MINISTRY OF JUSTICE
Tāhū o te Ture

LEGAL ADVICE

LPA 01 01 24

24 August 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Bill

Purpose

1. We have considered whether the Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 24418/2.18). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression), section 19 (freedom from discrimination) and section 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. In 2001, the Government passed the Dairy Industry Restructuring Act 2001 (the principal Act) to enable the formation of Fonterra, known as the new co-op,[1] and to manage risks arising from Fonterra's dominance in New Zealand dairy markets.

5. Subparts 5 and 5A of Part 2 of the principal Act promote the efficient operation of dairy markets in New Zealand by regulating the activities of Fonterra to ensure that New Zealand markets for dairy goods and services are contestable. The principal Act includes requirements relating to Fonterra's capital structure, as its share trading arrangements could impact on contestability in the market for farmers' milk supply.

6. Fonterra intends to implement a new capital structure to enable it to better compete for farmers' milk supply in the face of forecast static, or declining, milk production, and to efficiently use its existing processing infrastructure. Two key elements of Fonterra's new capital structure are reduced minimum shareholding requirements, and a restricted farmers-only market.

7. The Bill amends Subparts 5 and 5A of Part 2 of the principal Act and inserts a new Subpart 5B into Part 2. The aim of the Bill can be summarised as:

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[1] "New co-op" effectively refers to Fonterra. It is defined in the principal Act as the amalgamated company arising from the amalgamation of The New Zealand Co-operative Dairy Company Limited, Kiwi Co-operative Dairies Limited, and Fonterra Co-operative Group Limited.

a. supporting Fonterra's capital restructure by explicitly enabling Fonterra to retain a partially delinked unit fund on a permanent basis; and

b. adjusting the regulatory regime to mitigate the potential risks arising from the restructure.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

8. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.[2]

9. The Bill includes requirements on Fonterra that engage the right to freedom of expression under section 14, including to:

   a. make publicly accessible specified information about its performance, policies, and base milk price calculations (clauses 6[3], 10[4], 19[5], 22[6]);

   b. publish specified information as directed by the Commerce Commission (the Commission), as part of the Commission's review of the milk price manual and/or base milk price calculation (clause 25[7]);

   c. provide specified information to the Commission relating to the base milk price calculation and the Commission's draft report on this calculation (clause 23[8]);

   d. by notice in writing from the Commission, provide specified information or other material or answer any questions to enable the Commission to carry out its functions and exercise its powers (clause 27[9]).

10. A limit on a right or freedom may be justified with relation to section 5 of the Bill of Rights Act. Justification requires that the limit is rationally connected to a sufficiently important objective; impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.

11. We have concluded that the limits imposed by these requirements appear to be justified under section 5 of the Bill of Rights Act:

   a. The requirements are rationally connected to the important objective of supporting a transparent and well-functioning dairy industry, given the risks (noted in the

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2 See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

3 New sections 109LA and 109LB of the Dairy Industry Restructuring Act 2001.

4 New section 135A of the Dairy Industry Restructuring Act 2001.

5 New section 150JA of the Dairy Industry Restructuring Act 2001.

6 New section 150QA of the Dairy Industry Restructuring Act 2001.

7 New subsection 150UA(1)(b) of the Dairy Industry Restructuring Act 2001.

8 Amended section 150T and new subsection 150T(2) of the Dairy Industry Restructuring Act 2001.

9 New subsection 150ZD(2) of the Dairy Industry Restructuring Act 2001.

Regulatory Impact Statement) that the capital restructure could reduce the contestability of farmers' milk supply.

b. The limits on freedom of expression appear reasonable and proportionate to the objective. Several of the requirements appear to reflect or build on existing processes and practice; commercially sensitive information can be withheld from publication; and the Commission would have to consult Fonterra before issuing a direction to publish information under new subsection 150UA(1)(b), and to provide notice in writing of any requirement under subsection 150ZD(2). While the Bill could be clearer about when the requirements in new sections 109LA, 109LB and 135A need to be met, we accept that there is a need to enable sufficient flexibility in order to avoid imposing unreasonable or disproportionate limits.

12. For completeness, we have considered whether the requirements in clause 27 (new subsection 150ZD(2) of the Dairy Industry Restructuring Act 2001) engage section 21 of the Bill of Rights Act (the right to be secure against unreasonable search or seizure). For the reasons noted above, we have concluded that any search or seizure appears to be reasonable and that therefore this right is not engaged.

Section 19 – Freedom from discrimination

13. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act).

14. Discrimination under section 19 of the Bill of Rights Act arises where:[10]

a. there is differential treatment or effects as between persons or groups in analogous or comparable situations based on a prohibited ground of discrimination; and

b. that treatment has a discriminatory impact (it imposes a material disadvantage on the person or group differentiated against). Once differential treatment on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.[11]

15. New subsection 150E(2A)(b) of the Bill requires that the chair of the Milk Price Panel (the Panel) not be a relative of a sitting director of Fonterra, a member of Fonterra's Co-operative Council, or a current panel member appointed by that council. This is additional to the existing requirement, in subsection 150E(2) of the principal Act, for the chair and a majority of the Panel to be independent.

16. This provision may impose a limit on the right to be free from discrimination on the grounds of family status or marital status, which are prohibited grounds of discrimination under the Human Rights Act. The right would be limited if a person were considered to have been differently treated when compared to a member of an analogous group (for example, someone with comparable skills) because they were ineligible to be Panel chair on the grounds of family status or marital status; and to have been materially disadvantaged as a result.

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10 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55].

11 See for example, *Child Poverty Action Group v Attorney-General* [2013] NZCA 420; [2013] 3 NZLR 729; (2013) 9 HRNZ 742, at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78; (2009) 6 NZELR 704, at [40] per Elias CJ, Blanchard and Wilson JJ.

17. To the extent that this provision limits the right, we consider it to be demonstrably justified in terms of section 5 of the Bill of Rights Act. Mitigating conflicts of interest in the base milk price setting process is rationally connected with the important objective of supporting transparency and confidence in that process for the benefit of the wider industry. The additional requirements appear reasonable and proportionate. The definition of "relative", which is unchanged from the principal Act, is confined to close family members.

Section 25(c) – Right to be presumed innocent until proven guilty

18. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.[12]

19. The Bill creates new strict liability offences where:

    a. a person fails, without reasonable excuse, to comply with the requirements of new sections 109LA or 109LB (relating to financial markets research and analysis about Fonterra's performance), or 135A (dividend and retentions policy);

    b. a person fails, without reasonable excuse, to comply with the requirements of a notice given under new section 150ZD(2)(a), (b), or (c) (to provide specified information or material or answer questions to enable the Commission to carry out its functions);

    c. without reasonable excuse, Fonterra contravenes amended sections 150E(1) or 150E(1A) or new section 150E(2A) (relating to appointment of members to the Panel);

    d. without reasonable excuse, Fonterra contravenes section 150EA(1), (2) or (3) (relating to engagement of persons to calculate a base milk price).

20. Each of these offences carries a maximum penalty of $200,000, plus $10,000 per day for continuing non-compliance. This is consistent with existing penalties in the principal Act.

21. On the face of it, strict liability offences limit section 25(c) of the Bill of Rights Act. This is because they create a 'reverse onus': instead of the State having to prove guilt, the accused must prove a defence (or disprove a presumption) in order to avoid liability.

22. A reverse onus may nevertheless be consistent with the Bill of Rights Act if the grounds for the offence are rationally connected to a sufficiently important objective; if the onus impairs the right or freedom no more than reasonably necessary to achieve the objective; and if it is otherwise in proportion to the importance of the objective.[13] Strict liability offences have been found more likely to be justifiable where:

    a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;

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12 *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

13 See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and

c. the penalty for the offence is at the lowest end of the scale and proportionate to the importance of the Bill's objective.

23. On balance, we consider that the limit on section 25(c) of the Bill of Rights Act appears justifiable, as:

a. the offences rationally support the important objective of maintaining transparency and effective regulation of the dairy industry in the context of Fonterra's capital restructuring;

b. the offences are regulatory and apply to a highly regulated industry;

c. Fonterra would be best placed to advise of any reason for its non-compliance and would be able to avoid liability by offering a reasonable excuse for not complying;

d. while the financial penalties are high, they appear reasonable and proportionate in context. We understand that they are intended to apply to Fonterra, New Zealand's largest dairy processor. Significant penalties are therefore likely to be needed if they are to act as a deterrent and reflect that the activities will be undertaken in a commercial context. The use of daily penalties appears reasonable, given that any failure to supply the required information could have significant, and potentially cumulative, effects on the dairy industry – for example, by distorting trading decisions or undermining confidence in the milk price-setting regime – until it was rectified.

Conclusion

24. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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