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Exclusive

# Fonterra changes defence over 2016 farmgate clawback ahead of class action



By Annabelle Cleeland

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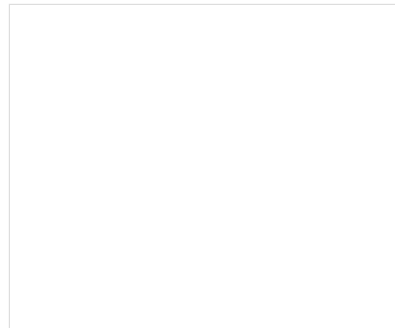


Dairy devastation: Hayden and Rachael Finch, Denison, pictured with daughters Emily and Georgia, sold two properties and their 950-head milking herd following the Fonterra milk price scandal in 2016.

FARMERS fear New Zealand dairy giant Fonterra is attempting to weaken compensation claims to Australian suppliers affected by the milk processor's 2016 price clawback, with a new defence set for trial in November.

At last week's hearing on June 15, Fonterra sought an order allowing it to change its defence to include a 40 cent payment made to farmers in 2017-18, claiming it should be treated as part of the controversial 2016 farmgate price clawback.

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The hearing was set for a month-long trial in Supreme Court of

...obligations with a retrospective step down, which is expected to be the milk payments expected.


Farmers were forced to pay back a sizeable portion of their income, in a year the NZ giant went on to post an \$834 million profit.

The clawback caused a severe cash-flow crisis and triggered a class action that is supported by 300 farmers who allege Fonterra engaged in misleading and deceptive conduct, acted unconscionably and breached contracts it had with dairy farmers.

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But former suppliers called the defence "absolute rubbish" and an attempt to reduce the financial compensation claim for retrospective lost income, which is expected to be "hundreds of millions of dollars" according to Adley Burstyner lawyer David Burstyner.

Mr Burstyner, who is representing the class action, said the 40c payment was not paid to all farmers who suffered the step down as Fonterra refused to give it to suppliers who had switched to other processors.

"It seemed very spiteful conduct," Mr Burstyner said.

"Fonterra paid the 40c to new suppliers who were not victims of the 2015-2016 step down, meaning about \$20 million of the 40c payments were given to non-victims.

"It is quite astounding to claim that a payment, which was substantially given to non-victims of step-down, is a payment of compensation."

In an attempt to boost milk volumes, Fonterra offered a 40 cents a kilogram milk solids incentive on top of its July 1, 2017 opening forecast price of \$5.30-\$5.70/kg.

At the time, Fonterra Australia farm source director Matthew Watt "this payment relates to the 17-18 season, not the 15-16 season".

Mr Watt wrote on dairy insider blog, Milk Maid Marian, "although not legally obliged, we are making the additional 40c payment to our suppliers as it's the right thing to do".

"All Fonterra farmers affected by the 2015-16 price drop are being offered the opportunity to receive this additional payment, including existing, retired and returning farmers," he wrote.

"We're in the process of contacting all the farmers that have left us.





📷 Dairy devastation: Rachael Finch, Denison, sold two properties and their 950-head milking herd following the Fonterra milk price scandal in 2016.

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"Suppliers who do not have a support loan (Fonterra Australia Support Loan) are free to spend the money as they see fit."

The payment coincided with a move by besieged Murray Goulburn to write off almost \$150 million in debts owed by farmers after the Australian Competition and Consumer Commission launched legal action against the cooperative over the 2015-16 milk price fiasco.

Fonterra suppliers had to accept a milk price below the cost of production at \$1.90kg/MS, (with an average cost of about \$5.30kg/MS) or continue with the same milk price and take out a FASL.

Despite Murray Goulburn wiping its version of FASL and cancelling farmer debt, Fonterra continued with the FASL but paid an additional 40c/kgMS to anyone who supplied milk for the 2017-18 financial year.





18 May 2017

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**ANNOUNCEMENT FOR SUPPLIERS**

- Our forecast full year farmgate milk price range is \$5.30 to \$5.70 per kilogram of milk solids for the 2017/18 season.
- We will also pay an additional payment of 40 cents per kgMS on top of our forecast full year price range for season 2017/2018, comprising 24 cents per kg of butterfat and 60 cents per kg of protein.
- This brings our forecast full year price range to \$5.70 to \$6.10 per kgMS for the 2017/18 season.

**Forecast full year range**

We are forecasting a full year farmgate milk price range for the 2017/18 season of \$5.30 to \$5.70 per kgMS. This forecast price range is based on current currency exchange rates and commodity markets, and what our product mix can earn in that market. We will provide an updated full year forecast when we announce our opening price closer to the start of next season.

We've seen a rebalancing of global supply, and demand for dairy is strong. Over the last three years we've worked hard to strengthen our business, by investing in world-class assets, including our new Stanhope cheese plant, improving our product mix, and divesting non-core businesses. This coupled with improvements in global market conditions has enabled us to announce a competitive forecast for next season.

Over the last 12 months you've told us that you need clear and timely price guidance so that you can plan ahead. Providing this forecast full year price range six weeks ahead of the start of the season is part of our commitment to providing you a clear line of sight on next season, to assist you with budgeting and planning.

**Fonterra Milk Price Package**

We're also announcing the Fonterra Milk Price Package: an additional payment of 40 cents per kilogram of milk solids, payable on top of our forecast closing range and Fixed Base Milk Price tenders. The 40 cents per kgMS will comprise 24 cents per kilogram of butterfat, and 60 cents per kilogram of protein. Together with our forecast range, this brings our total forecast full year range to \$5.70 to \$6.10 per kgMS for the 2017/18 season.

The Milk Price Package will be available to all current, retired and recommencing Fonterra suppliers.


The Package has been tailored to suit your cash flow and growth needs. For our existing suppliers who have consistently supplied Fonterra since 30 April 2016, there are two options on how you can receive it:

1. As an advance, paid by July 2017, or
2. As a monthly payment in 2017/18 season

More information on how the Milk Price Package works can be found in appendix 1. Full terms and conditions of the advance option will be set out in the advance application form, which will be available shortly.

We said that we would consider Murray Goulburn's (MG) recent announcements including the decision to forgive its Milk Supply Support Package (MSSP). After consulting with the Boriac Supply Company, we determined that the most fair and equitable response was to provide all current, retired and recommencing suppliers this additional 40 cents per kgMS payment. We will also reimburse the interest charge of 0.85 of a cent applied to this season's milk price for the Fonterra Australia Support Loans (FASL) by the end of July.

Every supplier was affected differently by last season's step down, and we know that there were a range of different business decisions made. We knew that a retrospective payment couldn't cater for all of the most of this payment. Having access to this payment now enables farmers to reduce or pay off FASL where they have one, or use the cash to underpin their business.

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"They paid off the FASL we had to take out to survive," class action plaintiff and former Gippsland dairy farmer Rachael Finch said.

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"The 40c didn't go into our bank account - it left us with a big financial hole because we had no cash flow.

"The payment was to entice new supply."

The Finch family were milking 950 cows across two properties in Denison, north of Rosedale, and had supplied Fonterra since 2012.

The milk price scandal cost the Finch family more than \$360,000 in consequential losses after they sold their milking herd and two properties in separate settlements that concluded in 2019.

"We unnecessarily dried off 400 cows because of the milk price and sold our properties because of it - consequently some of our milking cows were sent to the meat works," she said.

"Selling the first farm was an opportunity to consolidate and work on one farm but we had to sell a lot of cows when prices were really low (the 2016/17 season)."

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Mrs Finch said the dairy crisis led to a mass exodus in the Victorian dairy industry.

"In their wisdom to focus entirely on profit, they forgot about the most important ingredient, which is people and trust," she said.

"Fonterra effectively fast-tracked the exit of farmers from the dairy industry and reduced the Australian milk pool overnight."

The number of registered dairy herds nationally plummeted from 6079, in 2016, to 4618 last year, according to Dairy Australia.

"Dairy farmers work on trust and once that trust is broken, their business doesn't operate," Mrs Finch said.

"The hardest thing was to make our staff redundant and sell our cows.

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and Georgia, sold two properties and their 950-head milking herd following the Fonterra milk price scandal in 2016.

"Fonterra has forgotten all the people who suffered severely, including suicide and financial ruin and this does open wounds of the total and utter trust that was broken, the entire dairy industry was affected."

Mrs Finch said the defence to include the 40c payment made in 2016-17 was "absolutely rubbish", after they received a pro-rata payment for the 2017-18 season because they retired after May 10, 2017.

"It was a calculated move to attract supply because those suppliers who left didn't receive the money," she said.

"I encourage every single Fonterra supplier in 2015-16 to sign-up to the class action.

"If people are afraid no one will collect their milk because Fonterra has the monopoly in their area, I see that as an opportunity for someone to be the milk factory of choice."

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Tasmanian Land Council has requested to join the class action in recent weeks, claiming compensation following the sale of its dairy business to Chinese-owned Van Dairy Group for \$275 million.

Following the sale, TLC, which had a milking herd of about 19,000, paid Van Dairy Group \$2.2 million as a result of the post-closing price difference.

Fonterra Australia general counsel Jorja Cleeland denied the allegations raised in the class action.

Ms Cleeland said the ACCC investigated the 2016 milk price reduction and decided not to take any action against us.

"In relation to the inclusion of the 40c payment, a party's alleged loss must always be considered in the light of the entire circumstances, including any payments received by it," Ms Cleeland said.

"Amendments to claim and defence documents are not unusual in litigation as more facts are revealed through the pre-trial process and through the interviewing of witnesses.

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"Often, these amendments are required to address specific allegations or statements made by the other party in their documents. Amendments may also be made when the legal advice a party receives evolves.

"This was the case with both the Plaintiff's amended statement of claim and Fonterra's subsequent amended defence in the present matter."

The solicitors acting for dairy farmers called for more suppliers to register for the class action.

"Corporates will treat people badly if people don't stand up to them it won't stop," Mr Burstyner said.

"I am optimistic about a precedent about how agricultural producers can be treated when there is such a power imbalance, and about delivering compensation to farmers if they register so the class action continues to go ahead.

"Our claim asks the Court to order Fonterra to pay compensation not only for the hole in farmers' revenue for May and June 2016 milk, but also the very significant consequential losses dairy farmers were made to suffer through no fault of their own, whether that is the cost of impact on herds sizes, genetic lines, and future production, extra costs for new loans, or other long term losses.

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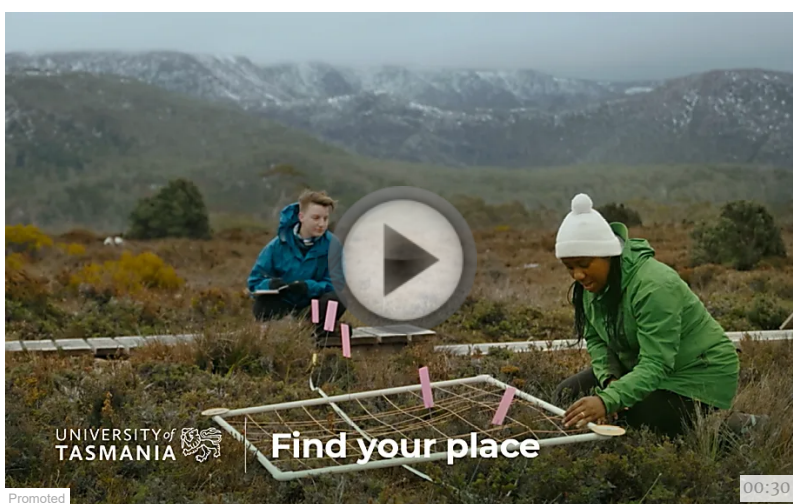
Journalist

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Annabelle Cleeland is a Stock & Land journalist. She has worked at Australian Community Media for more than a decade serving in a number of roles including editor, senior journalist and national sheep & wool writer. She runs a fine Merino wool property with her young...

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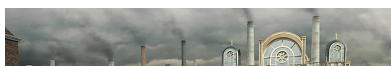
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