

**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: 14 April 2023

ORIGINATING PROCESS: Writ filed 17 June 2020

HOW OBTAINED: At the return of the Plaintiffs' summons filed on 4 November 2022

ATTENDANCE: LWL Armstrong KC with MW Guo and PE 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



OTHER MATTERS:

A. Following the hearing of the Plaintiffs' summons on 28 February 2023 the following matters remained in issue for determination by the Court:

- i. whether a Common Fund Order can and should be made;
- ii. whether the proposed deduction of 27.5% commission for the Funder should be deducted from the Settlement Sum;
- iii. what amount is an appropriate amount to be paid to the Funder as 'Reimbursement of Project Costs', as defined in the Settlement Distribution Scheme (SDS);
- iv. what amount is an appropriate amount to be allowed as a deduction for unpaid legal costs and disbursements; and
- v. whether it is appropriate to allow the Funder's costs of after the event insurance,

(together, the **unresolved matters**).

B. The parties have previously provided written and oral submissions in relation to the unresolved matters.

C. These Orders provide a mechanism and a timetable for dealing with:

- i. further submissions and a supplementary report in relation to legal costs; and
- ii. further submissions in relation to the power of the Court to make a Common Fund Order,

(the **procedural timetable**).

D. It is desirable that the Orders for the approval of the settlement of the proceeding are not further delayed pending the completion of the procedural timetable and the determination of the unresolved matters.

E. It is the intention of the Court to deliver its reasons in support of the substantive orders approving the settlement at the same time that it delivers reasons in relation to the unresolved matters.



In these Orders, unless the context otherwise requires:

- a. **Act** means the *Supreme Court Act 1986* (Vic).
- b. **Appeal Period** has the meaning given to it in the Settlement Agreement.
- c. **Approval Judgment** means the judgment comprising the orders set out in paragraphs 3, 5, 6 and 7 of these orders.
- d. **Approval Judgment Appeal Period** means the period of time commencing on the day on which the Approval Judgment is granted and ending:
 - i. if there is no appeal by a Claimant or any other person from the granting of the Approval Judgment – either (A) on the date that is 42 days after the date on which Approval Judgment is granted (if the Court does not allow further time for the filing of an application for leave to appeal or a notice of appeal relating to the Approval Judgment) or (B) at the end of the period of further time allowed by the Court for the filing of an application for leave to appeal or a notice of appeal relating to the Approval Judgment (if the Court allows such further time); or
 - ii. if there are any appeals by a Claimant or any person from the granting of the Approval Judgment – upon the final determination of all such appeals (including any subsequent appeals or applications to appeal) and the expiration of time for any further appeals or application to appeal.
- e. **Funder** means the Intervenor, being LLS Fund Services Pty Ltd (ABN 51 627 975 213) as trustee for Litigation Lending Fund 1, the Plaintiffs’ commercial litigation funder in the proceeding.
- f. **Group Member** means all persons, other than any persons who were otherwise group members but opted out of the proceeding prior to the date of these orders, who:
 - i. during the milk-supply season from 1 July 2015 to 30 June 2016 supplied milk to the Defendants from farms located in Victoria, Tasmania, South Australia, or New South Wales pursuant to:
 1. a “Fonterra Australia Milk Supply Handbook” (but not the Fonterra Australia “Milk Supply Handbook – Wagga Wagga”); and / or
 2. a Fonterra Australia “Exclusive Milk Supply Agreement”; and
 - ii. as at 5 May 2016 continued to supply milk, or had committed to supply milk, during the milk-supply season from 1 July 2015 to 30 June 2016 as described in paragraph (d)(i) above; and
 - iii. were not a director or officer of the Defendants 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 2001* (Cth)); and
 - iv. are not a justice of the High Court of Australia, the Supreme Court of Victoria or the Federal Court of Australia.
- g. **Settlement Agreement** means the agreement at DSB-1 of the Affidavit of David Burstyner affirmed 4 November 2022.
- h. **Settlement Sum** means the sum so identified in the Settlement Agreement.



THE COURT ORDERS THAT:

Confidentiality

1. Pursuant to the inherent power of the Court and rule 28A.06 of the *Supreme Court (General Civil Procedure) Rules 2015 (Rules)*, and subject to any further order, in order to prevent a real and substantial risk of prejudice to the proper administration of justice:
 - a. the evidence identified in:
 - i. Annexure A of these Orders; and
 - ii. the Schedule to the affidavit of Stephen James Conrad affirmed 16 February 2023;
is not to be disclosed to any person or entity except to the parties making the respective claims for confidentiality, their legal representatives and the Funder (except where the evidence has already been provided to another party or their legal representatives); and
 - b. any person or entity to whom such disclosure is or has been made may not disclose that material or any part thereof to any other person or entity without prior leave of the Court.

Registration by participating Group Members

2. Pursuant to s 33ZF of the Act, the deadline by which any Group Member wishing to make a claim for a share of the Settlement Sum must register such a claim is extended to 4:00pm on the day that is 7 days from the date of the authentication of these Orders.

Settlement approval

3. Pursuant to s 33V of the Act, the settlement of the proceeding upon the terms set out in:
 - a. the Settlement Agreement; and
 - b. the SDS, being the scheme at Annexure B of these orders,
(together the **Fonterra Class Action Settlement**) is approved by the Court.



4. Pursuant to ss 33V of the Act, the amount of \$30,000 for the Plaintiffs as the “Plaintiffs’ Reimbursement Payment” is approved for the purposes of the SDS (utilising defined terms from it) provided that, for the avoidance of doubt, no payment is approved to be made before the end of the Approval Judgment Appeal Period and no payment is approved to be made other than in accordance with the terms of the Settlement Agreement.

Authority and binding effect

5. Pursuant to ss 33V and/or 33ZF of the Act, the Court authorises the Plaintiffs *nunc pro tunc* to enter into and give effect to the Settlement Agreement, for and on behalf of the Group Members.
6. Pursuant to s 33ZB, further or alternatively s 33ZF of the Act, the persons bound by the Fonterra Class Action Settlement are:
 - a. the Plaintiffs;
 - b. the Group Members (which for the avoidance of doubt excludes persons who were Group Members but opted out of the proceeding);
 - c. the Defendants;
 - d. the Plaintiffs’ solicitors (Adley Burstyner and David Burstyner); and
 - e. the Funder.
7. For the avoidance of doubt, any Group Member who does not, before 4:00pm on the day that is 7 days from the date of the authentication of these Orders, lodge a claim to participate in the SDS shall:
 - a. remain a Group Member for all purposes of this proceeding; and
 - b. be bound by and have the benefit of the releases given in the Settlement Agreement; but
 - c. not be entitled to any distribution pursuant to the SDS or the Settlement Agreement.



SDS Administrator

8. Pursuant to s 33V and/or 33ZF of the Act, David Burstyner be appointed as the SDS Administrator.
9. The SDS Administrator has liberty to apply in respect of any matter arising in or in relation to the administration of the SDS upon at least three (3) clear business days' notice to each other party and the Court.

Costs

10. All *inter partes* costs orders in the proceeding as between the Plaintiffs and the Defendants be vacated.
11. The Plaintiffs' summons be adjourned to 29 May 2023 (**Costs Hearing**) insofar as it relates to orders sought for deductions in respect of:
 - a. amounts to be paid to the Funder as "Reimbursement of Project Costs";
 - b. amounts to be paid to the Plaintiffs' solicitors as "Unpaid Plaintiffs' Legal Costs and Disbursements", as defined in the SDS;
 - c. amounts to be paid to the SDS Administrator for "Administration Costs", as defined in the SDS,**(Costs Issues)**.
12. By the day that is two business days from the date of the authentication of these Orders, the Costs Referee produce to the solicitors for the Plaintiffs and Intervenor a document or documents recording the calculations which form the basis for her conclusions in her reports dated 24 February 2023 and 27 February 2023, including any document showing the amounts she has allowed for each time entry for professional fees and for each disbursement.
13. By **20 April 2023**, the Plaintiffs and Intervenor provide to the Costs Referee any further material which they wish the Costs Referee to consider for the purposes of the questions referred to her by the orders of 18 November 2022, including in response to her reports



dated 24 February 2023 and 27 February 2023 and the matter referred to at paragraph 65 of the Costs Referee's report dated 24 February 2023.

14. By **8 May 2023**, the Costs Referee shall:
 - a. in accordance with r 50.03 of the Rules submit any supplementary report on the questions referred to her by the orders of 18 November 2022, including the matter referred to at paragraph 65 of her report dated 24 February 2023 and any response to her reports dated 24 February 2023 and 27 February 2023, to the Court addressed to the Chambers of the Honourable Justice Delany; and
 - b. provide a copy of the supplementary report to the solicitors for the Plaintiffs and Intervenor.

15. By **25 May 2023**, the Plaintiffs, the Intervenor, and the Defendants should they wish to be heard, file and serve any further evidence and submissions upon which they propose to rely in relation to the Costs Issues.

16. In the event the Defendants do not file and serve any evidence or submissions on the Costs Issues, the Defendants be excused from appearing at the Costs Hearing.

Security for costs

17. All amounts of security for costs provided by or on behalf of the Plaintiffs be released.

18. All undertakings given by the Funder for security for costs provided on behalf of the Plaintiffs be discharged.

Dismissal

19. Upon the SDS Administrator being satisfied that the implementation of the SDS has been completed:
 - a. the SDS Administrator file and serve an affidavit deposing to that fact;



- b. the parties submit proposed consent orders providing for the proceeding to be dismissed with no order as to costs, being a draft order signed by the Plaintiffs and the Defendants.

Other matters

20. The Plaintiffs, the Defendants, the Administrator and the Funder each have liberty to apply on not less than three (3) business days' notice to each other.
21. No order as to costs of and incidental to the hearing on 28 February 2023, save that Plaintiffs' costs are part of the Plaintiffs Legal Costs and Disbursements within the meaning and operation of the SDS.
22. The parties and Intervenor have leave to file and serve written submissions in relation to the question reserved for consideration by the Full Court of the Federal Court of Australia in proceeding VID 726 of 2021 (*Elliott-Cardé v McDonald's Australia Limited* (ACN 008 496 928)) (**McDonald's Referral**) within 14 days after the delivery of Orders or Reasons (whichever is first) in disposition of the McDonald's Referral.

DATE AUTHENTICATED: 14 April 2023



The Hon. Justice Delany

SCHEDULE OF PARTIES

Lynden and Geoffrey Iddles

Plaintiffs

-and-

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—evidence subject to confidentiality orders

Affidavit of David Sandor Burstyner affirmed 4 November 2022

| | Passage | Basis | Party making claim |
|----|----------------------|---|---------------------------|
| 1. | Exhibit DSB-1, [6.3] | Defendants’ bank account details. These are confidential. | Defendants |

Affidavit of David Sandor Burstyner affirmed 16 December 2022

| | Passage | Basis | Party making claim |
|----|--|---|---------------------------|
| 2. | Table at [32] | Litigation privilege. Prejudicial to Plaintiffs as it reveals extent to which proceeding has been subject of funding deliberations. | Plaintiffs |
| 3. | [34], third and fourth sentences | Litigation privilege. Prejudicial to Plaintiffs as it reveals extent to which proceeding has been subject of funding deliberations. | Plaintiffs |
| 4. | [75], figure in penultimate sentence | Litigation privilege. | Plaintiffs |
| 5. | [76], last three sentences | Litigation privilege. Confidential communications in relation to proof of claims in the proceeding. | Plaintiffs |
| 6. | [78], words after ‘estimated’ | Litigation privilege. Reference to matters in previous item. | Plaintiffs |
| 7. | [109], words after ‘favour’ | Litigation privilege. | Plaintiffs |
| 8. | [110], after ‘settlement which ...’ to ‘... seemed reasonable’ | Litigation privilege. See item 4. | Plaintiffs |
| 9. | Exhibit DSB-2, pp 22-59 | Litigation privilege. Counsel opinion on prospects. | Plaintiffs |

Affidavit of Stephen James Conrad affirmed 14 February 2023

As indicated in the Schedule thereto.

Affidavit of Matthew David Lees filed 17 February 2023

The image in paragraph 89, page 117 of exhibit MDL-1 and the entirety of exhibit MDL-2.

Annexure B

Version 2 – 12.12.2022

Lynden Iddles & Geoffrey Iddles v Fonterra Australia & Ors
Supreme Court of Victoria No. SCI 2020 02588

("Fonterra Class Action")

SETTLEMENT DISTRIBUTION SCHEME

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 (**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, 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