

Submission to the Primary Production Select Committee

Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Bill

We welcome the opportunity to submit on the Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Bill (the Bill). We appreciate the consultation process to date and are grateful to all involved for the prompt progression through the legislative process.

This legislation will support the introduction of Fonterra's new capital structure, which is critical for the future of our Co-operative.

We believe that an internationally competitive, New Zealand owned Co-operative of scale is in our country's best interests. We all want a well performing and competitive dairy industry in New Zealand that:

1. gives farmers a choice on who to supply their milk to at a transparent, fair and sustainable price;
2. provides local consumers with a choice of new, innovative and sustainable products;
3. provides sustainable, rewarding and fulfilling work for our people;
4. supports Kiwi farmers through the challenging but necessary changes to their farming systems; and
5. invests in research and innovation to grow value for New Zealand and help solve the significant challenges our country faces – such as climate change and freshwater.

Fonterra's scale efficiencies underpin our ability to deliver all of these outcomes. Scale helps us to set the industry benchmark for environmental practices, employment standards, health and safety, and investment into on-farm support services, innovation, new market and product development. All of this creates value for New Zealand in terms of milk price and profits returned to rural communities, export performance, employment, environmental performance, and community development.

We have already shown our commitment to the future of the New Zealand dairy industry. Our long-term strategy out to 2030, includes targets to:

1. invest around \$1 billion in sustainability;
2. invest around \$1 billion into moving milk into higher value products; and
3. increase annual R&D investment by over 50% to around \$160 million per annum in 2030.

We've made becoming a leader in sustainability a core part of our strategy. We have set clear targets and timelines for our ESG commitments, which we invite you to read in our Annual Sustainability Report that is appended to this submission.

We have committed to achieving net-zero emissions by 2050. Much of our \$1 billion investment in sustainability will be used to decarbonise and improve water use and quality. On farm, we have signed up to the Memorandum of Understanding with the Government and other industry partners to establish a Joint Venture to tackle agricultural emissions. We are looking to invest up to \$50 million through the Joint Venture over the next four years. The work of the Joint Venture will complement other work we already have

underway to reduce on farm emissions, including our own Kowbucha trials, our partnership on Asparagopsis seaweed and work with Royal DSM on feed additives.

To achieve these ambitions for the Co-op and meet our other strategic targets, we need a fair go at competing for a sustainable supply of New Zealand milk on more equal terms.

The new Flexible Shareholding capital structure will help to level the playing field with our foreign-backed competitors in an environment where we expect total New Zealand milk volumes to decline, or be flat at best, due to environmental pressures, new regulations and alternative land uses.

Our Flexible Shareholding capital structure will help our Co-op maintain a sustainable milk supply. Within a shrinking pool of New Zealand milk, it is intended to make it easier for new and young farmers to join our Co-op, and for existing farmers to remain in our Co-op.

Farmers leave the Co-op for different reasons, but one of the most influential ones is the high level of compulsory investment that's required to be part of our Co-op. A Flexible Shareholding structure will make it easier for farmers to join and stay with the Co-op by reducing Fonterra's minimum shareholding requirement (remembering that most other processors do not require supplying farmers to own any shares).

Flexible Shareholding will increase the emphasis within our Co-op on performance and innovation. It gives our farmers more choice about where they put their capital, driving clear structural tension for our Co-op to deliver both a competitive return on invested capital and a sustainable milk price.

The decision to change the Co-op's capital structure is not something we went into lightly. We spent the best part of two years listening to our farmers, putting forward ideas for discussion, and making changes to our capital structure proposals based on what we had heard.

One of the most meaningful pieces of feedback we received was concern for farmers that were planning on retiring from farming or leaving for a competitor, and the impact that the restricted market discount on shares traded in a farmer only market would have on their plans. In response we made a key change to the transition plan to allow these impacted farmers up to 15 seasons initially and reducing down to 10 seasons to sell their shares. This supports farmers' ability to freely exit the Co-op during the transition period to Flexible Shareholding, and beyond.

At the end of the consultation process, the recommended changes were put to a vote and received a very strong mandate by our farmers. More than 80% of eligible votes were cast, and of those, more than 85% were in support of the Flexible Shareholding Structure that these legislative changes are designed to enable.

Our farmer shareholders collectively made that decision knowing there would be a significant impact on the value of our Fonterra shares.

We did it because we are passionate about our Co-op. Because we want to protect what thousands of kiwi farming families have collectively built up over generations and rely on to support themselves and their communities. And because we want to pass on a strong New Zealand farmer owned Co-op to the next generation of Kiwis.

The Flexible Shareholding capital structure changes our farmers shareholders approved will:

1. reduce the minimum number of shares required to supply milk to Fonterra, and increase the maximum number of shares farmers are able to buy;
2. increase the timeframe new entrants have to purchase the shares they need, and increase the timeframe farmers exiting our Co-op have to sell their shares; and
3. move to a market where farmers can trade shares and the size of the Fonterra unit fund is capped.

The Bill will amend the Dairy Industry Restructuring Act 2001 (DIRA) to remove legal risk associated with capping the size of the Fonterra unit fund. In addition to amending DIRA to remove this risk, the Bill introduces additional measures to mitigate the perceived risks arising from our new capital structure. While we are supportive of many elements of the Bill, we have concerns about some of the proposed measures, including significant measures that were not consulted on prior to the introduction of the Bill. We have summarised our positions below, and included detailed comments (including specific drafting recommendations, where relevant) to support the Committee in their prompt consideration of the Bill.

Many of the proposed DIRA amendments seem to address perceptions around the transparency and independence of the milk price regime. We respect the national interest in our milk price, considering that in

the last financial year Fonterra's milk payments represented \$13.7 billion delivered to the New Zealand economy. And, as you will hear from our competitors, Fonterra's milk price sets the benchmark for the industry. So all New Zealand dairy farmers, whether they supply Fonterra or not, benefit from the fair, transparent, and independently overseen price we pay for our farmers' milk.

However, for the record we object to any inference that the Co-op or the individuals involved in the process are somehow "gaming" the system. In fact, Fonterra has been advocating for greater transparency of milk prices across the industry in all of our DIRA submissions. We continue to propose that DIRA be amended to require all processors to publish prices paid for farmers' milk. Improved transparency of milk prices paid by other processors will address the current imbalance of information available to farmers and support contestability in milk supply.

It's interesting that our competitors are resisting that suggestion, while questioning the integrity of our milk price calculation – which already includes significant oversight from a majority independent Panel including a Ministerial nominee, and Commerce Commission oversight.

Since 2012, the Commerce Commission has raised just two matters related to the inputs, assumptions and processes used to calculate the base milk price, which Fonterra has not promptly addressed to the Commission's satisfaction. In reality, those differences of opinion translated into approximate impacts on the base milk price of less than 1 cent (farmer support payments in 2015) and 2 cents (asset beta), with the Commission noting that these impacts were immaterial. The Commission last recommended that we amend the calculation methodology in 2018, to address an issue that had an impact on the Milk Price of less than 0.15 cents.

Fonterra has always responded promptly, either by amending the calculation in the following year or by providing further information which has addressed the matter to the Commission's satisfaction.

While perhaps not apparent from the existing legislative provisions, Fonterra operates an "open book" engagement and information sharing process with the Commerce Commission in the context of the Milk Price oversight regime in which full details of aspects of the Milk Price calculation are provided to the Commission during its review processes (including detailed and highly commercially sensitive data concerning Fonterra's sales and costs). In that sense, there is full transparency with the Commission on how Fonterra calculates its Milk Price and this transparency, when combined with the significant and robust governance structure in place, means that we have no real ability to "play games" with our Milk Price.

We are looking to implement our capital structure changes as soon as possible, as our farmers and unit holders are currently stuck between two capital structure regimes. We therefore support the Committee's prompt consideration of the Bill, and the expedited legislative process to see the DIRA amendments passed and in effect by the end of 2022.

We request to present to the Select Committee in person/make a verbal submission.

Regards



Peter McBride
Chairman



Miles Hurrell
Chief Executive

Summary of positions

1. We support this Bill progressing promptly through the legislative process.
2. We ask that Parliament implement further changes to the measures to mitigate perceived risks arising from our new capital structure.

Certain conduct by Fonterra relating to its capital structure is not prohibited (clause 7, amending section 109M)

We support these proposed amendments to section 109M which remove the key legal risk associated with implementing our new capital structure.

New third party enforcement provisions allowing any person to bring a direct claim against Fonterra for an injunction or damages for breach of the Milk Price oversight provisions (clause 27, inserting new subpart 5B)

This is a significant expansion of current enforcement provisions, and was not consulted on. These provisions significantly impact Fonterra. We believe that it is important any new enforcement tools for subpart 5A do not undermine, contradict or confuse the Commission's new directive powers (if our submission to remove the directive powers is not accepted) and that any enforcement tools can only be exercised by the Commission (and not by third parties).

New individual liability provisions for any person "involved in a contravention" (clause 27, inserting new section 150Z)

Individual liability is not appropriate in the context of the Milk Price oversight regime. We request the individual liability provisions for any person "involved in a contravention" are removed from the Bill. If this is not accepted, then we request that defences are added to the Bill, similar to those in other enforcement regimes.

Giving the Commerce Commission powers of direction in respect of its review findings (clause 25, inserting new sections 150UA to 150UD)

We do not agree that it is necessary to give the Commission powers of direction. If this is not accepted, we request that the Bill be amended to include confirmation that any direction will only relate to a determination in the Commission's review of the Manual or the Milk Price calculation.

Requiring Fonterra to publish information provided or requested as part of the Commission's Milk Price review processes (clause 19, inserting new section 150JA; clause 22, inserting new clause 150QA; clause 25, inserting new sections 150UA(1)(b) and 150UB(2) and (3))

Consultation during the policy development process did not propose any additional requirements on the public disclosure of Milk Price information. We consider that the public disclosure requirements are unnecessary for the operation of the regime which has at its core an assurance review by the Commission, an independent expert body who have full access to Milk Price related information part of their oversight role. We also have particular concerns about the scope of the information that would be covered. If the disclosure requirements are not removed, we ask that reasonable limitations are added in line with the grounds for withholding information under the Official Information Act 1982.

Two season transition period for the current contracted party for the base milk price calculation (clause 28, inserting new Part 2 into Schedule 1, section 7(2))

We are opposed to being required to replace the current contracted party for the base milk price calculation two seasons after the Bill commences. We propose that the current contracted party should be allowed to complete a six-year term from 1 June 2023 before being replaced.

Requiring a market-maker in Co-operative shares to support ongoing liquidity (clause 5, amending section 109L)

We support the approach taken in the Bill to require the market-maker to be designated as a market-maker under the relevant licensed market's market rules.

Substantive views

Below we set out our substantive views on the Bill by topic and where relevant, we have shown our specific drafting recommendations.

Enabling Fonterra's new capital structure

Certain conduct by Fonterra relating to its capital structure is not prohibited (clause 7, amending section 109M)

We support these proposed amendments to section 109M. These amendments will remove the key legal risk associated with implementing our new capital structure, enabling Fonterra to maintain access to a sustainable New Zealand milk supply and deliver on our strategic targets.

Governance and operation of Fonterra's base milk price setting arrangements

Increasing the number of Ministerial nominees to Fonterra's Milk Price Panel from 1 to 2; setting maximum and minimum number of panel members; and Minister to approve Milk Price Panel Chair (clause 16(1), replacing section 150E(1))

While we do not oppose increasing the number of Ministerial nominees to two, we believe that the independence of the Panel is already assured through its current composition.

Chair must not have a meaningful association with Fonterra or a shareholding farmer (clause 16(2), inserting new section 150E(2A))

While we do not oppose this measure, we believe the current definition of "independent" in DIRA is sufficient, and there is no clear rationale for adopting a different test of independence for the Chair.

The value of the Fonterra directors on the Milk Price Panel, with their real time understanding and insights of Fonterra's large processing business and the global markets in which it operates, should not be underestimated in the context of governing the setting of the base milk price. The Milk Price Panel terms of reference already require that the Chair be an independent director.

Requiring Fonterra to contract out the day-to-day administration of the base milk price calculation and to replace the contracted party every six years (clause 17, inserting new section 150EA)

We do not oppose codifying in legislation the current arrangements that the day-to-day administration of the base milk price is contracted to an external party.

While we believe a longer period than six years would be appropriate, we support the Bill enabling continuation of the current practice of contracting this function to one or more external parties.

Replacing the current contracted party for the base milk price calculation after two seasons (clause 28, inserting new Part 2 into Schedule 1, section 7(2))

We are opposed to being required to replace the current independent contracted party for the base milk price calculation two seasons after the Bill commences.

This is a technical function and requires the parties filling this role to have a high level of expertise in complex calculations and a comprehensive knowledge of Fonterra's ingredients business operations. Our experience has been that it is extremely difficult to attract and retain individuals with some of the skillsets required of the contracted party (particularly those requiring a detailed operational understanding of dairy manufacturing processes and technology).

Given this and the complexity in the milk price calculation, we are very concerned that insufficient continuity of key personnel and resources and a rushed succession process could lead to an increase of arbitrary outcomes and potentially material errors, which go against the intended objective of integrity in the base milk price.

We therefore propose that the current contracted party should be allowed to complete a six-year term from 1 June 2023 before being replaced.

We request the following amendment to clause 28 of the Bill:**28 Schedule 1 amended**

...

7 Calculation of base milk price

- (1) A person that, immediately before the commencement date, was engaged by new co-op to calculate a base milk price is a person engaged by new co-op under **section 150EA(1)** if the person meets the requirements in **section 150EA(3)**.
- (2) Despite **section 150EA(2)(a)**, the maximum term of engagement for a person referred to in **subclause (1)** is **2** ~~6~~ consecutive seasons starting on the day after the commencement date.

Giving the Commerce Commission directive powers**Giving the Commerce Commission powers of direction in respect of its review findings (clause 25, inserting new sections 150UA to 150UD)**

We do not agree that it is necessary to give the Commission powers of direction.

These powers are duplicative of the intended impact of the proposed governance changes to the Milk Price regime and add significant additional annual cost for no clear benefit. As noted earlier in our submission, there is no evidence that these powers are necessary based on the history of the Milk Price oversight regime.

Our first preference is to delete clause 25 from the Bill.

If this is not accepted, we request that the Bill be amended to include confirmation that any direction will only relate to a determination in the Commission's review of the Manual or the Milk Price calculation.

The proposed power for the Commission to direct Fonterra to take any action in relation to a matter "referred to" in such a report is unworkably broad. It should be limited to specific determinations that the Commission has made in those reports with respect to compliance with the section 150A purpose.

This is consistent with the briefings and Cabinet papers released in conjunction with the Bill, which clearly indicate that the process of issuing a direction could only be commenced on the basis of the Commission's published review findings on the Manual or the base milk price calculation¹.

Our second preference is to make the following amendment to clause 25 of the Bill:**25 New sections 150UA to 150UD and cross-heading inserted**

After section 150U, insert:

*Directions relating to Commission reviews***150UA Commission may give directions in relation to reviews**

- (1) The Commission may, by notice, direct new co-op to do 1 or more of the following in the manner specified in the notice:
 - (a) take any action to implement a determination made by the Commission in relation to a matter referred to in any of the following reports:
 - (i) a report made under section 150I:
 - (ii) a report made under section 150P:

¹ Briefing on Fonterra Capital Restructure: Decisions on Regulatory Design, ref B22-0295 para 10 a); Cabinet Paper on Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Bill: Approval for Introduction and Associated Increase in Appropriation, para 21.

...

...

We also propose limits on the Commission's power to direct Fonterra to publish information – see below.

Requiring Fonterra to publish information

Requiring Fonterra to publish information provided or requested as part of the Commission's Milk Price review processes (clause 19, inserting new section 150JA; clause 22, inserting new clause 150QA; clause 25, inserting new sections 150UA(1)(b) and 150UB(2) and (3))

Consultation during the policy development process did not propose any additional requirements on the public disclosure of Milk Price information.

We provide full and transparent disclosure in our engagement with the Commission. This enables them to do their role under the Milk Price oversight regime. We consider that the public disclosure requirements are unnecessary for the operation of the regime which has at its core an assurance review by the Commission, an independent expert body.

If the public disclosure requirements proposed in the Bill are enacted, we have particular concerns about the scope of the information that would be covered; whether the Commission would accept Fonterra's views on whether information is commercially sensitive; and the significant amount of work that would be required to review the large amount of information shared with the Commission to identify what is commercially sensitive. In addition, the proposed requirement that the Commission can direct Fonterra to publish information requested by/provided to the Commission in the course of the review sets up a process requiring disclosure of information without some of the protections provided by the Official Information Act 1982, which we consider is unprecedented and heavy-handed.

It is unclear why these broad disclosure powers are considered necessary, given the Commission has the ability to require production of information to it in any event.

We are highly concerned that these requirements could result in information which Fonterra considers commercially sensitive being made publicly available (e.g., accessible by Fonterra's domestic and international competitors), with the Commission applying a lower threshold than us to what is treated as commercially sensitive, to the detriment of the competitive process and in fact contrary to the competition law frameworks that the Commission and its international equivalent regulators seek to enforce.

Our first preference is to delete clauses 19 and 22 of the Bill and, in clause 25 of the Bill, to delete section 150UA(1)(b) (with consequential amendments to sections 150UA and 150UB).

If this is not accepted, we ask that reasonable limitations are added to the information disclosure requirements in line with the grounds for withholding information under the Official Information Act 1982.

Our second preference is to make the following amendments to clauses 19, 22 and 25 of the Bill:

19 New section 150JA inserted (Milk price manual review information to be published)

After section 150J, insert:

150JA Milk price manual review information to be published

- (1) New co-op must make all non-sensitive information publicly accessible within 20 working days after the date on which the Commission makes its final report publicly available under section 150J.
- (2) In this section, **non-sensitive information** means information that has been requested by ~~or~~ and provided to the Commission in relation to the review of the milk price manual and that new co-op reasonably considers is not commercially sensitive, legally privileged or prejudicial to the privacy of natural persons, or there would

[otherwise be good reason to withhold from disclosure if it were official information under the Official Information Act 1982.](#)

22 New section 150QA inserted (Base milk price calculation review information to be published)

After section 150Q, insert:

150QA Base milk price calculation review information to be published

- (1) New co-op must make all non-sensitive information publicly accessible within 20 working days after the date on which the Commission makes its final report publicly available under section 150Q.
- (2) In this section, **non-sensitive information** means information that has been requested by ~~or~~ [and](#) provided to the Commission in relation to the review of the calculation of the base milk price and that new co-op reasonably considers is not commercially sensitive, [legally privileged or prejudicial to the privacy of natural persons, or there would otherwise be good reason to withhold from disclosure if it were official information under the Official Information Act 1982.](#)

25 New sections 150UA to 150UD and cross-heading inserted

After section 150U, insert:

Directions relating to Commission reviews

150UA Commission may give directions in relation to reviews

- (1) The Commission may, by notice, direct new co-op to do 1 or more of the following in the manner specified in the notice:
 - (a) ...
 - (b) [following publication of a report made under section 150I or under section 150P,](#) publish any [non-sensitive information \(as defined in sections 150JA and 150QA\)](#) ~~requested by or~~ provided to the Commission as part of a review under section 150H or 150O ~~(whether or not the information is actually provided to the Commission).~~

...

...

150UB Criteria for giving directions

- (1) The Commission may only give a direction that is consistent with the purpose set out in section 150A.
- (2) A direction under **section 150UA(1)(b)** is consistent with the purpose set out in section 150A for the purpose of **subsection (1)**.
- (3) A direction under **section 150UA(1)(b)** to publish [non-sensitive](#) information applies despite **sections 150JA and 150QA** if the Commission is satisfied that the information is ~~not commercially sensitive~~ [non-sensitive information \(as defined in sections 150JA and 150QA\)](#).

Enforcement provisions

Third party direct enforcement of subpart 5A (clause 27, inserting new subpart 5B)

The Bill includes significant new third-party enforcement rights, by providing for the Commission's new enforcement powers for a breach of the milk price oversight provisions by Fonterra to effectively also be used by "any other person".

This would mean that another party could bring injunction proceedings or damages claims directly against Fonterra arising from an alleged breach of these provisions, separately from and in competition with the Commission's Milk Price oversight regime. This could force us to change our milk price calculation even if the Commerce Commission has reviewed and accepted our Milk Price as being compliant.

We see the Commission's review role as a key feature of the regulatory regime given the principles-based way in which the base milk price is required to be set. Those principles involve matters of judgement and assessment of imprecise circumstances – they are not suitable for direct legal enforcement.

The subpart 5A regime is in this regard very different to the obligations in subpart 5, which have clearly-defined boundaries and do not involve such a degree of exercise of judgement. For example, subpart 5 requires us to set and publish application periods, to accept applications made in those periods (or, from 1 June 2023, to deal with those applications in a particular way), not to discriminate between new entrants and shareholding farmers in the same circumstances, and not to exceed specified thresholds for long-term milk supply contracts. Assessment of our compliance with those obligations is a relatively straightforward factual matter, based on objective measures, and is also directly relevant to market outcomes. By contrast, the base milk price represents a notional amount calculated in accordance with specified principles in subpart 5A. Assessment of our compliance with those principles involves a much more nuanced analysis, requiring considerable experience and expertise. The provisions of subpart 5A were not drafted in a way that contemplated direct enforcement by third parties – rather, they were drafted to guide an effective review process on the part of the Commerce Commission.

We are deeply concerned that third-party rights of action could also allow other parties to gain access to extensive commercially-sensitive information about Fonterra's business, via discovery processes – that is inappropriate. We can see significant scope for such powers to be mis-used by third parties.

This provision was not consulted on during the policy development process, and we have not identified any reference in the briefing notes or Cabinet papers about enforcement rights being extended to "any other person".

We are strongly opposed to these third-party enforcement powers being included in the Bill, and request that these powers are removed from the Bill.

We propose maintaining the status quo of third-party enforcement applying to subpart 5. In respect of subpart 5A, we recognise that the briefings and Cabinet papers released in conjunction with the Bill make it clear that the Cabinet considers enforcement tools for the Commission are needed in respect of subpart 5A.² However, we believe that it is important any new enforcement tools for subpart 5A do not undermine, contradict or confuse the Commission's new directive powers (if our submission to remove the directive powers is not accepted) and that any enforcement tools can only be exercised by the Commission (and not by third parties). In our view, the simplest way of enabling this would be to remove subpart 5A from the definition of "relevant provision" but extend enforcement powers to include compliance with a direction by the Commission under section 150UA (again, if our submission to remove the directive powers is not accepted). We believe this is more than adequate as an enforcement framework for subpart 5A.

We therefore request the following amendments to clause 27 of the Bill:

27 New subpart 5B of Part 2 inserted

After section 150V, insert:

² Briefing on Fonterra Capital Restructure: Decisions on Regulatory Design, paras 70 and 72; Cabinet Paper on Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Bill: Approval for Introduction and Associated Increase in Appropriation, para 41.5.

Subpart 5B—Enforcement

...

150X Meaning of relevant provision

In this subpart, **relevant provision** means subpart 5 ~~or 5A~~ or regulations made under section 115.

...

150Z Pecuniary penalties

(1) The court may, on application by the Commission, order a person to pay to the Crown a pecuniary penalty if satisfied that the person—

~~(a)~~ has contravened a relevant provision or has failed without reasonable excuse to comply with a direction under section 150UA

...

Liability of individuals for breach of subpart 5A (clause 27, inserting new section 150Z)

Individual liability is not appropriate in the context of the Milk Price oversight regime.

The Milk Price Group (MPG), Milk Price Panel and Fonterra Board are restricted by legislation and Fonterra's Constitution in their roles. The MPG must apply the Manual to calculate the milk price (and exercise multiple judgements in doing so), the Milk Price Panel must recommend changes to the Manual that are consistent with the DIRA purpose statement, and the Fonterra Board is required to pay the Milk Price set by the Panel, and make the changes to the Manual recommended by the Panel, or provide public justification why it did not do so.

The Commerce Commission provides detailed oversight of each of the roles with full disclosure of the inputs, assumptions and processes used, and (with these reforms) in some cases, direction as to how to set the milk price or amend the Manual.

Ultimately, individual liability is best suited to intentional wrongdoing by an individual, that results in market harm, not limited actions within a defined set of parameters with complete and transparent oversight and review by the Commission.

This potential liability will clearly make it less attractive for capable, independent people to be involved in setting the Milk Price, particularly given the proposed changes to the composition of the Panel.

Given Commerce Act liability is usually excluded from public liability insurance policies, including directors' and officers' liability insurance policies, this liability may also not be insurable.

Our first preference is to delete sub-sections 150Z(1)(b) and (4) from clause 27 of the Bill.

If this is not accepted, then we seek to add defences similar to those in the Financial Markets Conduct Act 2013 where "involvement in a contravention" gives rise to liability.

There is no reason why individuals should be exposed to liability under the Milk Price regime without the defences they would have in other legislative settings where there is individual liability.

Our second preference is to add the following sub-clauses to section 150Z in clause 27 of the Bill:

27 New subpart 5B of Part 2 inserted

After section 150V, insert:

Subpart 5B—Enforcement

...

150Z Pecuniary penalties

...

- (5) In any proceeding under this section against a person (A), it is a defence if A proves that—
- (a) A's contravention was due to reasonable reliance on information supplied by another person; or
 - (b) both of the following apply:
 - (i) A's contravention was due to the act or default of another person, or to an accident or to some other cause beyond A's control; and
 - (ii) A took reasonable precautions and exercised due diligence to avoid the contravention.
- (6) For the purposes of subsection (5)(a) and (b), **another person** does not include a director, an employee, or an agent of A.
- (7) Subsection 8 applies if—
- (a) a person (B) contravenes a relevant provision; and
 - (b) another person (C) is involved in the contravention.
- (8) In any proceeding under this section against C, it is a defence if C proves that—
- (a) C's involvement in the contravention was due to reasonable reliance on information supplied by another person; or
 - (b) C took all reasonable steps to ensure that B complied with the provision.
- (9) For the purposes of subsection (8)(a), **another person** does not include a director, an employee, or an agent of C.
- ...

Liquidity in trade of Fonterra shares in restricted farmer-only market

Requiring a market-maker in co-operative shares to support ongoing liquidity (clause 5, amending section 109L)

We support requiring a market-maker in the farmers-only market to deliver specified functions. We also support the approach taken in the Bill to require the market-maker to be designated as a market-maker under the relevant licensed market's market rules.

Requiring Fonterra to make independent market analysis of its performance accessible to farmers and unit holders (clauses 6 and 8, inserting new sections 109LA and 109LB and amending section 118)

We support this measure, noting that it is aligned with our goals and that it benefits all shareholders and unitholders.

We are seeking clarification that Fonterra will only be required to commission research and analysis when there is not sufficient credible research and analysis already available, and that Fonterra will only be required to commission a reasonable amount of research and analysis.

Our preferred approach is to allow existing levels of independent coverage (not commissioned by Fonterra) to continue, with Fonterra only being required to intervene – to the extent it is reasonably able to do so – if there is an inadequate level of financial markets research and analysis in respect of its performance.

We therefore propose the following amendment to clause 6 of the Bill:

6 New sections 109LA and 109LB inserted

After section 109L, insert:

109LA New co-op must commission financial markets research and analysis about its performance

- (1) New co-op must ~~commission~~ take reasonable steps, on an ongoing basis, to facilitate a reasonable level of financial markets research and analysis in respect of new co-op's performance being produced and publicly accessible, that:-

- ~~(2) New co-op must ensure that the commissioned financial markets research and analysis —~~
- (a) is free from bias and independent of new co-op; and
 - (b) provides credible analysis.
- ~~(3) New co-op must make the commissioned financial markets research and analysis publicly accessible.~~

Requiring Fonterra to maintain and publish a dividend and retentions policy (clauses 10 and 8, inserting new section 135A and amending section 118)

We support this proposal to codify in legislation our current practice.

Technical amendments

Boundaries of the current safe harbour provisions that relate to the setting of the base milk price (clauses 14, 18 and 21, amending sections 150B, 150I and 150P)

We do not oppose the proposed amendments to clarify that the Commission may assess the use of the current Milk Price safe harbour provisions in the legislation in its review processes.

Bring forward the timeframes for information to be provided to the Commerce Commission (clauses 23 and 24, amending sections 150T and 150U)

We are not opposed to these changes.

Limitation of actions for damages (clause 27, inserting new section 150ZB)

The reference to section 82 of the Commerce Act 1986 as a whole (i.e., including section 82(2)) results in two overlapping, inconsistent limitation provisions – section 82(2) conflicts with new section 150ZC(4). This should be remedied by making it clear that only section 82(1) applies to actions for damages, not section 82(2).

We therefore propose the following change to section 150ZB in clause 27 of the Bill:

27 New subpart 5B of Part 2 inserted

After section 150V, insert:

Subpart 5B—Enforcement

...

150ZB Actions for damages

- (1) Every person (other than the Commerce Commission) is liable for damages for loss or damage caused by that person engaging in conduct that constitutes a contravention of a relevant provision.
- (2) Sections 82(1) and 82A of the Commerce Act 1986 apply to actions for damages under this section.

...

Effective date

There is an effective date of 1 June 2023 for most provisions (clause 2)

While we would look to implement our Flexible Shareholding capital structure before 1 June 2023, we are not opposed to the effective date of 1 June 2023. We expect to implement Flexible Shareholding once the

legislation is passed and we would look to voluntarily implement the proposed liquidity enhancements in the Bill from the date of implementation.