Step-downs Term in paragraph 16, further or alternatively paragraph 17, Farmers reasonably took steps to effect immediate reductions in expenses (including by “drying-off” cows, selling cows and if possible cancelling feed and agistment arrangements) or obtaining replacement funds (from sales of assets or taking loans), all of which involved losses by or costs to Farmers that would not have been suffered or incurred if the May 2016 Price Decrease had only been implemented if and to the extent warranted by changes in the Four Variables, or been implemented upon reasonable notice and in reasonable decrements.

(iv) By reason of the breach of the Overall Price Match Term, Farmers were paid less for the milk supplied in the 2015 Season than they otherwise would have been paid.

Pending receipt of experts’ reports, the Plaintiffs’ estimates of the Iddles’ lost revenue and profit resulting from the breaches of the Considered Estimates Term, further or alternatively the Reasonable Step-downs Term, further or alternatively the Overall Price Match term, are set out in Part A of Annexure C.

The Plaintiffs suffered further losses set out in Part B of Annexure C.

PART C – MISLEADING AND DECEPTIVE CONDUCT

Pricing Representations

22. Further and in the alternative to the matters set out in Part B, Fonterra on or about 29 June 2015, at the time of announcing its Opening Prices for the 2015 Season, stated to Farmers that or to the effect that Fonterra's Opening Price and Closing Range were "more cautious" than in recent seasons, reflecting a challenging global market and Fonterra's commitment to ensuring that the price offered by it was competitive, deliverable and transparent.

Particulars

The statement was made in the Opening Price Letter.

23. During the period from 29 June 2015 until 4 May 2016 Fonterra:
- (a) from time to time announced to Farmers that or to the effect that it was "holding" its Opening Price at not less than \$5.60, as an indication of the likely Closing Price; and
 - (b) took no or no adequate step to revise or withdraw the Opening Price or indication of likely Closing Range.

Particulars

The announcements in paragraph (a) were partly in writing and partly to be implied.

So far as they were in writing they were contained in, inter alia:

- a. a price review announcement dated 13 August 2015;*
- b. a "Watt Happened" video update dated 1 September 2015;*
- c. a "Watt Happened" video update dated 1 October 2015;*
- d. a price review announcement dated 6 October 2015;*
- e. a supplier announcement dated 30 November 2015;*
- f. an email circular to Farmers dated 3 February 2016;*
- g. a letter to Farmers dated 4 April 2016;*

sample copies of which may be inspected by appointment at the offices of the Plaintiffs' solicitors.

So far as the announcements were implied, they were implied from Fonterra's statement in the Opening Price Letter that the Opening Prices were Fonterra's considered estimate of the season price (the latter being the Closing Price) and

its subsequent references to the Opening Price, without further qualification as to meaning, in the documents referred to in 'a' to 'g' above.

24. By the conduct referred to in paragraphs 22 and 23 and:
- (a) in the case of Handbook Farmers – setting the terms of and entering into the 2015 Handbook Agreements; and
 - (b) in the case of EMSA Farmers – setting the terms of and entering into the 2015 EMSAs;
- Fonterra represented to Handbook Farmers and EMSA Farmers respectively that or to the effect that:
- (i) Fonterra's Opening Prices and Closing Range were conservative;
 - (ii) Fonterra's Opening Prices and Closing Range reflected Fonterra's considered estimate of the likely Closing Range, based on the Four Variables;
 - (iii) so far as the Closing Range related to future matters, Fonterra had reasonable grounds for the estimate of the Closing Range, within the meaning of section 4 of the *ACL*;
 - (iv) there were no material risks that the Closing Price would be substantially below the Closing Range, about which risks Fonterra was or ought reasonably to have been aware from monitoring the Four Variables but which had not been notified to Farmers;
- (together and severally the **Pricing Representations**).

25. In the premises set out in paragraph 24, the Pricing Representations were continuing representations throughout the period from 29 June 2015 up to the time of the May 2016 Price Decrease Announcement on 5 May 2016.

26. The Pricing Representations:
- (a) were made in trade or commerce within the meaning of section 18 of the *ACL*; and
 - (b) in paragraph 24(b)(i) to (b)(iii) – were representations as to future matters, within the meaning of section 4 of the *ACL*.

Particulars

The Plaintiffs refer to and repeat paragraphs 4(c) and (d) above.

Misleading conduct

27. As at 29 June 2015:

- (a) removals of dairy milk production quotas in Europe, announced before 2014, had occurred, and were causing an increase in the supply of milk powder available on international markets;
- (b) in August 2014, Russia placed an embargo on cheese and butter imports from the European Union (EU), resulting in an increase in production of milk powder in the EU;
- (c) a surplus of stock of skim milk powder was developing in the EU and the market considered it would likely lead to significant intervention purchases by the European Commission;
- (d) the United States of America (USA) had increased its domestic production of milk because of the low price of grain, weakening the price of cheese in global markets;
- (e) a significant decline in imports by China of milk powders had occurred and was attributed to overstocking in China in 2014;
- (f) by reason of *inter alia* the matters in (a) to (e), international prices for dairy milk had been in decline since 2014;
- (g) Australian domestic demand for dairy milk had not increased sufficiently to offset the reductions in international demand or international prices referred to in (a) to (e) above;
- (h) there were no forecast changes in:
 - (i) Fonterra's operating costs;
 - (ii) Fonterra's business performance; or
 - (iii) exchange rates;that were reasonably expected by Fonterra to offset the effects of reduced demand for and reduced prices for its processed milk during the 2015 Season;
- (i) in the premises in (a) to (h) above (together or in any combination) it was likely, alternatively there was a material risk that:
 - (i) Fonterra would not be able to hold the Opening Price (including the monthly Price Schedules) for the whole of the 2015 Season; and
 - (ii) Fonterra's Closing Price for the 2015 Season would be more than 10% below its Opening Price.

Particulars

As to paragraph (a), the European Union (EU) removed the EU milk quota system on 31 March 2015. Accordingly, for the first time in around 30 years, only market forces determined the amount of milk produced in Europe. Countries such as Ireland and Denmark increased their production of milk in response. This resulted in surplus milk powder and butter fat which caused downward pressure on international milk prices. The Plaintiffs refer to Eurostat milk production data for the EU-20A from January 2013 until June 2015, a copy of which may be inspected by appointment at the offices of the Plaintiffs' solicitors.

As to paragraph (b), the civilian aircraft Malaysian Airlines MH17 was shot down over the Ukraine on 17 July 2014. The EU imposed sanctions on Russia for that action. In return, Russia imposed sanctions on EU including a ban on Russian imports of EU dairy products. Half a million tonnes of product normally shipped from EU to Russia (an amount equivalent to Australia's total dairy exports) was instead released for sale on the international market. The Plaintiffs refer to the European Commission 2014 reports for export data, a copy of which may be inspected by appointment at the offices of the Plaintiffs' solicitors.

As to paragraph (c), the European Commission's dairy sector policy formally opened public intervention for skim milk powder on 1 March 2015, which enabled purchases of surplus inventories by EU member governments at stipulated prices if volumes were offered by producers. In June 2015, milk production was increasing rapidly in several countries which at that time was expected to cause an increase in the production of skim milk powder, which caused the whole price of skim milk powder to fall towards the EU public intervention trigger price. The Plaintiffs refer to the EU 2015 statement of policy on public intervention and Eurostat reports of milk production and dairy product output increases in second quarter of 2015, copies of which can be inspected by appointment at the offices of the Plaintiffs' solicitors.

As to paragraph (d), during several years prior to the 2015 Season, there had been a significant reduction in the world market price for grain, being feedstock for dairy cattle. Reduced feed costs were associated with increases in production as producers sought to leverage higher margins. The US increased its production of milk and became the world's third largest exporter, overtaking Australia and resulting in increased competition and reduced prices in international dairy markets. Wholesale spot prices for cheddar cheese 40-pound blocks fell from more than US\$5,000 per tonne in

October 2014 to below US\$3,400 per tonne in February 2015. The Plaintiffs refer to US Department of Agriculture (USDA) monthly milk production reports from January 2014 to June 2015, copies of which may be inspected by appointment at the offices of the Plaintiffs' solicitors.

As to paragraph (e), China imported a record volume of whole milk powder in 2013 and 2014, which peaked in the third quarter of 2014 at a rolling 12-month import volume of almost 1.2 million tonnes of whole milk powder and skim milk powder, which was unprecedented. In the following two quarters import volumes fell heavily and by April 2015 the rolling 12-month import volume had fallen by 35%. International demand for milk powders then slowed, contributing to a weakening of prices for milk powders. The Plaintiffs refer to China customs data for milk powder imports for the period 2011 to 2015, a copy of which may be inspected by appointment at the offices of the Plaintiffs' solicitors.

As to paragraph (f), from mid July 2014 to late June 2015, international dairy milk prices had declined as:

- (i) skim milk powder prices fell 45%;*
- (ii) butter prices fell 24%;*
- (iii) whole milk powder prices fell 36%; and*
- (iv) cheddar cheese prices fell 29%.*

The Plaintiffs refer to the [New Zealand's Exchange AgriHQ](#) weekly spot price reports for the period July 2014 to June 2015, copies of which may be inspected by appointment at the offices of the Plaintiffs' solicitors.

As to paragraph (g), in Australia:

- (i) cheese demand increased by 13,000 tonnes;*
- (ii) butter demand increased by 8,000 tonnes; and*
- (iii) milk powder demand fell by 4,500 tonnes;*

But these increases in domestic demand were insignificant compared to the reduction in international demand and international prices in dairy milk referred to in (a) to (f) above. The Plaintiffs refer to the Dairy Australia Industry In-Focus Report of 2015, a copy of which may be inspected by appointment at the offices of the Plaintiffs' solicitors.

Further particulars may be provided following discovery.

28. Further and in the alternative, by not later than 13 August 2015:
- (a) the matters in paragraph 27 were continuing;
 - (b) Fonterra had observed a significant drop in global dairy commodity prices; and
 - (c) Fonterra's senior management had concluded that the Opening Price (being \$5.60) was no longer tenable.

Particulars

As to paragraph (a), the Plaintiffs refer to and repeat the particulars to paragraph 27 above.

As to paragraph (c), senior management included Ms Swales and Mr Watt.

29. In the premises set out in:
- (a) paragraph 27, as at 29 June 2015 and at all times while the Pricing Representations were continuing; alternatively
 - (b) paragraph 28, as at 13 August 2015 and at all times thereafter while the Pricing Representations were continuing:
- it was the case that:
- (i) Fonterra's Opening Prices and Closing Range were not conservative;
 - (ii) so far as the Opening Prices (including Monthly Prices) and Closing Range related to future matters, Fonterra did not have reasonable grounds for the Monthly Prices or estimate of Closing Range, within the meaning of section 4 of the *ACL*;
 - (iii) there were material risks:
 - (a) that the Opening Prices (including the Monthly Prices) would not be paid throughout the 2015 Season and that the Closing Price would be substantially below the Opening Price, (further or alternatively the Closing Range);
 - (b) about which risks Fonterra was or ought reasonably to have been aware from monitoring the Four Variables; and
 - (c) which had not been notified to Farmers;
 - (iv) in the premises in (i) to (iii) above, the Pricing Representations referred to in paragraph 24 were misleading or deceptive, or likely to mislead or deceive, within the meaning of section 18 of the *ACL*.

30. Further, Fonterra:
- (a) as at 29 June 2015 set, and thereafter held; alternatively
 - (b) from not later than 13 August 2015 held;

its Opening Prices for the 2015 Season at \$5.60:

- (i) for the purpose (or purposes including the substantial purpose) of matching or exceeding the FMP being offered to dairy farmers by Murray Goulburn; and
- (ii) not as Fonterra's considered estimate of the prices likely to be paid throughout the 2015 Season or the likely Closing Range for the 2015 Season, derived by reference to the Four Variables.

Particulars

Fonterra's purpose can be inferred from the fact that Fonterra's Opening Price matched Murray Goulburn's opening price and closing range and did not align with the global dairy prices. Annexure D details the movement in Fonterra FMP compared to global dairy prices from March 2014 to November 2017.

Further particulars may be provided following discovery and receipt of expert reports.

31. In the premises set out in paragraph 30, as at:

- (a) 29 June 2015, alternatively;
- (b) 13 August 2015;

and at all times thereafter while the Pricing Representations were continuing:

- (i) Fonterra's Opening Prices did not reflect Fonterra's considered estimate of the Monthly Prices or the likely Closing Range, derived from the Four Variables; and
- (ii) the Pricing Representations were misleading or deceptive, or likely to mislead or deceive, within the meaning of section 18 of the ACL.

Particulars

The Plaintiffs refer to and repeat the particulars to paragraph 30 above.

Loss and damage

32. In reliance upon the Pricing Representations, the Plaintiffs and some or all of the Farmers:
- (a) in the case of Handbook Farmers – entered into the 2015 Handbook Agreements;
 - (b) in the case of EMSA Farmers – entered into or continued the 2015 EMSAs;
 - (c) maintained or increased dairy herd sizes from the 2014 Season into the 2015 Season, including by acquisition or breeding of cattle, instead of reducing herd sizes;
 - (d) entered feed-supply, agistment and other farm-management arrangements for the care of larger herds than they otherwise would have stocked;
 - (e) maintained cows in milk production, rather than drying off cows, longer than they otherwise would have done;
 - (f) purchased water, fertiliser and other requirements for the long-term growth of crops for feed for larger planned herd sizes;
 - (g) made capital expenditures including the acquisition or improvement of land, buildings, fixtures and equipment;
 - (h) entered into or drew on financial arrangements (for example, loans, mortgages and other arrangements) (**Preparatory Finance**) in anticipation of the expenditures referred to in (a) to (g) above and receipt of FMPs consistent with the Opening Price Letter.

Particulars

If the Plaintiffs had notice at the start of the 2015 Season that the FMP would be in the region of \$5.10 for the Season, they would not have undertaken the ‘actual’ steps outlined in Annexure C Part C, but instead would have implemented the ‘counterfactual’ cost-saving measures set out in Annexure C Part C.

Particulars of reliance relating to individual group members may be provided following the trial of common questions or otherwise as the Court may direct.

33. But for the contravention alleged in paragraph 31(ii) above:
- (a) Fonterra in June 2015, applying a cautious approach as described in the Opening Price Letter, would have set:
 - (i) its Opening Price at approximately \$5.00, or in any event materially less than \$5.60; further or alternatively
 - (ii) its Spring Price and Monthly Prices at levels materially less than the prices set out in the Price Schedule to the Opening Price Letter and the Income Estimates; and
 - (iii) its Closing Range in the range \$5.00 to \$5.20, or in any event materially less than \$5.60; further or alternatively

- (b) Fonterra by August 2015, alternatively before January 2016 would have:
- (i) announced to Farmers that its reviews of the Four Variables required that it step-down FMPs below the Opening Price, and that it was revising its estimate of the Closing Range to a Closing Price between \$5.00 to \$5.20, or in any event materially less than \$5.60; and
 - (ii) given notice to Farmers of a Price Decrease in FMPs; and
 - (iii) implemented the Price Decrease progressively to enable Farmers to reduce operating costs and avoid reduced gross margins associated with the declining FMPs;
- (c) the Plaintiffs and some or all of the Farmers, in response to the lower price forecasts in (a), further or alternatively (b), would have:
- (i) reduced herd sizes from 2014 levels in an orderly manner over the period from the announcement in (a) or (b), as the case may be, to May 2016;
 - (ii) managed herd pregnancies and lactation periods to reduce herd feed requirements during the 2015 Season, relative to 2014 levels;
 - (iii) varied their feed-supply, agistment and other farm-management arrangements to reflect reduced herd sizes and care requirements during the 2015 Season;
 - (iv) not purchased water, fertilizer and other requirements for the long-term cultivation of crops for feed for larger planned herd sizes;
 - (v) reduced capital expenditures;
 - (vi) not entered into, alternatively drawn on Preparatory Finance.

Particulars

The Plaintiffs refer to and repeat the particulars to paragraph 32 above.

34. In the premises set out in paragraphs 32 and 33, by reason of the Pricing Representations and the May 2016 Price Decrease the Plaintiffs and some or all of the Group Members suffered loss or damage.

Particulars

The particulars of loss and damage for the Plaintiffs are set out in Annexure C, Part C. Particulars of loss and damage for individual Group Members will be provided following the trial of common questions or otherwise as the Court may direct.

PART D – UNCONSCIONABLE CONDUCT

35. Further and in the alternative to Parts B and C above, at all times from not later than 29 June 2015, alternatively 13 August 2015:

- (a) Fonterra determined the terms of the Handbook Agreements and the EMSAs;
- (b) Fonterra set the Opening Prices, and the consequent FMPs;

Particulars

The Plaintiffs refer to and repeat the particulars to paragraph 6 above.

- (c) Fonterra had access to confidential information in respect of, and specialist expertise for monitoring and forecasting:
 - (i) the Four Variables; and
 - (ii) the Opening Prices, the consequent FMPs and the likely Closing Range for the 2015 Season;
- (d) the information and expertise referred to in (c) was not, or commonly was not available to Farmers;

Particulars

Farmers who supplied milk to Fonterra:

- a. *included many Farmers who operated small to medium dairy farming businesses;*
- b. *received payments from Fonterra (calculated by reference to the FMP) for the milk they supplied as their sole or primary source of income;*
- c. *did not know at the start of the 2015 Season what the final FMP would be for the milk they supplied in the course of that year, and bore the risk of that uncertainty;*
- d. *were unable to forecast Fonterra's FMP themselves, as the forecast depended on matters about which they did not have information, including Fonterra's costs, their current and planned product mix, demand and likely prices in a range of foreign countries;*
- e. *relied on the services in particular, the employees of Fonterra through the 'Fonterra SupportCrew', including 'Milk Supply Officers' in managing their farms and budgets (SupportCrew) including the 'income estimation' service which estimated Farmers' monthly cash flow based on, among*

other things, Fonterra's Opening Prices; annual and monthly budgeting, investment scenario planning; financial business analysis and opportunities to maximise revenue; and

f. received regular updates on the market and pricing information from Fonterra in newsletters called 'Watt Matters' and videos called 'Watts Happening'.

(e) Farmers were not, or commonly were not, sophisticated analysts of:

- (i) international and global dairy industry prices or trends;
- (ii) Fonterra's operating costs;
- (iii) Fonterra's business performance; or
- (iv) currency exchange rates;

Particulars

The Plaintiffs refer to and repeat the particulars to paragraph (d) above.

(f) the Farmers included:

- (i) Farmers for whom Fonterra was the only practicable customer for their milk, due to their farm's location;
- (ii) Farmers whose contractual terms with Fonterra required them to supply milk exclusively to Fonterra, in particular, the EMSA Farmers;
- (iii) Farmers who faced practical or contractual impediments to switching milk processors during a Season, including the need to find a milk processor with the capacity to take additional milk;
- (iv) Farmers who would be disproportionately affected by a price reduction in May and June because they managed their herds predominantly to calve in autumn, to take advantage of the higher milk prices typically available in May and June (**Autumn Calvers**);

(g) Fonterra prior to and during the 2015 Season had been, by its representatives (including SupportCrew representatives), encouraging Farmers to increase herd sizes and milk production volumes, via incentive programs including programs known to the Plaintiffs as 'GroPlan' and the 'Interest Free Supplier Advance' program;

- (h) Fonterra had no legitimate reason for not disclosing to Farmers or potential Farmers Fonterra’s actual considered estimate of the Opening Prices and/or likely Closing Range for the 2015 Season;
- (i) Fonterra:
 - (i) was required by the 2015 Handbook Agreements and the 2015 EMSAs to set; and
 - (ii) represented to Farmers that it had set;its Opening Prices (including FMPs) and Closing Range to reflect Fonterra’s considered estimate of the prices to be paid throughout the Season and the likely full-year Closing Price, based on its independent assessment of the Four Variables;

Particulars

The Considered Estimates Term is described in paragraph 6(b) above.

- (j) Fonterra had no obligation, under the Handbook Agreements or any other agreement with Farmers:
 - (i) in any given month to match or exceed the FMP being offered by Murray Goulburn to MG Farmers, provided that Fonterra’s full-year price to Farmers (measured over the whole of the Season) was not less than the full-year “bundled return” paid by MG to MG Farmers over the whole of the Season;
 - (ii) to match Murray Goulburn’s price at the outset of the Season;
 - (iii) to limit its prices so that it did not pay higher prices than Murray Goulburn; or
 - (iv) to reduce its price because Murray Goulburn reduced its price;

Particulars

The Overall Price Match Term is described in paragraph 6(d) above.

- (k) Fonterra took no or no adequate step to inform Farmers or potential Farmers that its 2015 Opening Prices and Closing Range had been set:
 - (i) for the purpose of matching or exceeding the Opening Prices offered by Murray Goulburn to MG Farmers; and
 - (ii) not as Fonterra’s considered estimate of the likely Monthly Prices or likely full-year Closing Price, derived from its independent assessment of the Four Variables;

Particulars

The Plaintiffs refer to and repeat the particulars to paragraphs 30 and 31 above.

- (l) Fonterra's senior management knew or expected, or ought reasonably to have known or expected, the matters in (a) to (k) above;

Particulars

The senior managers included (but are not limited to) Ms Swales and Mr Watt. Senior management ought reasonably to have known the said matters because they related to the contractual obligations that Fonterra had undertaken toward Farmers, and to the continuing accuracy of the representations that Fonterra had made to Farmers in connection with its contracts with them.

- (m) Fonterra's senior management had or ought reasonably to have had information that:
- (i) removals of dairy milk production quotas in Europe, announced before 2014, had occurred, and were causing an increase in the supply of milk powder available on international markets;
 - (ii) in August 2014, Russia placed an embargo on cheese and butter imports from the EU, resulting in an increase in production of milk powder in the EU;
 - (iii) a surplus of stock of skim milk powder was developing in the EU and there was a material risk it would lead to significant "public intervention" purchases by the European Commission or EU member states;
 - (iv) the USA had increased its domestic production of milk correlating with the low prices of grain feedstocks, weakening the price of cheese in global markets;
 - (v) a significant decline in imports by China of milk powders had occurred and was attributed to overstocking in China in 2014;
 - (vi) by reason of the matters in (i) to (v), *inter alia*, international prices for dairy milk had been in decline since 2014;
 - (vii) Australian domestic demand for dairy milk had not increased sufficiently to offset the reductions in international demand or international prices referred to in (i) to (vi) above;
 - (viii) there were no forecast beneficial changes in:
 - A. Fonterra's operating costs;
 - B. Fonterra's business performance; or

C. exchange rates;

that were reasonably expected by Fonterra to offset the effects of reduced demand and prices for its processed milk during the 2015 Season;

Particulars

Senior management with the requisite knowledge included (but are not limited to) Ms Swales and Mr Watt. The Plaintiffs refer to and repeat the particulars to paragraph 28 above.

The awareness of Fonterra can be inferred from:

- i. references to commodity prices and market conditions during the 2015 Season including the Opening Price Letter and the announcement made on 13 August 2015, and newsletters entitled 'Watt Matters' from Mr Watt to Farmers; and*
- ii. the statements made in a video by Mr Watt entitled 'Watt Happened' published to Farmers on 1 September 2015.*

Senior management ought reasonably to have known the matters in (i) to (viii) above because:

- a. they were material to the success of Fonterra's business;*
- b. they were relevant to the Four Variables; and*
- c. Fonterra had stated to Farmers (in clause 10.3 of the Handbook) that it would undertake bi-monthly reviews to monitor the said matters.*

Further particulars may be provided after discovery and receipt of experts' reports.

(n) Fonterra's senior management had or ought reasonably to have had information that, by reason of the matters referred to in (k) and/or (m) above, there was a material risk that:

- (i) the Opening Prices would not be paid; and/or
- (ii) the full-year Closing Price would be materially below the Closing Range;

Particulars

The Plaintiffs refer to and repeat the particulars to paragraph 35(k) above.

Ms Swales and Mr Watt ought to have known about the public comments of the CEO of Fonterra NZ, Mr Spierings, in an article headed “Aussie Farmers being overpaid amid global dairy rout, says Fonterra boss” in the Sydney Morning Herald on 28 August 2015, including comments to the effect that Fonterra’s parent’s view was that Australian dairy farmers were being paid too much for their milk, that the price of \$5.60 was too high and that calculations of farmgate milk price based on export prices indicated that the appropriate level was materially lower than \$5.60.

Further particulars may be provided after discovery and receipt of experts’ reports.

- (o) Fonterra’s senior management knew or ought reasonably to have known that the information in (k) and (m) and (n) above had not been disclosed to Farmers or potential Farmers;

Particulars

The Plaintiffs refer to and repeat the particulars to paragraph 35(k) above.

Further:

- a. *which Fonterra had represented to Farmers that or to the effect that it would keep them informed about matters related to the accuracy of the Opening Price Letter (section 10.3 of the Handbook); and*
- b. *Ms Swales and Mr Watt were responsible for regular updates to Farmers, including (in the case of Mr Watt) via the ‘Watt Matters’ newsletters.*
- (p) in respect of Handbook Farmers – Fonterra’s senior management knew or expected, or ought reasonably to have known or expected, that its Handbook Farmers commonly decided on a per-Season basis, and not more frequently, which dairy processor they would supply;

Particulars

The matter was general knowledge within the industry and was typical of the Fonterra Farmers.

- (q) Fonterra’s senior management knew or ought reasonably to have known that Fonterra:

- (i) prior to and during the 2015 Season had encouraged Farmers to increase milk production, including encouragements via programs such as Fonterra's '**GroPlan**' program and loan-finance incentives such as its '**Interest Free Supplier Advance**' product; and
- (ii) the Farmers included Farmers who had participated in the GroPlan or similar Fonterra programs, or utilized the Fonterra loan-finance products;
- (r) Fonterra's senior management knew or expected, or ought reasonably to have known or expected, that once its Handbook Farmers decided which dairy processor they would supply during a Season, Farmers might be unable to switch to another processor during the Season:
 - (i) because other processors lacked capacity to take additional supply; or
 - (ii) for other reasons including disruption to arrangements with the initial processor, like the GroPlan or similar Fonterra programs, or the Fonterra loan-finance products;
- (s) Fonterra's senior management knew or expected, or ought reasonably to have known or expected, that its Farmers commonly made decisions as to:
 - (i) herd sizes;
 - (ii) herd care and management;
 - (iii) milk production schedules;
 - (iv) budgeting; and
 - (v) farm investment;
 based on Fonterra's Opening Prices and Closing Range;

Particulars

The Plaintiffs refer to and repeat the particulars to 35(o) above.

*Fonterra employed a team of in-house consultants (**Support Crew**) to advise Farmers about such matters each Season.*

- (t) Fonterra's senior management knew or ought reasonably to have known that Fonterra:
 - (i) in *inter alia* the 2015 Handbook, had stated to the effect that Price Decreases were rare and had only been implemented once before, and that Prices Decreases would be avoided; and

- (ii) had never implemented a Price Decrease that operated retrospectively to “claw back” from Farmers the economic value of higher prices paid by Fonterra earlier during a given season;

Particulars

The Plaintiffs refer to and repeat the particulars to 35(o) above.

- (u) Fonterra’s senior management knew or expected, or ought reasonably to have known or expected, that Farmers were commonly aware of or assumed the matters in 35(t) above;

Particulars

The Plaintiffs refer to and repeat the particulars of paragraph 35(t) above.

- (v) Fonterra’s senior management knew or expected, or ought reasonably to have known or expected, that a Price Decrease of more than 10% below Opening Price during the 2015 Season was likely to cause:

- (i) significant difficulty to Farmers’ farming businesses;
- (ii) significant financial distress to some Farmers;
- (iii) significant emotional distress to some Farmers; and
- (iv) mental harm to some Farmers;

Particulars

The Plaintiffs refer to and repeat paragraphs 35(o) to (u) above.

- (w) Fonterra’s senior management knew or expected, or ought reasonably to have known or expected, that:

- (i) if Handbook Farmers were given prior notice of a Price Decrease, alternatively a Price Decrease of greater than 10% below Closing Range, some Handbook Farmers would switch to supply competitors of Fonterra;
- (ii) if EMSA Farmers were given sufficient prior notice of a Price Decrease having or likely to have a material adverse effect on any Farmer, then absent a renegotiation of that Farmer’s EMSA Agreement (pursuant to cl.2.3(d) of the EMSA), some EMSA Farmers would seek to avoid the adverse effect by giving three (3) months’ notice of termination under their EMSAs and, after termination, switching supply to competitors of Fonterra;

Particulars

The Plaintiffs refer to and repeat paragraphs 35(o) to (u) above.

- (x) Fonterra's senior management knew or expected, or ought reasonably to have known or expected, that switches by Farmers as described in 35(w) above might:
 - (i) damage Fonterra's reputation among Farmers and potential Farmers;
 - (ii) harm Fonterra's ability to meet existing obligations to its customers; and
 - (iii) harm Fonterra's competitive position in securing milk from Farmers in future seasons;

Particulars

The Plaintiffs refer to and repeat paragraphs 35(n) to (r) above.

- (y) Fonterra, to act in good faith toward Farmers and potential Farmers, was required to set its Opening Prices and Closing Range by reference to its actual considered estimate of the likely monthly prices and full-year closing price for the 2015 Season, assessed by reference to the Four Variables and not by reference to Fonterra's short-term competitive position as against Murray Goulburn.

Particulars

The Plaintiffs refer to and repeat the Considered Estimates Term.

- 36. Fonterra implemented the May 2016 Price Decrease as alleged in paragraph 15 for the purpose, or purposes including the substantial purpose, of avoiding economic loss to Fonterra, alternatively maximising profits for Fonterra.
- 37. In the premises set out in paragraph 35 and 36, Fonterra by:
 - (a) setting the 2015 Opening Prices and Closing Range for the purpose of matching or exceeding the Opening Prices offered by Murray Goulburn to MG Farmers, and not as Fonterra's considered estimate of the likely monthly prices and full-year closing price based on its independent assessment of the Four Variables;
 - (b) making the Pricing Representations;
 - (c) failing to revise or withdraw the 2015 Opening Prices and Closing Range at any time prior to 5 May 2016;

- (d) implementing the May 2016 Price Decrease:
 - (i) at all; alternatively
 - (ii) upon less than:
 - A. reasonable notice to Handbook Farmers (being 3 months' notice); or
 - B. 3 months' notice to EMSA Farmers;
 - (iii) in one decrement;
 - (iv) with the effect of clawing back from Farmers the economic value of higher farmgate milk prices paid by Fonterra earlier in the Season (**retrospective effect**); further or alternatively
 - (v) in a quantum that was more than a reasonable reduction, alternatively was more than 10% below Opening Price;

engaged in conduct that was, in all the circumstances, unconscionable in contravention of section 21 of the *ACL*.

38. Further and in the alternative, by not later than 13 August 2015:
- (a) the matters alleged in paragraph 35 existed;
 - (b) Fonterra had observed a significant drop in global dairy commodity prices;
 - (c) Fonterra's senior management had concluded that the Opening Price (being \$5.60) was no longer tenable;
 - (d) Fonterra had made the Pricing Representations;
 - (e) Fonterra's senior management knew, or expected or ought reasonably to have known or expected, that the longer Fonterra refrained from announcing a Price Decrease, the greater the shock and financial impact that Farmers would experience when the Price Decrease was eventually announced;
 - (f) Fonterra's senior management knew or expected, or ought reasonably to have known or expected, that the later and more larger the reduction referred to in paragraph 37(de), the greater was likely to be the:
 - (i) difficulties caused to Farmers' farming businesses;
 - (ii) financial distress caused to some Farmers;
 - (iii) emotional distress caused to some Farmers; and
 - (iv) mental harm caused to some Farmers;

Particulars

The matters in paragraph (e) and (f) above were notorious, and were acknowledged in substance at page 34 of the 2015 Handbook.

- (g) Fonterra's senior management knew or ought reasonably to have known that Fonterra had not taken any or any adequate step to draw to Farmers' attention the specific likelihood of a Price Decrease, alternatively a Price Decrease of more than 10% below Closing Range, before the end of the 2015 Season.

Particulars

The Plaintiffs refer to and repeat the particulars to paragraph 35(m) above.

39. In the premises set out in paragraphs 37 and 38, Fonterra by:
- (a) failing to revise or withdraw the 2015 Opening Prices and Closing Range on 13 August 2015, or at any time prior to 5 May 2016; and
 - (b) implementing the May 2016 Price Decrease:
 - (i) at all; alternatively
 - (ii) upon less than:
 - A. in the case of Handbook Farmers – reasonable notice; or
 - B. in the case of EMSA Farmers – 3 months' notice;
 - (iii) with retrospective effect;
 - (iv) in one decrement; further or alternatively
 - (vi) in a quantum that was more than reasonable, or alternatively was more than 10%; further or alternatively
 - (c) deducting from Farmers' milk-supply payments penalties for failing to meet GroPlan targets (**GroPlan penalties**), when the said failures were caused by Farmers selling down or drying-off herds in response to the May Price Decrease;

engaged in conduct that was, in all the circumstances, unconscionable in contravention of section 21 of the *ACL*.

Particulars

Reasonable notice for the purposes of (b)(ii)(A) was at least three (3) months' notice but during autumn months was six (6) months' notice since Farmers during autumn will commit to arrangements covering the winter months.

Loss and damage

40. But for the unconscionable conduct alleged in paragraph 35 and 36:

- (a) Fonterra would not have implemented the May 2016 Price Decrease, but instead paid prices in accordance with the Opening Price Letter (including the monthly Price Schedule); alternatively

Particulars

Fonterra would have borne any financial impact of having represented the payment prices that it perceived were too high, as did other processors.

- (b) Fonterra would have set its 2015 Opening Prices, and its Closing Range maximum, at not more than \$5.20 (or in any event, at values materially lower than \$5.60 and \$6.00 respectively) and the Plaintiffs and some of the Farmers:

(i) would not have:

- A. in the case of Handbook Farmers – made the 2015 Handbook Agreements;
B. in the case of EMSA Farmers – made or continued the 2015 EMSAs;
further or alternatively

(ii) would have:

- A. reduced herd sizes from 2014 levels in an orderly manner over the period July 2015 to May 2016;
B. managed herd pregnancies and lactation periods to reduce herd feed requirements during the 2015 Season, relative to 2014 levels;
C. varied their feed-supply, agistment and other farm-management arrangements to reflect reduced herd sizes and care requirements during the 2015 Season;
D. not purchased water, fertilizer and other requirements for the long-term planning and growth of crops based on larger planned herd sizes;
E. reduced capital expenditure;
F. not entered into or drawn on Preparatory Finance; alternatively

- (c) Fonterra would have implemented the Price Decrease the subject of the eventual May 2016 Price Decrease:

(i) without retrospective effect;

(ii) upon reasonable notice; and

(iii) in staged decrements commencing from the end of the reasonable notice period;

and Farmers would have taken the steps described in paragraph 40(b)(ii) above during the 2015 Season, and:

- A. in the case of Handbook Farmers – switched to other processors; or
- B. in the case of EMSA Farmers – switched to other processors, after giving three months’ notice to Fonterra under clauses 2.3(c) of the 2015 EMSAs; and

(d) in the premises in:

- (i) paragraph (a) above, Farmers would not have suffered loss or damage; alternatively
- (ii) paragraph (b) or (c) above, Farmers would not have suffered:
 - A. loss of revenue and/or profit from reduced milk prices combined with elevated expenses (including for cattle-feed, agistment and herd management expenses);
 - B. loss of capital value upon sale of cattle at “fire sale” prices;
 - C. loss of value of their businesses;
- (iii) paragraphs (a), (b) or (c) above, Farmers would not have suffered:
 - A. financial distress including in respect of commitments under Preparatory Finances;
 - B. emotional distress; or
 - C. mental harm.

41. Further and in the alternative, but for the unconscionable conduct alleged in paragraph 38:

- (a) Fonterra would not have implemented the May 2016 Price Decrease, but instead paid prices in accordance with the Opening Price Letter or a full-year closing price within the Closing Range for the 2015 Season; alternatively
- (b) Fonterra would have implemented the Price Decrease the subject of the eventual May 2016 Price Decrease:
 - (i) without retrospective effect;
 - (ii) upon reasonable notice; further or alternatively
 - (iii) in staged decrements commencing from the end of the reasonable notice period;

and Farmers would have taken the steps described in paragraph 40(b)(ii) and 40(c) above; and

- (c) in the premises in:
- (i) paragraph (a) above, Farmers would not have suffered loss or damage; alternatively
 - (ii) paragraph (b) above, Farmers would not have suffered:
 - A. loss of revenue and/or profit from reduced milk prices combined with elevated expenses (including for cattle-feed, agistment and herd management expenses);
 - B. loss of capital value upon sale of cattle at “fire sale” prices;
 - C. loss of value of their businesses;
 - (iii) paragraphs (a) or (b) above, Farmers would not have suffered:
 - A. financial distress;
 - B. emotional distress; or
 - C. mental harm.

42. In the premises set out in paragraph 40, further or alternatively paragraph 41, the Plaintiffs and some or all of the Group Members suffered loss or damage by reason of Fonterra’s unconscionable conduct in contravention of section 21 of the ACL.

Particulars

The Plaintiffs suffered the following loss and damage:

- A. *the loss particularized in paragraph 21; further or alternatively*
- B. *the loss particularised in paragraph 32; further or alternatively*
- C. *the loss associated with the decline in value of their farm;*
- D. *emotional distress;*
- E. *mental harm.*

Particulars of loss and damage for individual group members will be provided following the trial of common questions or otherwise as the Court may direct.

COMMON QUESTIONS OF LAW OR FACT

43. The questions of law or fact common to the claims of the Plaintiffs and Group Members are:

- (a) for the claims in respect of breach of contract –
 - (i) whether the Considered Estimate term is to be implied into:
 - A. the 2015 Handbook Agreements (for the Handbook Farmers); or
 - B. the 2015 EMSAs (for the EMSA Farmers);
 - (ii) whether the Reasonable Step-downs term is to be implied into:
 - A. the 2015 Handbook Agreements (for the Handbook Farmers); or
 - B. the 2015 EMSAs (for the EMSA Farmers);
 - (iii) whether Fonterra breached the Considered Estimates term;
 - (iv) whether Fonterra breached the Reasonable Step-downs term, and in particular:
 - A. whether the May 2016 Price Decrease was warranted according to the terms of the 2015 Handbook Agreements (for the Handbook Farmers) or the 2015 EMSAs (for the EMSA Farmers);
 - B. what if any prior notice of the May 2016 Price Decrease was required, in order to give reasonable notice;
 - C. what if any decrements were permitted or required, in order to implement the Price Decrease in reasonable amounts;
 - (v) whether Fonterra breached the Overall Price Match Term;
 - (vi) what principles apply to the identification and measurement of compensable loss and damage caused by the alleged breaches of the:
 - A. 2015 Handbook Agreements (for the Handbook Farmers) or
 - B. the 2015 EMSAs (for the EMSA Farmers);
- (b) for the claims of misleading and deceptive conduct –
 - (i) whether, and if so over what periods, Fonterra made the Pricing Representations;
 - (ii) so far as the Pricing Representations were representations as to present matters:
 - A. whether, and if so over what periods, the Pricing Representations were misleading or deceptive to, or likely to mislead or deceive Farmers;
 - B. whether, and if so at what times, there were material risks that the closing price would be substantially below the Closing Range, about which risks Fonterra ought reasonably to have been aware from monitoring international and domestic markets and the performance of its own business, but which had not been notified to Farmers;

- (iii) so far as the Pricing Representations were as to future matters – whether Fonterra had reasonable grounds for making the Representations at the time they were made, or at any time while they were continuing;
 - (iv) what principles apply to the identification and measurement of compensable loss and damage caused to Farmers by Fonterra’s contraventions of section 18 of the ACL;
- (c) for the claims of unconscionable conduct –
- (i) whether, and if so at what times, the matters alleged in paragraph 35 or 38 existed;
 - (ii) whether Fonterra, by the conduct alleged in paragraph 36 or 39, or any of the said conduct, engaged in conduct that was in all the circumstances unconscionable, within the meaning of section 21 of the ACL;
 - (iii) what principles apply to the identification and measurement of compensable loss and damage caused by the contraventions of section 21 of the ACL;
- (d) whether the declaratory relief sought in the Originating Process ought to be granted.

AND THE PLAINTIFFS CLAIM on their own behalf and on behalf of the Group Members:

- A. Declarations pursuant to section 36 of the *Supreme Court Act 1986* (Vic) that the Defendants:
 - i) by the misleading or deceptive conduct alleged herein contravened section 18 of the Australian Consumer Law (ACL); further or alternatively
 - ii) by the unconscionable conduct alleged herein contravened section 21 of the ACL.
- B. Damages in respect of Fonterra’s breaches of contract
- C. Further or alternatively to B, damages pursuant to section 236 of the ACL, in respect of:
 - i) Fonterra’s misleading or deceptive conduct; alternatively
 - ii) Fonterra’s unconscionable conduct.
- D. Interest.
- E. Costs.

Dated: ~~8 September~~^{17 June} 2020

LWL Armstrong QC

LJ Keily



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Adley Burstyner

Solicitors for the Plaintiffs

Annexure A

Table 1 – Base Milk Prices – loading on Spring Prices

North and South

	Fat	Protein
July 2015	Spring Price + 0.60	Spring Price + 1.50
August 2015	Spring Price + 0.38	Spring Price + 0.95
September 2015	Spring Price	Spring Price
October 2015	Spring Price	Spring Price
November 2015	Spring Price	Spring Price
December 2015	Spring Price	Spring Price
January 2016	Spring Price	Spring Price
February 2016	Spring Price + 0.38	Spring Price + 0.95
March 2016	Spring Price + 0.60	Spring Price + 1.50
April 2016	Spring Price + 0.71	Spring Price + 1.78
May 2016	Spring Price + 0.78	Spring Price + 1.95
June 2016	Spring Price + 0.89	Spring Price + 2.23

East and West

	Fat	Protein
July 2015	Spring Price + 0.60	Spring Price + 1.50
August 2015	Spring Price	Spring Price
September 2015	Spring Price	Spring Price
October 2015	Spring Price	Spring Price
November 2015	Spring Price	Spring Price
December 2015	Spring Price	Spring Price
January 2016	Spring Price + 0.38	Spring Price + 0.95
February 2016	Spring Price + 0.38	Spring Price + 0.95
March 2016	Spring Price + 0.60	Spring Price + 1.50
April 2016	Spring Price + 0.71	Spring Price + 1.78
May 2016	Spring Price + 0.78	Spring Price + 1.95
June 2016	Spring Price + 0.89	Spring Price + 2.23

Table 2 – Base Milk Prices – Prices including Spring Prices

(Spring Price of \$3.06 kg/MS for fat and \$7.65 kg/MS for protein)

North and South

	Fat	Protein
July 2015	3.66	9.15
August 2015	3.44	8.60
September 2015	3.06	7.65
October 2015	3.06	7.65
November 2015	3.06	7.65
December 2015	3.06	7.65
January 2016	3.06	7.65
February 2016	3.44	8.60
March 2016	3.66	9.15
April 2016	3.77	9.43
May 2016	3.84	9.60
June 2016	3.95	9.88

East and West

	Fat	Protein
July 2015	3.66	9.15
August 2015	3.06	7.65
September 2015	3.06	7.65
October 2015	3.06	7.65
November 2015	3.06	7.65
December 2015	3.06	7.65
January 2016	3.44	8.60
February 2016	3.44	8.60
March 2016	3.66	9.15
April 2016	3.77	9.43
May 2016	3.84	9.60
June 2016	3.95	9.88

Annexure B
Components of May 2016 Price Decrease

(prices are kg/MS)

North and South

	Fat				Protein			
	Opening Price	Reduced Price	\$ Reduction	% Reduction	Opening Price	Reduced Price	\$ Reduction	% Reduction
May 2016	3.84	1.10	2.74	71.3	9.60	2.75	6.85	71.3
June 2016	3.95	1.21	2.74	69.3	9.88	3.03	6.85	69.3

East and West

	Fat				Protein			
	Opening Price	Reduced Price	\$ Reduction	% Reduction	Opening Price	Reduced Price	\$ Reduction	% Reduction
May 2016	3.84	1.10	2.74	71.3	9.60	2.75	6.85	71.3
June 2016	3.95	1.21	2.74	69.3	9.88	3.03	6.85	69.3

Annexure C

Part A(i) –Plaintiffs’ Revenue Loss and Loss of Profits²

Breach of Considered Estimates and Reasonable Step-down terms

	MAY 2016 ³			JUNE 2016		
	Actual	Counterfactual <i>No Price Decrease</i>	Difference	Actual	Counterfactual <i>No Price Decrease</i>	Difference
Butterfat Production	1116 kg @ \$3.84 per kg (from 1-5 May) + 8106 kg @ \$1.10 per kg (from 5-31 May)	10,627 kg @ \$3.84 per kg	1405 kg @ \$3.84 per kg + 8106 kg @ \$2.74 per kg	7538 kg @ \$1.21 per kg	8204 kg @ \$3.95 per kg	666 kg @ \$2.74
Revenue from Butterfat including 10.0% GST	\$9808 + \$4714 = \$14,521	\$44,888	\$30,367	\$10,033	\$35,646	\$25,613
Protein Production	905 kg @ \$9.60 per kg (from 1-5 May) + 6793 kg @ \$2.75 per kg (from 5-31 May)	9022 kg @ \$9.60 per kg	1324 kg @ \$9.60 per kg + 6793 kg @ \$6.85 per kg	6293 kg @ \$3.03 per kg	7430 kg @ \$9.88 per kg	1137 kg @ \$6.85 per kg
Revenue from Protein including 10.0% GST	\$20,549 + \$9,557 = \$30,106	\$95,272	\$65,166	\$20,975	\$80,456	\$59,481
Total Revenue inc. GST, Production Payments,	\$43,828	\$144,537	\$100,709	\$62,839	\$166,967	\$104,128

² Figures are calculated according to the First and Second Applicants' 86% portion of share farm arrangement.

³ Price Decrease applied to milk produced from 5 May 2016 to 31 May 2016 as specified on May 2016 Monthly Statement.

Quality Adjustment and Charges						
TOTAL REVENUE LOSS	\$204,837					

Part A(ii) – Loss arising from breach of Overall Price Match term

Further or alternatively, with respect to the Overall Price Match term, the loss was \$0.40 per kg/MS supplied by each Farmer during the Season.

Annexure C (continued)

Part B –Plaintiffs’ “fire sale” losses

In addition, the Plaintiffs suffered the following losses as a result of responding to the May 2016 Price Decrease (which losses shall be quantified prior to trial):

- i. Refinancing of loans from principal and interest to interest only;
- ii. Taking out further loans (with bank);
- iii. Selling 250 cows, some with calf (impacting on milk production and cash flow) at low prices;
- iv. Taking out the FASL loan which incurred interest;
- v. Discontinuing employment of two works on the farm (meaning a greater amount of work was carried out by family members);
- vi. Needing to extend terms with creditors;
- vii. Using savings;
- viii. Selling inherited CBA shares to supplement depleted cash flow.

Annexure C (continued)

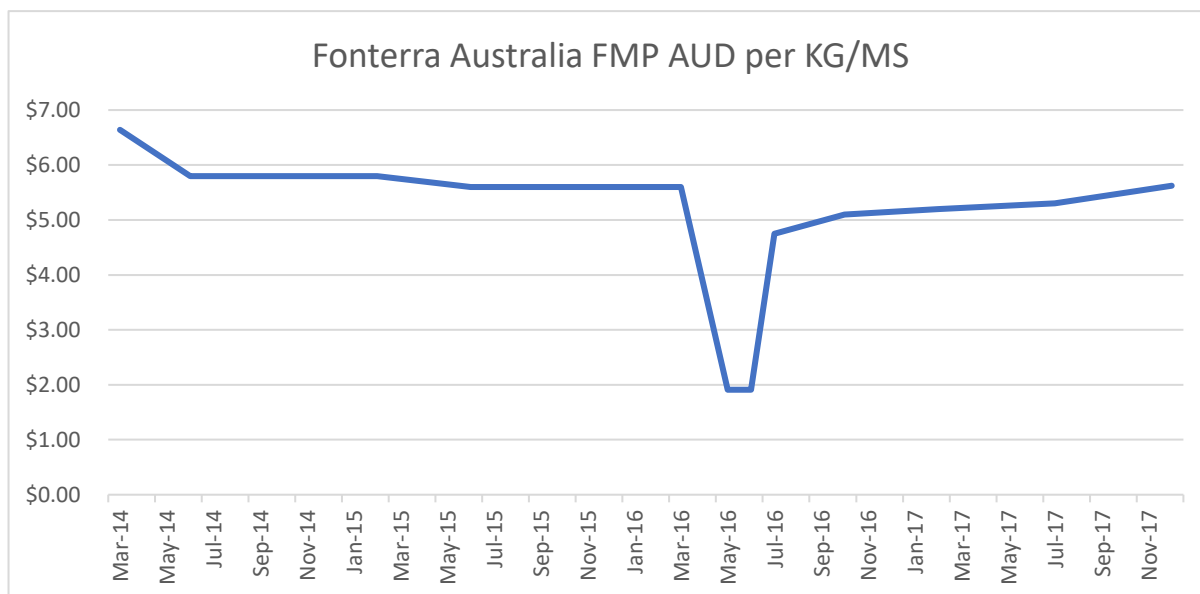
Part C - Plaintiffs' reliance loss

Category	Actual	Counterfactual ('but for' the breaches/contraventions)	Cost difference
Herd size	250 cattle were sold in a disorderly fashion, at fire-sale price	250 cattle would have been sold at an earlier date and in an orderly manner, saving from the fire-sale price	TBA
Capital Expenditure	Farm equipment expenditure was made which would not have been made	Reduce discretionary spend on farm equipment	\$1456
	Repairs to building and maintenance were made which would not have been made	Delay repairs to building and maintenance	\$23,397
	Fences were replaced instead of repaired	Reduce fencing costs by repair instead of replace	\$8094
Revenue Expenditure	Artificial insemination was used instead of bulls	Reduce artificial insemination costs (by using bulls)	\$9202
	Dairy supplies were purchased in relation to a larger herd	Reduce levels of 'dairy supplies'	\$8148
	Expensive and full levels of fertiliser was used, in order to improve crops	Revert to base level fertiliser requirements	\$48,842
	Expensive purchased feed and high levels of feed were used, to improve milk quality and for larger herd	Reduce feed costs (reduce mix of fees, relying on home-grown feed and for smaller herd)	\$56,390
	Cows were treated rather than culled and livestock levels were maintained or increased	Reduce livestock expenses (fewer cows and more culling rather than treating)	\$5,000

	Vet supplies were paid in order to treat cows when they were unwell	Reduce cost of vet supplies	\$2022
	Employess were retained or engaged	Reduce wages by utilizing family labour and fewer casual employees, having smaller herd	\$16,367
TOTAL		Expense reduction = \$178,855 <i>(subject to refinement once loss more precisely quantified prior to trial)</i> Revenue reduction = \$0 Net loss = \$178,855	

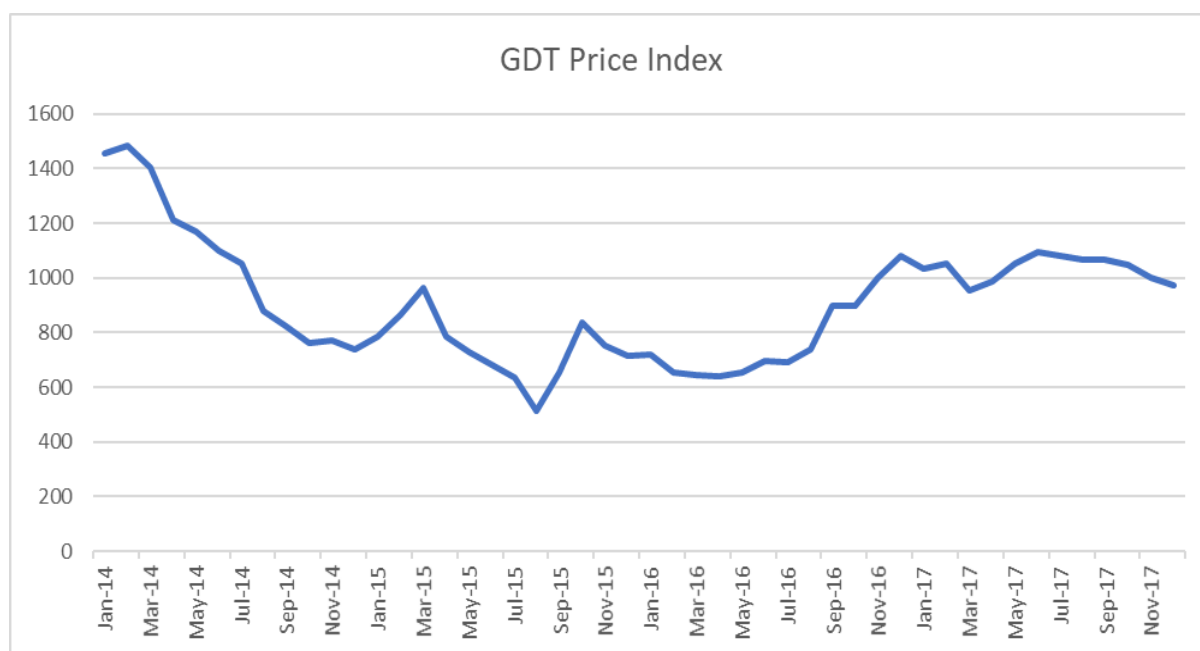
Annexure D

Fonterra FMP vs GDT Price Index



Fonterra Australia FMP: average farmgate milk price per kilogram of milk solids

Source: various Fonterra Australia publications and media articles



GDT Price Index: calculated from the total quantity sold in a GDT Trading Event across all products, contract periods and sellers.

Details: <https://www.globaldairytrade.info/en/gdt-events/how-gdt-events-work/reference-material/>

Source: Global Dairy Trade, *GDT Price Index over 10 years* (6 February 2019) GDT Events Results
<<https://www.globaldairytrade.info/en/product-results/>>

Announcements of Opening Farmgate Milk Price FY11 to FY18

Source: Australian Competition & Consumer Commission, *Dairy Inquiry: Interim Report* (November 2017) citing original source as processors, media, ASX announcements and ACCC analysis.

