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The General Manager
New Zealand Productivity Commission
PO Box 8036
The Terrace
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Submitted via email: transtasmanreview@productivity.govt.nz

Dear Sir

Re: Strengthening Economic Relations between Australia and New Zealand

Thank you for the opportunity to contribute to the Australian and New Zealand Productivity Commissions' joint study on strengthening trans-Tasman economic relations, as outlined in the issues paper, '*Strengthening Economic Relations between Australia and New Zealand*' (April 2012).

This submission is structured as follows:

1. Overview of Fonterra's business interests in both Australia and New Zealand; and
2. Our specific comments about the Closer Economic Relations agreement, and recommendations for further reform.

About Fonterra

Fonterra Co-operative Group ("Fonterra") is one of the world's largest diversified milk processing companies, and one of the world's top producers of dairy nutrition for export. We also have substantial interests in consumer branded businesses across Asia, Latin America, Australia, and our home market of New Zealand.

Fonterra is New Zealand's largest company with revenues of NZ $19.9 billion in 2011, and employing approximately 12,000 people in New Zealand. Although formed in 2001, Fonterra has a history dating back 200 years through our legacy companies.

Australia is a crucial part of Fonterra's trans-Tasman home market. Through our legacy companies, we have existed in Australia for well over 50 years. We employ 2,000 people in Australia, collect 21 percent of Australia's milk, and operate ten manufacturing sites in Australia.

Fonterra's Australia-New Zealand operations are a cornerstone of our business, and a key part of our growth plans. Our Australia-New Zealand business unit was formed in 2007 when our Australian business (milk supply, manufacturing, ingredients, brands and foodservices), New Zealand Brands business, and Tip Top (our New Zealand ice cream business), were merged into one strategic trans-Tasman business unit. With revenues of NZ $4.4 billion in 2011, our Australia-New Zealand business unit is one of the largest consumer foods businesses in Australasia. It also provides Fonterra with an assured supply of fresh milk, a network of 16 manufacturing sites, and marketing and brand synergies, offering a unique competitive advantage in the trans-Tasman market.

Specific Comments about the Closer Economic Relations Agreement

1. TRADE RELATIONS

Since the establishment of the Australia-New Zealand Closer Economic Relations Trade Agreement in 1983, the trans-Tasman dairy market has been open to trade from both countries. Fonterra and its predecessors have built up a substantial business in Australia under this framework. Fonterra now processes milk in both countries and trades dairy products within the trans-Tasman market under a tariff-free environment. It is important that this tariff-free trading environment continues.

Fonterra has also benefited from a close working relationship with the dairy industry in Australia, working to remove trade barriers in third countries for the mutual benefit of both parties. This includes the World Trade Organisation Uruguay and Doha Rounds, the ASEAN / Australia / New Zealand Free Trade Agreement and membership of the Global Dairy Alliance.

2. CORPORATE / SECURITIES LAW – CAPITAL MARKETS

Closer integration between Australia and New Zealand would be beneficial in the following areas:

a) **Capital raising:** Each of Australia and New Zealand has rigorous securities legislation. However, additional compliance steps are required before an Australian issuer can raise funds in New Zealand, or a New Zealand issuer can raise funds in Australia, utilising the same offer documents as are used in the issuer's domestic jurisdiction.

   Each country would benefit from the increased capital raising opportunities that removing such compliance steps may present. There are no apparent material benefits from the additional requirements.

b) **Dual listing:** Each of Australia and New Zealand has a strong set of listing rules applicable to the ASX and NZX.

   It would be beneficial if an issuer on one of the stock exchanges was able, without restriction, to also list on the other exchange in a way that it did not also need to comply with the second exchange's listing rules (i.e. compliance with the first exchange's listing rules being sufficient, subject to required announcements and disclosures being made to

both exchanges contemporaneously). The benefits of requiring issuers to comply with two sets of listing rules are not obvious.

3. COMPETITION LAW

As set out below, there are a number of differences between the competition law regimes of Australia and New Zealand. There are costs to organisations that wish to do business in both jurisdictions in educating themselves on those differences and ensuring compliance with two different regimes.

Differences in legislation:

Laws relating to criminalisation of cartels should be harmonised, but not by adopting the Australian model. There is no sound policy basis for criminalising cartels, in particular no evidence that criminalisation increases compliance where there are already significant sanctions for breaches of the relevant laws. New Zealand should not introduce criminal sanctions for cartel conduct, because evidence from Australia indicates that these sanctions inhibit business activity. The major Asian and Chinese markets, which New Zealand and Australia will increasingly rely on, do not have criminal sanctions for cartel behaviour. If criminal sanctions for cartel conduct are introduced in New Zealand, then it will be disadvantaged when competing with those countries. New Zealand should not introduce criminal sanctions for breach of competition laws and Australia should repeal the relevant criminal sanctions. This will leave both countries in the best possible position to compete in Chinese and other Asian markets.

Other differences between Australia and New Zealand's competition law regime relate to “per se” prohibitions. It would not be appropriate to introduce “per se” prohibitions in New Zealand. The benefit from these prohibitions is not clear and the uncertainty that they create acts as a significant deterrent to entrepreneurial business activity. For example, Australia has a per se prohibition on exclusionary provisions (these are subjected to a 'rule of reason' analysis in New Zealand). Australia also has a per se prohibition on third line forcing (while no corresponding prohibition exists in New Zealand). Finally Australia has a per se prohibition on resale price maintenance in respect of goods and services (New Zealand's resale price maintenance prohibition only applies to goods).

In addition, Australia has specific statutory guidance for determining whether a company has a substantial degree of power in a market, and when it has taken advantage of that power. We do not believe that statutory guidance of this nature would be beneficial for New Zealand.

Although typically it may be desirable to seek greater harmonisation between the two countries' laws, harmonisation should only occur where potential benefits of harmonisation exceed the costs. The introduction in New Zealand of additional per se prohibitions or statutory criteria for determining when a company has taken advantage market power would not meet that test.

Differences in clearance procedure:

The Australian Competition and Consumer Commission (ACCC), unlike the New Zealand Commerce Commission (NZCC), have both an informal and formal process for merger clearances. The informal process is the main method of obtaining clearance in Australia. It is generally seen as beneficial to business as it:

- Allows businesses to test a proposed merger on a confidential basis;

- Does not necessarily require the transaction to be suspended prior to clearance;
- Has no fees;
- Has no set time frame (the ACCC can amend its timeline if necessary to take account of the applicant's requirements);
- Typically provides decisions in a more timely fashion; and
- May provide direct access to the Commissioners themselves.

In contrast, the NZCC only has a formal process that is public and operates to timeframes mandated in the Commerce Act. If the NZCC does not reach decision within those timeframes and the applicant does not agree to an extension then the clearance is deemed to be declined. The formal public process creates particular difficulties for time sensitive transactions and transactions that need to remain confidential for commercial reasons. While it is possible to approach the NZCC with an informal courtesy letter informing them of a transaction:

- The NZCC will not provide any comfort in response to such an approach; and
- Even in straight-forward transactions, the NZCC often respond to an informal notification be requesting a formal clearance application in order to market test the transaction.

There would be benefits, not just for parallel Australia-New Zealand merger clearance applications but for all clearance applications, if the NZCC moved towards offering an informal clearance regime similar to the ACCC's regime.

Differences in interpretation:

There is a history of divergent interpretation between the ACCC / Australian Courts and the NZCC / New Zealand Courts. For example:

- The NZCC has considered that a vertically integrated wholesale and retail company that includes maximum price provisions in its wholesale supply agreements with other retailers will be in breach of the price fixing prohibition (we understand the ACCC does not take this approach);
- The ACCC / ACT, on the same facts, found different markets than the NZCC / High Court in the Qantas / Air New Zealand case;
- Differences in interpretation between the Australian and New Zealand Courts of the prohibition on misuse of market power.

These differences in interpretations create additional compliance and education costs for trans-Tasman businesses. Greater collaboration between the two countries' regulators and Courts on their approaches to interpreting similar legislation would be beneficial.

4. MOVEMENT OF CASH

At present, the inability to move cash freely and seamlessly between Australia and New Zealand adds costs to doing business. A common currency would be ideal for this purpose, but we recognise the sovereignty risks associated with it. However, the ability for banks common to both countries to offset Australian dollar and New Zealand dollar accounts seamlessly, and allow a facility that allows cash to be drawn down or repaid over both countries would be beneficial.

5. MOVEMENT OF LABOUR

There are a number of issues that impede the free movement of labour between Australia and New Zealand. They are:

- **Superannuation portability.** The ability to transfer superannuation funds between New Zealand and Australia quickly and easily is an important issue for the Commissions to address, to encourage the free movement of labour between the two markets. The fact that Australia have not yet legislated for this can be a discouragement to free movement.

- **Dual taxation arrangements.** At present, the transaction costs associated with staff ending up in dual tax jurisdictions as a result of transferring between Australia and New Zealand is onerous. Consideration of a specific set of tax rules for trans-Tasman staff transfers which would be easy to apply, and have limited impacts on company cash flow would be beneficial. This would allow organisations with New Zealand and Australian presences to move labour more freely, providing benefits to both economies.

- **Long service leave provisions.** Long service leave provisions in Australia add costs to businesses when transferring staff from New Zealand to Australia, as length of service is recognised across both jurisdictions. This adds an immediate (and sometimes significant) liability to the business. Consideration of how this issue could be addressed would be beneficial.

Thank you again for the opportunity to contribute to your study. We hope you find these comments useful. Please do not hesitate to contact me if you have any questions.

Yours sincerely

David Matthews

General Counsel