

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2020 02588

BETWEEN:

LYNDEN IDDLES AND GEOFFREY IDDLES

Plaintiffs

and

**FONTERRA AUSTRALIA PTY LTD (ACN 006 483 665) and
ors according to the attached Schedule**

Defendants

- and -

**LLS FUND SERVICES PTY LTD (ABN 51 627 975 213)
AS TRUSTEE FOR LITIGATION LENDING FUND 1**

Intervenor

ORDER

JUDGE: The Honourable Justice Delany

DATE MADE: 20 September 2023

ORIGINATING PROCESS: Writ filed 17 June 2020

HOW OBTAINED: Upon the first and second return of the Plaintiffs' summons filed on 4 November 2022, and following the application of the settlement administrator made by email to chambers on 8 September 2023

ATTENDANCE: *On 28 February 2023:*
L Armstrong KC with Min Guo and P Kelly, counsel for the Plaintiffs
RA Heath KC with L Dawson, counsel for the Defendants
WAD Edwards SC with O Nanlohy, counsel for the Intervenor
On 23 June 2023:
O Bigos KC with N Lenga, counsel for the Plaintiffs
WAD Edwards SC, counsel for the Intervenor

OTHER MATTERS: A. Under paragraph 1 of orders made 18 November 2022, Catherine Mary Dealehr ('Legal Costs Referee') was appointed as a special referee pursuant



to r 50.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), to report in writing to the Court her opinions on the costs of this proceeding and the Settlement Administration process.

- B. On 28 February 2023, a hearing took place of the Plaintiffs' application under s 33V of the *Supreme Court Act 1986* (Vic), being a class action settlement approval hearing. Deductions for legal costs were not dealt with that day, consistent with the Court's email of 17 November 2022 which advised the parties that the approval application would be dealt with in two stages. Additionally, the Plaintiffs received the Legal Costs Referee's substantive report one business day prior to the hearing (which was the due date) and needed time to consider that report and obtain the underlying material, which they received on 14 April 2023.
- C. Orders made 14 April 2023:
- a. approved the settlement of the Fonterra Class Action on the terms of the Settlement Agreement and the Settlement Distribution Scheme ('SDS');
 - b. appointed David Burstyner ('Administrator') as the administrator of the Fonterra Class Action Settlement; and
 - c. remitted to a further hearing certain Costs Issues (as defined in those orders), together with a timetable including (in paragraph 13 of the orders) provision of further material to the Legal Costs Referee by 20 April 2023.
- D. Terms used in these orders have the meanings defined in those orders made 14 April 2023, unless the context otherwise requires.
- E. Clause 3.2 of the Settlement Agreement states:
- '...the Settlement Sum will be held in escrow in the Escrow Account until the end of the Appeal Period. After the end of the Appeal Period, the balance of the Escrow Account will either:
- (a) be paid to Fonterra in accordance with clause 2.2(g); or
 - (b) be paid to another bank account that is, subject to approval of the Court, controlled by the Solicitors and held as



controlled monies for the benefit of the Claimants, the Funder, and any other persons with an entitlement to those monies in accordance with the SDS, subject in each case to the obligations set out in this Agreement.’

- F. Pursuant to an Escrow Agreement entered on or about 18 November 2022, set out at pages 2 to 32 of Exhibit MDL-1 to the affidavit of Matthew David Lees sworn on 17 February 2023:
- a. the proceeds of the Fonterra Class Action Settlement were paid to Perpetual Corporate Trust Limited ABN 99 000 341 533 (Perpetual), as escrow agent, and are now controlled by Perpetual including by account 032143 940119 at the Westpac Banking Corporation.
 - b. ‘The Escrow Agent must release a Released Amount to the relevant Escrow Party (or as directed by the Escrow Parties), in accordance with:...the terms of an order, judgment, or decree ordering the release of a Released Amount, accompanied (but only if the order is not explicitly directed to the Escrow Agent) by a legal opinion....’ (being the terms of clause 6.(a)).
- G. These orders, in particular order 3, are directed to Perpetual.
- H. The following sums, to the extent transferred from the Escrow Account, are also intended to be held in trust by the Administrator and not distributed to Group Members:
- a. \$468,771 on account of the costs of Adley Burstynier from 21 February 2023 and of the Settlement Administration; and
 - b. \$30,000 on account of the costs of a further report of the Legal Costs Referee.



THE COURT ORDERS THAT:

Amendment to Settlement Distribution Scheme

1. Pursuant to s 33V of the *Supreme Court Act 1986* (Vic) ('the Act'), the SDS in the Fonterra Class Action Settlement (being the scheme at Annexure B of orders made 14 April 2023 in this proceeding) be substituted by the scheme in Annexure A of these orders, to incorporate the amendments to paragraphs 2 and 3 of the Calculation Protocol in the SDS which are indicated by tracked changes in Annexure A.
2. The Administrator's costs of and incidental to his application made 8 September 2023 are part of his Administration costs under the SDS.

Transfer of settlement funds to Administrator and distribution to Group Members

3. Pursuant to s 33ZF of the Act, Perpetual is directed to release the amount in the Escrow Account (that amount being the entirety of the proceeds of the Fonterra Class Action Settlement) and transfer those funds to the following bank account controlled by the Administrator (the 'Controlled Monies Account'):

Account name: Fonterra Settl't Adley Burstynier CMA

BSB: 633000

Account No.: 209068980

Bank: Bendigo Bank

4. The Administrator is to proceed to distribute to Group Members \$13,611,965 or such greater sum as he considers is appropriate and not inconsistent with these orders.

Adoption of Referee Reports and deductions for cost including funding commission

5. Pursuant to r 50.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), the costs allowed and disallowed in the reports of the Legal Costs Referee dated 24 February 2023, 27 February 2023 and 8 May 2023 be adopted, but not in respect of costs on and after 21 February 2023.
6. Pursuant to ss 33V and 33ZF of the Act, the following amounts be approved as deductions from the Settlement Sum and are to be paid by the Administrator from the Controlled Monies Account:
 - a. \$6,875,000 to the Intervenor, as a common fund order made pursuant to s 33V(2) of the Act and as 'Funding Commission' provided for in the SDS into the following account:



Account name: LLS Fund Services Pty Ltd ATF Litigation Lending Fund 1

BSB: 182-222

Account No.: 304463680

SWIFT code: MACQAU2S

Bank: Macquarie Bank

- b. \$3,081,506.50 to the Intervenor as 'Reimbursement of Project Costs' provided for in the SDS, excluding costs on and after 21 February 2023 which shall be the subject of a further order following the provision of a further report by the Legal Costs Referee pursuant to order 10 below, into the same account as specified in (a) above;
- c. \$902,757.50 to Adley Burstynier as 'Unpaid Plaintiffs' Legal costs and Disbursements' provided for in the SDS, excluding costs on and after 21 February 2023 which shall be the subject of a further order following the provision of a further report by the Legal Costs Referee pursuant to order 10 below. For avoidance of doubt, this amount includes, without limitation, the following payments that Adley Burstynier is to make as Administrator:
 - i. \$72,500 to the Legal Costs Referee; and
 - ii. \$11,484.37 to PricewaterhouseCoopers ABN 52780433757, being a disbursement allowed by the Legal Costs Referee.

Quantification of post 20 February 2023 Settlement Administration and Plaintiffs' costs

7. The Legal Costs Referee's appointment by order made 18 November 2022 be extended to include a report in writing to the Court of her opinion on the amount of legal costs that are fair, reasonable and proportionately incurred for:
 - a. the Plaintiffs' costs of the proceeding including their summons filed 4 November 2022 and including the quantification of legal costs to the Legal Costs Referee, in respect of the period from and including 21 February 2023; and
 - b. the Administrator's costs of the Fonterra Class Action Settlement Distribution Scheme process.
8. The Legal Costs Referee is to:
 - a. have regard to the reasons published as *Lynden Iddles & Anor v Fonterra Australia Pty Ltd & Ors* [2023] VSC 566 ('Reasons'), which includes:
 - i. allowing only actual professional fees and disbursements incurred, where they turn out to be less than estimates;



- ii. not allowing for the costs of and incidental to the 20 April 2023 report of Suzanne Ward;
 - iii. not allowing for the costs of submissions to the Court seeking to vary the Legal Costs Referee's report of 8 May 2023;
 - iv. allowing the fair, reasonable and proportionately incurred professional costs and disbursements of Adley Burstyner for:
 - 1. providing material to the Legal Costs Referee to address her 24 February 2023 and 27 February 2023 reports in order to inform her 8 May 2023 report, including costs of and incidental to the affidavits made 20 April 2023 by David Burstyner and Geoffrey Kenneth Iddles and provided to the Legal Costs Referee pursuant to order 13 made 14 April 2023, all of which are to be treated as costs of the quantification of Adley Burstyner's professional costs and disbursements as sought in the Plaintiffs' 4 November 2022 application;
 - 2. subject to paragraph 9.a.v., work performed at any time regarding quantification of the costs incurred on or after 21 February 2023 comprising Settlement Administration costs and the Plaintiffs' costs of the proceeding (which work largely addressed the change from estimated costs to actual costs) including, to the extent they deal with that quantification, costs of and incidental to the affidavits of David Burstyner made 16 and 23 June 2023;
 - 3. the hearing on 23 June 2023, pursuant to paragraph 21(e) of the Reasons, but not to the extent they were only costs of disputing the Legal Cost Referee's reports to the Court;
 - v. disallowing the professional costs and disbursements of Adley Burstyner of advising, obtaining evidence on and making submissions about the costs claim for the exclusive purposes of submissions and evidence at the hearing ultimately scheduled for 23 June 2023 (as opposed to the purposes of providing material to the Legal Costs Referee for consideration in her preparation of her various reports);
- b. apply the rates which the SDS sets for the costs incurred by the Administrator.
9. The Legal Costs Referee is to commence her report upon request from the Administrator.



10. Fourteen days prior to providing her final report to the Court the Legal Costs Referee is to provide the Administrator with an interim version of the report in order to enable him to provide further material for consideration by the Legal Costs Referee, addressing either or both of the Plaintiffs' costs or the Administrator's costs. After the lapse of fourteen days the Legal Costs Referee shall file her final report with the Court and provide copies to the Administrator and the Intervenor.
11. Within 14 days of receiving the Legal Costs Referee's further report as filed with the Court the Plaintiffs and the Administrator shall notify, and the Intervenor may notify, the Court either that they do not apply for any variation of the Legal Costs Referee's report or they wish to make submissions in which case they shall (by the same date) file and serve any further evidence and submissions upon which they propose to rely. Subject to further order, the adoption or otherwise of the Legal Costs Referee's report shall be determined in chambers without further hearing.
12. The costs of and incidental to the Legal Costs Referee's further report, and the costs of the Administrator or the Plaintiffs providing material to the Legal Costs Referee, shall, subject to further order, be paid from the Settlement Sum as an expense of the settlement administration. Unless the Court otherwise orders, costs payable to the Legal Costs Referee shall be no more than \$30,000 inclusive of GST.

Liberty to apply

13. The Plaintiffs, the Defendants, the Administrator, and the Intervenor each have liberty to apply on not less than three (3) business days' notice to each other.

DATE AUTHENTICATED: 17 October 2023



The Hon. Justice Delany

SCHEDULE OF PARTIES

LYNDEN AND GEOFFREY IDDLES

Plaintiffs

FONTERRA AUSTRALIA PTY LTD
ACN 006 483 665

First Defendant

FONTERRA MILK AUSTRALIA PTY LTD
ACN 114 326 448

Second Defendant

FONTERRA BRANDS (AUSTRALIA) PTY LTD
ACN 095 181 669

Third Defendant

Annexure A

Lynden Iddles & Geoffrey Iddles v Fonterra Australia & Ors

Supreme Court of Victoria No. SCI 2020 02588

("Fonterra Class Action")

SETTLEMENT DISTRIBUTION SCHEME

Version 3 – 8 September 2023

BACKGROUND

- A. This Settlement Distribution Scheme (**SDS**) establishes a procedure for distributing the Settlement Sum of \$25,000,000 (twenty-five million dollars) to be paid by **Fonterra**, without admission of liability, pursuant to a settlement of Supreme Court of Victoria proceeding no. S ECI 2020 02588.
- B. This SDS does not become operative until the Court has granted Settlement Approval and may be amended before Settlement Approval is obtained, subject to the Court approving the amendment.
- C. This SDS provides for the following major steps:
- (i) this SDS shall be administered and applied by David Burstyner of the firm Adley Burstyner (**Administrator**) (Section 3);
 - (ii) the parties will transfer the Settlement Sum into a Settlement Distribution Fund to be managed by the Administrator;
 - (iii) the Administrator will deduct from the Settlement Distribution Fund various amounts approved by the Court (Section 5);
 - (iv) Group Members who wish to claim a Payment pursuant to the SDS will submit Proofs to the Administrator (Section 6);
 - (v) the Administrator will review the Proofs, verify the eligibility of each Claimant under the SDS, and if the Claimant is eligible, calculate the Claimant's entitlement to a Payment from the Settlement Distribution Fund (Section 8);
 - (vi) where a Proof is rejected by the Administrator, or calculation disputed by the Claimant, the Administrator will notify the Claimant of the Claimant's right to seek a review of such rejection, and will facilitate the review process (Section 8);
 - (vii) following determination of Claimants' entitlements to Payments, the Administrator will:
 - (a) seek Court approval of his Administration Costs;
 - (b) deduct the approved Administration Costs from the Settlement Distribution Fund (Section 10);
 - (c) distribute the amount then remaining in the Settlement Distribution Fund (being the Net Distribution Sum) among the eligible Claimants, in the proportions which their individual entitlements bear to the individual entitlements of the other Claimants (Section 11).

OPERATIVE PROVISIONS

1. DEFINITIONS

1.1. In this SDS, the following terms have the meanings defined:

Adley Burstyner means Adley Burstyner (ABN 38 205 640 150).

Administrator means David Burstyner of Adley Burstyner, in his capacity as the Court appointed administrator of the SDS.

Administration Costs means costs of and incidental to the administration of the SDS incurred by the Administrator, in the amount approved by the Court.

Administration Staff means employees or agents of Adley Burstyner tasked by the Administrator to assist the Administrator in the implementation of the SDS.

Approval Date means the business day following the end of the Appeal Period.

Calculation Protocol means the methodology for calculating the proportion of the Settlement Distribution Fund to be allocated to each individual Participating Claimant (Annexure A).

Claim Form means a notice by which Claimants register as Participating Claimants, such notice to be in a form, and to be advertised and sent in a manner, approved by the Court.

Claim Confirmation Notice means a notice to be sent to Participating Claimants in accordance with clause 8.

Claimants means the Plaintiffs and Group Members in the Proceeding (and for the avoidance of doubt, excludes Group Members who opted out in accordance with orders of the Court).

Costs Assessor means Cate Dealehr or such alternate as may be appointed by the Court.

FASL Offset Payment means, in respect of any Participating Claimant, the sum (if any) identified in respect of that Claimant in Schedule 1 to the Settlement Agreement.

Funder means LLS Fund Services Pty Ltd ABN 51 627 975 213 as Trustee for Litigation Lending Fund 1.

Funding Agreement means the litigation funding agreement dated 15 June 2020 between the Plaintiffs and the Funder.

Funding Commission means the amount of \$6,875,000 to be paid to the Funder or such other amount as approved by the Court.

Net Distribution Sum means the amount of the Settlement Distribution Fund available for distribution to the Claimants prior to any deduction of FASL Offset Payments but after the deduction of:

- a) the Reimbursement of Project Costs;
- b) the Funding Commission;
- c) the Unpaid Plaintiffs' Legal Costs and Disbursements;

- d) the Plaintiffs' Reimbursement Payment;
- e) the Administration Costs;
- f) any other amount required or permitted to be withheld by the Administrator pursuant to this SDS.

Notice means the Court-approved notice to be sent to Claimants informing them of the proposed settlement of the Proceeding and of their rights in relation to the proposed settlement (in the form set out in Annexure A to the orders made by the Honourable Justice Nichols dated 15 November 2022).

Payment means the individual entitlement of a Participating Claimant to a share of the Settlement Distribution Fund, calculated in accordance with the Calculation Protocol or as varied by review, and unless the context otherwise requires means a Payment prior to any deduction of FASL Offset Payments or other deductions permitted or required under this SDS.

Participating Claimants means Claimants who submit a Proof in accordance with clause 6.

Participating Claimants Database means a database maintained by the Administrator to record the identification, contact and banking details of Participating Claimants.

Plaintiffs' Legal Costs and Disbursements means the amount of legal costs and disbursements incurred by or on behalf of the Plaintiffs in conducting the Proceeding, and for the avoidance of doubt includes costs and disbursements of and incidental to the application for or notices of Settlement Approval or such other amount as may be approved by the Court.

Plaintiffs' Reimbursement Payment means the amount payable to the Plaintiffs in recognition of the time and inconvenience in acting as representative in the Proceedings, in the amount of \$30,000 or such other amount as may be approved by the Court.

Proceeding means Supreme Court of Victoria proceeding S ECI 2020 02588.

Proof means a claim for a Payment made in accordance, or substantially in accordance with the form provided in the Claim Form, and includes a Proof that the Administrator considers incomplete.

Reimbursement of Project Costs means an amount equal to the aggregate amount of the Funder's out of pocket costs, expenses, and/or disbursements paid or incurred in respect of or associated with investigating, prosecuting, defending and/or resolving Claims in connection with the Step-Down (including but not limited to those Claims made in the Proceeding) or such other amount as may be approved by the Court. For avoidance of doubt, subject to approval by the Court, Reimbursement of Project Costs includes a reimbursement for insurance fees and premiums paid or incurred in respect of any adverse costs cover or insurance obtained for the benefit of the Plaintiffs and/or Group Members.

Registration Date means 27 January 2023, being the date specified in the Notice as being the date by which the Proofs of Claimants must be received by the Administrator.

Review Counsel means Min Guo of the Victorian Bar, or such other member of the Bar as the Court on application by the Administrator may appoint.

Settlement Agreement means the Settlement Agreement dated 4 November 2022 between the parties to the Proceeding (among others).

Settlement Approval means the approval by the Court of the settlement to be implemented by this SDS, pursuant to s 33V of the *Supreme Court Act 1986* (Vic).

Settlement Distribution Fund means a fund into which the Settlement Sum is to be paid and which is to be operated by the Administrator in accordance with clause 4.1, and includes any interest derived from the investment of the Settlement Sum before its distribution to Claimants.

Step-Down means Fonterra's reduction of the farmgate milk price from an average \$5.60/kgMS to \$5.13/kgMS during the milk season commencing 1 July 2015 and ending 30 June 2016.

Step-Down Period means 4 May 2016 to 30 June 2016.

Unpaid Plaintiffs' Legal Costs and Disbursements means Plaintiff's Legal Costs and Disbursements as approved by the Court, that were not paid by the Funder, and includes any uplift on such costs pursuant to the *Legal Profession Uniform Law Application Act 2014* (Vic).

2. INTERPRETATION

2.1. The following rules apply to this SDS unless the context requires otherwise:

- (a) headings are for convenience only and do not affect interpretation;
- (b) terms defined in the Settlement Agreement have the same meaning when used in this SDS;
- (c) the singular includes the plural, and the converse also applies;
- (d) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (e) a reference to a clause is a reference to a clause of this document unless stated otherwise;
- (f) a reference to a *person* includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
- (g) a reference to *dollars* and \$ is to Australian currency; and
- (h) a reference to anything done by any person includes a reference to the thing done by a director, officer, servant, agent, personal representative or legal representative if permitted to be so done by law or by any provision of the Settlement Agreement and this SDS.

- 2.2. This SDS is intended to operate subject to and in accordance with the Settlement Agreement, and in the event of any inconsistency between the terms of the Settlement Agreement and this SDS, the Settlement Agreement shall prevail.
- 2.3. For the avoidance of doubt, nothing in this SDS relieves any Party (in any capacity) from any obligation of that Party under the Settlement Agreement.

3. ADMINISTRATOR

- 3.1. In acting as Administrator, the Administrator:
- (a) shall conduct himself as a lawyer discharging an office appointed by the Court and obligated to implement this SDS for the benefit of Group Members considered as a whole; and
 - (b) shall not act, and shall ensure that no person employed by him or by Adley Burstyner acts, as the lawyer for any individual Group Member (or subgroup of Group Members) in relation to the Claim of that Group Member (or subgroup) without that in any way restricting the Administrator or his staff from, at their discretion, providing Group Member with assistance that the Administrator considers reasonable, impartial and fair in respect of the preparation and submission of a Proof and related matters in connection with this SDS
- 3.2. The Administrator:
- (a) is responsible for administering, and distributing the monies in, the Settlement Distribution Fund efficiently and at a cost which is reasonable and proportionate in all the circumstances;
 - (b) may act by a delegate appointed by him, subject to the Administrator first obtaining from any such delegate an acknowledgement in writing that such person agrees to be bound by the obligations and duties set out herein as if that person was the Administrator and:
 - (i) references in this SDS to the Administrator shall hereafter include reference to such delegates;
 - (ii) for the avoidance of doubt the Administrator is and remains responsible for all acts or omissions of any such delegate;
 - (c) may be assisted by Administration Staff;
 - (d) must act independently;
 - (e) may obtain legal advice, including from other principals or servants of Adley Burstyner;
 - (f) may engage third party service providers including, but not limited to, accountants, lawyers, tax advisors, registry service providers and mailing houses;

- (g) may obtain advice in respect of tax matters arising from the administration or application of the Settlement Distribution Fund and may seek a ruling from the Federal Commissioner of Taxation, any relevant Commissioners of State Revenue, or other necessary State or Federal offices if the Administrator determines that obtaining such a ruling would be in the best interests of the Participating Claimants considered as a whole;
- (h) so far as is consistent with this SDS, is authorised to make decisions that, in the Administrator's sole discretion, ultimately benefit the body of Participating Claimants as a whole;
- (i) shall be indemnified from the Settlement Distribution Fund for any and all taxes, charges, duties, imposts or other levies arising in respect of the settlement of the Proceedings or the Settlement Distribution Fund, and for any costs incurred in good faith by or on behalf of the Administrator; and
- (j) in the discharge of their functions (by himself, his delegates or Administration Staff) under this SDS shall have the same immunities from suit as attach to the office of a judge of the Supreme Court of Victoria.

- 3.3. Notwithstanding anything elsewhere contained in this SDS, the Administrator may at any time:
- (a) correct any error, slip or omission occurring in the course of his administration of the SDS; and
 - (b) apply to the Court for guidance and orders in respect of any matter arising in or incidental to the administration of the SDS or the resolution of the Proceeding.

4. SETTLEMENT DISTRIBUTION FUND

- 4.1. The Administrator shall hold the amounts standing from time to time in the Settlement Distribution Fund as controlled monies for the benefit of the Claimants, the Funder, and any other persons with an entitlement to those monies in accordance with this SDS (subject to the payment of any and all taxes, charges, duties, imposts or other levies arising in connection with the establishment or administration of this SDS) pursuant and subject to the Settlement Agreement, this SDS and any further order of the Court.

5. INITIAL DEDUCTIONS

- 5.1. The Administrator shall, as soon as practicable after the Court makes any order approving amounts for any or all of the following payments and after the expiry of any appeal period applicable to any relevant order (including an order for interim payments), make those payments in those approved amounts from the Settlement Distribution Fund, on such terms (if any) as the

Court may direct (including as interim partial or full payments pending the Court making final orders in respect of Settlement Approval):

- (a) the Reimbursement of Project Costs to the Funder or as the Funder may direct;
- (b) the Funding Commission to the Funder or as the Funder may direct;
- (c) the Unpaid Plaintiffs' Legal Costs and Disbursements; and
- (d) the Plaintiffs' Reimbursement Payment.

6. PROOFS OF CLAIMS

- 6.1. Any Claimant wishing to participate in this SDS must before the Registration Date submit a Proof to the Administrator or as the Claim Form for the Proofs may direct (and persons who submit Proofs as aforesaid are Participating Claimants).
- 6.2. The Administrator shall provide to Claimants or their representatives such assistance in relation to the preparation of a Proof as the Administrator in his absolute discretion considers reasonable.
- 6.3. For the avoidance of doubt, the assistance referred to in clause 6.2 may be provided:
 - (a) before a Proof or purported Proof is first submitted to the Administrator; or
 - (b) for the purpose of correcting or supplementing a Proof or purported Proof earlier submitted to the Administrator; and
 - (c) without limiting the foregoing, may include the Administrator preparing in the form of a Proof, and treating as a submitted Proof, any instructions that had been received by Adley Burstyner from a Claimant prior to Settlement Approval (and references to "Proofs" in this SDS shall, where the context admits, be references to the Proofs completed as described in this subclause).
- 6.4. The Administrator shall collate the identification, contact and bank transfer details of Participating Claimants, and such other data as the Administrator considers appropriate, in the Participating Claimants Database.
- 6.5. No Proofs will be accepted by the Administrator after the Registration Date.

7. NON-PARTICIPATING CLAIMANTS ARE BOUND

- 7.1. A Claimant who does not by the Registration Date submit a Proof:
 - (a) shall be for all purposes of the Proceeding and this SDS a Claimant bound by the Settlement Approval and by this SDS; but

- (b) shall not be a Participating Claimant and shall not be entitled to a Payment from the Settlement Distribution Fund.

8. CLAIM CONFIRMATION NOTICES

- 8.1. Within 30 days after the Approval Date, or such later date as the Court on application by the Administrator may permit, the Administrator will send to each Participating Claimant a Claim Confirmation Notice that shall include (without limitation) the following information:
- (a) the Proof or other information obtained by the Administrator in respect of that Participating Claimant and on which the Administrator proposes to base the application of the Calculation Protocol (**base data**); and
 - (b) the Administrator's estimate of the proportion that the Participating Claimant's Payment will bear to the total value of all Payments due to Participating Claimants;
 - (c) the Administrator's estimate of the amount of the Payment to be made to the Participating Claimant, after deduction of such amounts as may be permitted or required by this SDS to be deducted as approved by the Court;
 - (d) any FASL Offset Payment in respect of the Participating Claimant; and
 - (e) an explanation of the Participating Claimant's rights to seek a review of the Claim Confirmation Notice.
- 8.2. The recipient of a Claim Confirmation Notice shall be deemed to accept the accuracy of the base data and any FASL Offset Payment for all purposes of or incidental to this SDS unless the recipient within 30 days after the date of the Claim Confirmation notice delivers to the Administrator a written notice (being a **Dispute Notice**):
- (a) identifying itself as a notice disputing the accuracy of the base data or FASL Offset Payment;
 - (b) setting out the recipient's reasons for seeking the review; and
 - (c) attaching any and all further information that the recipient relies on in support of their application for review.
- 8.3. The Administrator may, in his absolute discretion:
- (a) extend (before or after its expiry) any deadline set pursuant to clause 8.2, but that discretion shall be exercised sparingly having regard to the consideration that it is in the interests of all Participating Claimants that the SDS be administered efficiently to minimise the Administration Costs and that payments be made to Claimants as soon as reasonably practicable;
 - (b) require any Claimant to submit, as a precondition to a Dispute Notice being treated as valid and timely, a bond equal to not more than \$1,000, which bond shall be:

- (i) refunded to the Claimant if the outcome of the Dispute Notice is to increase the Claimant's Payment entitlement by more than \$1,000; but
- (ii) forfeit and paid into the Settlement Distribution Fund if the outcome of the Dispute Notice is not to increase the Claimant's Payment entitlement by more than \$1,000.

8.4. For the avoidance of doubt, a Dispute Notice shall as necessary stand as a FASL Objection Notice within the meaning of the Settlement Agreement.

9. REVIEWS

9.1. Where a Participating Claimant submits a Dispute Notice within the time allowed by the Administrator, then subject to clause 9.4 the Administrator shall conduct a review and consider the further material, and such further or other material as the Administrator in his absolute discretion sees fit to obtain and may revise the base data or Claim Confirmation Notice.

9.2. If the Administrator declines to adjust the assessment reflected in the Claim Confirmation Notice for a reason other than an objection to a deduction in respect of a FASL Offset Payment:

- (a) the Administrator shall refer his decision to Review Counsel;
- (b) Review Counsel may inform themselves in relation to the claim as Review Counsel in their absolute discretion may consider appropriate, having regard inter alia to the need to maintain proportionality between the costs of the review and the quantum of the dispute;
- (c) Review Counsel shall advise the Administrator whether to revise the Claim Confirmation Notice or to affirm it; and
- (d) Review Counsel shall provide a short statement of reasons for any rejection or acceptance of a Dispute Notice, which statement shall be delivered by the Administrator to the Claimant.

9.3. The decision of the Review Counsel pursuant to clause 9.2 shall be final and binding on the parties and the Administrator, and:

- (a) no appeal shall lie save on a question of law; and
- (b) the Administrator shall, subject to any appeal, apply the disputed sum in accordance with the said decision.

9.4. Where a Participating Claimant submits a Dispute Notice in respect of a proposed deduction on account of a FASL Offset Payment:

- (a) the Administrator shall consider the Dispute Notice, and such further or other material as the Administrator in his absolute discretion sees fit to obtain;
- (b) the Administrator may correspond with the Claimant and Fonterra for the purpose of:

- (i) resolving the dispute by consent or
 - (ii) the Administrator, acting responsibly and in good faith, making a non-binding assessment of whether the Claimant's objection should be upheld;
- (c) within 30 days of receiving the Dispute Notice, the Administrator:
- (i) without taking the steps in (b); or
 - (ii) if the steps in (b) have been taken but have not resolved the dispute;
- shall provide the Participating Claimant and Fonterra with notice of the Administrator's non-binding assessment (if any) or that the objection is to be determined by the dispute resolution process in accordance with clause 6.6(f) of the Settlement Agreement.

10. ADMINISTRATION COSTS

10.1. The Administrator shall be:

- (a) remunerated from the Settlement Distribution Fund for work done by him (including any delegates and Administration Staff) at the rates set out in Annexure B; and
- (b) reimbursed for any disbursements reasonably incurred by him in connection with this SDS;

in accordance with this clause 10 (the remuneration and reimbursement being together the Administration Costs).

10.2. The Administrator shall keep good and accurate records of the Administration Costs.

10.3. The Administrator shall make available such records, and provide such assistance, as the Costs Referee may reasonably require for the purpose of preparing such reports as the Court may direct for assessing the plaintiffs' reasonable costs and disbursements of and incidental to the proceeding.

10.4. The Administrator shall forthwith after the Approval Date (or such later date as the Court may direct) deduct from the Settlement Distribution Fund and pay to the solicitors for the plaintiffs such amounts in respect of the plaintiffs' legal costs and disbursements incurred up to the date of Settlement Approval as the Court may allow.

10.5. The Administrator shall, forthwith after receipt of any report from the Costs Referee in respect of plaintiffs' costs and disbursements or the costs and disbursements of and incidental to the implementation of the SDS (**Supplementary Report**), deduct from the Settlement Distribution Fund and pay to the solicitors for the plaintiffs the costs and disbursements allowed in the said Supplementary Report.

- 10.6. Upon the Administrator determining that he is in a position to complete the distribution of funds from the Settlement Distribution Fund:
- (a) obtain a final Supplementary Report from the Costs Referee; and
 - (b) deliver to the Associate to her Honour Justice Nichols (or as the Court may direct) the final Supplementary Report together with such materials as the Administrator may deem appropriate in support of any application for the payment to the solicitors for the plaintiffs any costs or disbursement not yet paid.
- 10.7. Upon Court approval of the final total quantum of Administration Costs the Administrator shall forthwith:
- (a) deduct from the Settlement Distribution Fund and pay to the solicitors for the plaintiffs any unpaid component of the approved Administration Costs; and
 - (b) distribute in accordance with this SDS any amount then remaining in the Settlement Distribution Fund.
- 10.8. A payment from the Settlement Distribution Fund in respect of approved Administration Costs and the balance outstanding of the deductions in clause 5.1, shall be made first from the income earned in the Fund, except to the extent that the Administrator in his absolute discretion determines that it is to be made from the capital of the Fund.

11. MAKING OF PAYMENTS

- 11.1. The Payment due to each Participating Claimant shall be determined by the Administrator according to the Calculation Protocol, applied by reference to the information in the Claim Confirmation Notice (as varied following any review).

Interim distributions to Participating Claimants

- 11.2. Where in the Administrator's reasonable assessment the only matters preventing final distribution of Payments in accordance with clause 11.1 are:
- (a) Court approval of Administration Costs;
 - (b) finalisation of reviews in accordance with the procedure provided by clauses 8.2 to 9.4, and the highest reasonable estimate of the value of the Payments awaiting determination is less than 20% of the amount available for distribution to Participating Claimants; or
 - (c) finalisation of the amount of tax (if any) required to be withheld;
- then the Administrator may in his absolute discretion pay to Participating Claimants who have not submitted Dispute Notices, or whose Disputes Notices have been resolved, some or all of the Payments due to those Claimants.

11.3. Prior to making any interim distributions as described in clause 11.2 the Administrator shall calculate or estimate:

- (a) *first*, the Administration Costs incurred to date but not paid, or likely to be incurred prior to the final distribution of the Settlement Distribution Fund;
- (b) *secondly*, if reviews have been requested and the procedure provided by clauses 8.2 to 9.4 is not yet complete – the highest reasonable estimate of the Payments still awaiting determination, calculated on the assumption that the disputed amounts are resolved in each Claimant's favour; and
- (c) *thirdly*, any tax payable (or reasonably assessed by the Administrator as likely to become payable) by him from the Settlement Distribution Fund;

and shall make any interim distributions in such amounts as to ensure, to the Administrator's satisfaction, that sufficient funds remain in the Settlement Distribution Fund to pay all amounts that might in future become payable from the said Fund.

Final distributions

11.4. Upon the Administrator determining that he is able to complete the distribution of funds from the Settlement Distribution Fund the Administrator shall:

- (a) as soon as practicable seek Court approval of any remaining unpaid Administration Costs; and
- (b) within fourteen (14) days after Court Approval in (a):
 - (i) deduct from the Settlement Distribution Fund and pay to the Administrator approved unpaid Administration Costs;
 - (ii) deduct from the Settlement Distribution Fund and pay to the solicitors for the plaintiffs such unpaid costs and disbursements as the Court may allow;
 - (iii) pay to Fonterra such amounts in respect of FASL Offset Payments as may be required pursuant to clause 6 of the Settlement Agreement;
 - (iv) pay to each Participating Claimant (after such deductions in (iii) as may be required in relation to any such Claimant):
 - (A) the Payments due to Claimants who had not formerly received an interim distribution; and
 - (B) the balance of any Payments due to Claimants who formerly received an interim distribution;

so as to complete for each Participating Claimant the payment of the whole of the amount due to that Claimant under this SDS.

11.5. Each Payment under clauses 11.2 or 11.4 may be made to Participating Claimants either by:

- (a) Electronic Funds Transfer (**EFT**), where bank details are available; or
- (b) cheque;

and the Administrator shall have a discretion which method of payment shall be adopted in respect of the Claimants or any subgroup or individual Claimant.

12. RESIDUE AMOUNTS

12.1. In the event that any cheque, electronic funds transfer or other attempt at payment by the Administrator to any person pursuant to this SDS is or appears to the Administrator to have been unsuccessful:

- (a) the Administrator shall use reasonable endeavours to effect the payment by other means; but
- (b) if the Payment has not been delivered (or cheque presented) within 60 days after the distribution of all Payments to Participating Claimants, the Payment shall be deemed forfeit and dealt with in accordance with clause 12.2.

12.2. If upon the distribution of all Payments to Participating Claimants and the expiry of the period in clause 12.1(b) there is an amount remaining in the Settlement Distribution Fund then the Administrator shall:

- (a) if the amount of the residue is, in the Administrator's absolute discretion, sufficient (having regard to distribution costs) to justify its distribution among the Participating Claimants – distribute the residue *pro rata* among the Participating Claimants; and
- (b) if (a) does not apply – pay the residue to the William Buckland Foundation ABN 23 196 005 019 or the Foundation for Rural and Regional Renewal ABN 27 091 810 589, at the Administrator's absolute discretion, being charitable organisations for the assistance of rural and agricultural communities.

13. OBLIGATIONS OF CLAIMANTS

13.1. Each Claimant wishing to claim a Payment must act honestly with respect to the SDS and must take all reasonable steps to ensure that any of her or his agents or representatives likewise act honestly.

13.2. Each Claimant wishing to claim a Payment must cooperate with the Administrator and take all steps that this SDS or the Administrator may require the Claimant to take, including:

- (a) providing any required or requested instructions, affidavits, declarations, statements, information, documents or other materials, and any authorisations or permissions;

- (b) attending and participating in meetings or conferences (in person or by electronic means) with the Administrator, his delegates, Administration Staff, Review Counsel or other persons;
- (c) promptly informing the Administrator of any change in the Claimant's contact details; and each such Claimant must do so:
 - (i) complying to the best of their ability with the substance and not merely the form of the requirement, request or direction; and
 - (ii) by the date or within the timeframe specified in the requirement, request or direction.

13.3. If a Claimant does not provide material or participate in meetings or conferences pursuant to cl 13.2(a) or (b) within the time stipulated by the Administrator, the Administrator may in his absolute discretion proceed for all purposes upon the basis of such information then in his possession as he accepts as reliable.

14. SUPERVISION BY THE COURT

14.1. The Administrator may refer to the Court any issues arising in relation to the SDS or the administration of the SDS, for determination or directions as the Court may deem appropriate.

14.2. Upon the conclusion of the SDS, the Administrator is to prepare a report for the Court, such report to give consideration to the following matters:

- (a) the total number of Claimants who applied to participate in the SDS;
- (b) the number of people the Administrator notified were ineligible to participate in the SDS, and the reasons why;
- (c) the amount distributed under the SDS to Claimants;
- (d) the amount of the Administration Costs, including a breakdown of the constituent components of those costs;
- (e) whether any time deadlines specified in the SDS were missed; and
- (f) the amount of any residue in the Settlement Distribution Fund and the manner of any application of that residue.

15. PRIORITY OF PAYMENTS

15.1. The funds standing from time to time in the Settlement Distribution Fund will be held by the Administrator upon trust for the persons entitled to payments from the Settlement Distribution Fund (including for the Administrator, the Funder, the Plaintiffs and Adley Burstyner, to the extent of the their entitlement to Administration Costs and deductions in clause 5.1), but all

taxes, duties, levies, charges and other imposts payable in respect of the Settlement Distribution Fund will be paid in priority to any distribution to the persons beneficially entitled to the funds.

15.2. Taxes, duties, levies, charges and other imposts payable in respect of the Settlement Distribution Fund may be paid from the capital of the Fund or from the income earned in the Fund, as the Administrator determines in his absolute discretion.

16. INCOME OF THE TRUST

16.1. The income of the trust estate referred to in clause 15.1 for each year shall be such amount as the Administrator determines in writing for that year.

16.2. If the Administrator makes no determination under clause 16.1 for a year, the income of the trust estate for that year shall be equal to the net income of the trust estate, within the meaning of that expression in Division 6 of Part III of the Income Tax Assessment Act 1936.

17. NOTICES

17.1. Any notice to be given pursuant to the SDS shall be deemed given and received for all purposes associated with this SDS if it is:

- (a) addressed to the person to whom it is to be given; and
- (b) either:
 - (i) delivered, or sent by pre-paid mail, to that person's postal address recorded in the Participating Claimants Database; or
 - (ii) sent by email to that person's email address recorded in the Participating Claimants Database and a delivery receipt states that delivery is complete, whether or not a delivery notification was sent by the destination server.

17.2. A notice that complies with this will be deemed to have been given and received:

- (a) if it was sent by mail to an addressee in Australia, two clear business days after being sent;
- (b) if it is sent by mail to an addressee overseas, five clear business days after being sent; and
- (c) if it is sent by email, at the time it is sent.

17.3. The Administrator's address, fax number and email address shall be as set out below unless and until the Administrator notifies the sender otherwise:

Attention: Daniel Fullerton

Harwood Andrews and Adley Burstyner
70 Gheringhap Street
GEELONG VIC 3220
Fax: 03 5225 5222
Email: info@adleyburstyner.com.au

18. TAXATION ISSUES

- 18.1. Each Claimant under this SDS is responsible for obtaining his or her own taxation or government entitlements advice in respect of the Claimant's participation in this SDS.
- 18.2. The Administrator is not obliged to obtain any taxation advice or taxation rulings (whether class, public or private) concerning any tax liability of the Claimants or any of them.

19. TIME

- 19.1. The time for doing any act or thing under the SDS may be extended by the Administrator, by direction of Review Counsel or by order of the Court.

Annexure A – Calculation Protocol

A. Outline

1. The intention of the SDS and this Calculation Protocol is to provide for a fair apportionment of the Net Distribution Sum between Claimants, having regard to the need to balance the desire to make payments to Participating Claimants as soon as reasonably practicable and the desire to calculate entitlements of Claimants while keeping the costs of such calculations proportionate.
2. In outline, this Calculation Protocol:
 - (a) estimates the milk revenue net of fees and levies that each Participating Claimant would have received during the Step-Down Period absent the Step Down, at the fat and protein production volumes in the most recent income estimate made by Fonterra prior to the Step-Down Period or – if greater for either of May or June 2016 – the actual production volumes for such month or months (**Counterfactual Revenue**);
 - (b) estimates the difference (**Revenue Difference**) between the Counterfactual Revenue and the actual milk revenue each Claimant received during the Step-down Period, regardless of the processor the Participating Claimant supplied during that period;
 - (c) calculates each Participating Claimant's notional share of the Net Distribution Sum as the proportion that each Participating Claimant's Revenue Difference bears to the sum of all Participating Claimants' Revenue Differences (**Provisional Distribution Amount**); and
 - (d) if a Participating Claimant has a FASL Offset Payment – applies that Participating Claimant's notional share first toward repayment of the **FASL Offset Payment** (to be paid to Fonterra as part of the **Support Loan Offset Payment**) before paying any residue to the Participating Claimant (**Final Distribution Amount**), pursuant to clause 6 of the Settlement Agreement.

B. Protocol

3. For each Participating Claimant:
 - (a) the income estimate used for Counterfactual Revenue, Received Revenue and Autumn Offset Payments will be the most recent data produced by Fonterra to the plaintiffs in this proceeding.
 - (b) Counterfactual Revenue = milk revenue for May and June 2016 in the most recent income estimate made by Fonterra prior to the Step-Down Period, or based on actual production for either or both months if greater for that month than what was estimated, net of fees and levies.
 - (c) Received Revenue = milk revenue actually received by the Claimant for May and June 2016:
 - (i) as recorded by Fonterra for any supply by the Claimant during the Step-Down Period, net of fees and levies; and
 - (ii) as recorded by all other processors the Claimant supplied during the Step-Down Period, net of fees and levies.

(d) *Autumn Offset Payments* =

$$\sum \text{Autumn Offset Payments made by Fonterra to the Claimant}$$

(e) Actual Revenue = Received Revenue + Autumn Offset Payments

(f) *Revenue Difference* = *Counterfactual Revenue* – *Actual Revenue*

unless:

(i) that amount is less than zero; or

(ii) the Claimant fails to provide any information requested by the Administrator for establishing the Claimant's Actual Revenue;

in which case, Revenue Difference = 0.

(g) Notwithstanding the preceding paragraph (f), if the Administrator determines that it is beyond doubt that, for reasons unrelated to the Step Down, the Claimant was not going to produce milk for any part of the period 5 May 2016 to 30 June 2016 then he may account for that in reducing any Revenue Difference to that extent, in whatever manner he considers reasonable.

(h) *Provisional Distribution Amount* = *Net Distribution Sum* ×

$$\frac{\text{Revenue Difference}}{\sum \text{Revenue Difference of all Participating Claimants}}$$

(i) Final Distribution Amount =

(i) if the Claimant has a FASL Offset Payment, the greater of:

A. Provisional Distribution Amount – FASL Offset Payment; or

B. zero.

(ii) in any other case, the Provisional Distribution Amount.

4. Support Loan Offset Payment = the sum of all amounts subtracted from Provisional Distribution Amounts as calculated in cl 3(i)(i) of this Protocol (including, for the avoidance of doubt, the full amount of the Provisional Distribution Amount if clause 3(i)(i)(B) applies).

Annexure B – Rates for Administration Costs

The following rates are exclusive of GST

David Burstyner, solicitor/director/administrator, admitted 2000 – \$682.5

Solicitor with > 7 years post admission – (including for the avoidance of doubt Daniel Fullerton) -
\$485

Solicitor with < 7 years post admission – (including for the avoidance of doubt Natasha Vassallo) -
\$365