[
]

The Commissioner
Commerce Commission
Wellington

Dear Sir

New Zealand Dairies Limited (NZDL) & Fonterra Cooperative (Fonterra)

Introduction

This submission is made on behalf of [ ] who were a bidder for the business assets of NZDL. [ ] million was higher than the reported successful bid from Fonterra but despite this it is our view that the company was not given due consideration as part of the process.

[ ] bid was submitted in line with the timetable set out by the Receivers and it was invited to a meeting with the Receivers and Legal representatives. At this meeting I was asked if direct contact could be made with the funder [ ] and this was granted in a letter the same day from the [ ]. Despite this agreement no call was made by the Receiver and [ ] received a letter from Buddle Findlay advising that the bid was not preferred as the view was that the bid would require Overseas Investment Office approval.

[ ]

[ ] is a company formed to invest in and operate dairy farming and dairy processing assets. [ ] is bullish on the future of the dairy sector and when the opportunity arose to invest in an existing entity it took the chance seriously and submitted a strong bid supported by [ ]

[ ]

[ ] is an International Equity investor controlled by a New Zealander, [ ] has invested in a wide range of assets and projects in a number of continents and countries. With the CEO and main shareholding being controlled by New Zealanders it is extremely keen and interested to invest in NZ.

[ ] investment criteria requires a minimum investment of [ ] million for a minimum period of 20 years, (preferably longer). To date their main investments have been in energy and have included renewable and conventional energy, heat and power generation. Recently the company has shown interest in the natural resource sector and in-ground commodities, such as pastoral farming and dairy production.

[ ] has for the past three years been researching the NZ dairy industry and is very interested to invest

Submission in relation to the Fonterra Application.

We wish to address the following points that are not exhaustive but that address some of the assertions made within the Fonterra application and relating to general points.

1. Fonterra claim that they did not pursue the acquisition

   [ ] would like to ask the Commission to investigate this claim because the implication is that Fonterra were approached and almost cajoled into buying the company. This suggests that the Receivers may not have conducted a fair process but rather one that was pre-determined in favour of Fonterra despite the presence of higher competing bids.

   As a bidder who bid [ ] the reported purchase price we would ask the Commission to investigate the fairness of the sale process.

2. No certainty that the NZDL Suppliers would commit to an alternative purchaser

   The above claim was made in the submission and [ ] contend that this is totally hypothetical because the suppliers had no choice but to commit to the Fonterra proposition. We understand that significant pressure was placed on the NZDL suppliers to accept the Fonterra proposal despite number of factors that were extremely important and that need to be considered.

   a. We understand that Fonterra insisted on 100% acceptance by the NZDL Suppliers
   b. We understand that the offer effectively tied the NZDL suppliers to Fonterra for a 7 year period which is clearly anti competitive and is outside the normal contract whereby suppliers are able to withdraw from supply to Fonterra on an annual basis
   c. We understand that the NZDL farmers are required to purchase shares in Fonterra with a value of approximately $45-$50 million relative to the planned production for the 2012/13 supply year. Thus in reality the suppliers will have to buy their own company and the net cost to Fonterra is effectively zero. As a contrast the [ ] offer did not require suppliers to acquire any shares linked to supply but did offer a Board position for a supplier representative and offered a voluntary opportunity for suppliers to purchase shares in the company.
   d. We understand that suppliers are required to maintain the commitment to supply the designated quantities of milk even in a situation where they may sell the farm via a covenant or similar mechanism or even if they wished to change the nature of the farming enterprise to say sheep farming. We understand that in response to a farmer enquiry about this option a Fonterra representative at the meeting said “ the sheep would have to produce a lot of milk won’t they”!!).
   e. [ ] contends that if the farmers had a genuine choice that they would have considered the options and voted for the offer that gave them the best deal in their opinion after they weighed up the options along with their personal situations. The [ ] offer would have maintained the independence

of the company, provided representation for suppliers and returned a much higher price to the Receivers' and therefore would have ensured full repayment to Suppliers, secured and unsecured Creditors and in addition would have given a better return to shareholders than the lower bid.

[ ] would like the Commission to investigate the validity of the above claim as it is hypothetical at best. Additionally [ ] contends that the Suppliers should have the normal right to relocate their milk on an annual basis as per all other suppliers and asks the Commission to deem the restrictions and term imposed on the NZDL Suppliers as anti-competitive and unduly restrictive in the event that the Fonterra acquisition is approved.

3. Fonterra proportion of South Island Milk is 82%

The notion that and addition of 2% to make 82% of a market does not constitute an increase in market power from an already dominant position is clearly wrong and [ ] would ask the Commission to reject it outright. Further it is [ ] contention that the relevant market is within a 100 km radius of Studholme and in this regard the market share of supply would be greater than 82% if this acquisition were approved.

4. Best Option

The argument is made that the Fonterra offer is the best (or only) option. [ ] contends that this is not correct and offers as evidence its own bid that was not accepted. It is clearly the best option for Fonterra but is it the best for the Company and the Suppliers and the customers of NZDL who will now not have the choice of receiving product from NZDL. In addition there were other bids that would have provided a better outcome for all stakeholders in NZDL.

5. Transport efficiencies for Fonterra

Fonterra claim that the purchase will enable them to make transport efficiencies which is correct as the average distance of the NZDL farms from the plant is less than the Fonterra average distance from their network of plants. However the submission also contends that the relevant distance for efficient collection should be considered as being 250 kilometres. These 2 factors are contradictory and indeed the assertion that 250 kilometres should be considered as the valid distance rather than the 100-150 kilometres previously used by the Commission is clearly a ridiculous assertion. Indeed Fonterra's own calculations under the Farmgate Milk Price setting manual where the "virtual efficient competitor" model is sued to set the costs and therefore to determine the milk price.

We contend that the Commissions previous ruling on the valid distance is correct and therefore that in effect the acquisition by Fonterra of the NZDL effectively rules out the viable option for the famer suppliers and others in the same area to realistically supply milk to alternative milk processors under the current processing configuration in the South Island.

6. The claim is made that the Fonterra offer was the best offer on the table. This is not the case as the [ ] offer was significantly better than the Fonterra "rumoured"

figure. We just wish this matter of fact to be corrected so that farmer suppliers, other creditors, shareholders and other stakeholders are aware that the bid that was accepted was not as has been reported the “best” offer. The Receivers may have elected for other reasons not to pursue the offer but the perception that the Fonterra offer was the best is not correct and we request that this be corrected.

7. NZDL “failure” was not of the company but more the structure and its parent’s performance

The comment in the application that says the company failed or was a failure is in our view incorrect. Indeed in a number of areas the company outperformed Fonterra but it was constrained by its shareholders and was unable to access facilities that Fonterra and others who are properly capitalised take for granted.

It is salient to note that in the financial year FY11 NZDL sold Whole Milk Powder for $19 per MT higher average price than Fonterra (according to the company’s accounts and Fonterra’s disclosures under the Farmgate Milk Pricing Schedule. In addition the company’s operating cash costs were lower than the Fonterra “Virtual” cost used for an efficient competitor.

Operationally the company made a small loss as it had to acquire milk at a higher effective price than Fonterra and it did not have the capital base to allow it to engage in foreign exchange management practices that are so critical in a volatile currency environment.

The fact that NZDL was required to pay a premium to Fonterra to secure milk supply also shows that Fonterra continues to have a dominant position in the market and that this will be further strengthened by any NZDL acquisition.

[ ] contends that its offer with the support of [ ]would have ensured a soundly financed company that would manage all risks in a comprehensive way and therefore provide a strong entity that farmers and other suppliers could rely on in the long term. This would further encourage competition for the milk supply rather than the current potential situation whereby this competition will be reduced significantly.

Summary

[ ] would ask that you review the application critically and take into consideration the factors mentioned above:

1. There was another and better offer for NZDL that was not pursued by the Receiver
2. If Fonterra was a reluctant bride why did the Receiver not fully explore offers that were on the table?
3. The fact that no alternative was offered to suppliers does not mean that none existed and Fonterra appear to have imposed some very stringent anti competitive restrictions on the NZDL farmers who had no effective option but to sign up to ensure that all were paid for their milk.
4. The conditions that the NZDL suppliers have had to agree to should be carefully examined to ensure that they are fair to the farmers and not bind them to Fonterra for longer than a normal 12 month period.

5. The Fonterra offer was clearly not the best offer on the table but the Receiver chose not to pursue other options and yet Fonterra claim not to have pursued the acquisition. This process should be investigated.
6. [ ] would urge the Commission to reject the claims made around the effective distance to cart milk and to confirm previous rulings on this topic.
7. NZDL has established a good reputation with customers and outperformed Fonterra in terms of price per tonne received for WMP in 2011. This shows that independent companies can perform and compete in the global market and if properly able to use all tools available to prosper and thrive. It would be a disappointing situation if this company were to be swallowed up by Fonterra when there are opportunities for it to continue to stand alone and to offer a genuine choice for customers and suppliers alike.

We ask that you critically review the application and find that competition should be allowed to thrive.

Yours faithfully

[ ]