



# NZX Regulation Decision

Fonterra Co-Operative Group Limited ("FCG")  
Application for a waiver from FSM Rule 3.2.1(c)

31 August 2016





## Waiver from FSM Rule 3.2.1(c)

### Decision

1. Subject to the conditions in paragraph 2 below and on the basis that the information provided by FCG is complete and accurate in all material respects, NZX Regulation (**NZXR**) grants FCG a waiver from Rule 3.2.1(c) to the extent this Rule requires FCG to have a minimum of two Independent Directors or, if there are eight or more Directors of FCG, three or one-third (rounded down to the nearest whole number of Directors of FCG) of the total number of Directors of FCG, whichever is the greater, for a period ending on the earlier of:
  - a. the appointment of a new Independent Director; or
  - b. three months from the date of this waiver (i.e. 30 November 2016).
2. The waiver in paragraph 1 above is provided on the conditions that:
  - a. the Chair of FCG certify to NZX that he does not consider that FCG's shareholders will be unduly prejudiced during the period which FCG relies on the waiver from the requirements of Rule 3.2.1(c);
  - b. FCG must not have less than three Independent Directors;
  - c. FCG must continue to satisfy Rules 3.4 and 3.5 in relation to the composition requirements for FCG's Audit and Finance Committee and the Milk Price Panel; and
  - d. for the purposes of the Rules, including Rule 3.3.5, where a majority of Independent Directors is required in order for a resolution which requires a majority of not less than 75% of FCG's Directors to be approved, all Independent Directors must approve this resolution.
3. The information on which this decision is based is set out in Appendix One to this decision. This waiver will not apply if that information is not or ceases to be full and accurate in all material respects.
4. The Rule to which this decision relates is set out in Appendix Two to this decision.
5. Capitalised terms that are not defined in this decision have the meanings given to them in the Rules.
6. In accordance with NZX policy, NZXR consulted with the Chair of the NZ Markets Disciplinary Tribunal when making this determination.

### Reasons

7. In coming to the decision to provide the waiver set out in paragraph 1 above, NZXR has considered that:
  - a. the policy behind Rule 3.2.1(c), which is analogous to NZX's policy for NZX Main Board Listing Rule 3.3.1(c), is to ensure that Independent Directors, with no other interests to



hinder their judgment in the interests of the Issuer, can contribute an independent perspective to Board decision-making. The requirement to have at least the minimum number of Independent Directors is an important shareholder protection. NZXR is not inclined to grant waivers from such protections, except in exceptional circumstances;

- b. Mr Waller has resigned from his Board and committee positions with FCG effective from 31 August 2016. The timing of Mr Waller's resignation was not an event within FCG's control and could not have been prevented by FCG. The reasons for his resignation are unrelated to the affairs of FCG. Although FCG has commenced a process to identify a candidate to replace Mr Waller as FCG Independent Director, no preferred candidate has yet been identified. FCG has submitted, and NZXR has no reason not to accept, that the circumstances which necessitated FCG's waiver application are exceptional circumstances that fall within the ambit of NZX's approach to waivers of corporate governance provisions;
- c. the condition in paragraph 2(a) above, gives NZX comfort that the composition of the FCG Board and its committees during the period of the waiver, will not be prejudicial to FCG shareholders;
- d. the conditions in paragraphs 2(b) and (c) above, give NZX comfort that throughout the period of the waiver, FCG's Board meetings will have a predetermined level of independent representation, and that it will have the requisite number of Independent Directors in respect of the committees prescribed by Rules 3.4 and 3.5;
- e. the condition in paragraph 2(d) above, gives NZX comfort that any of the Rules, including Rule 3.3.5, which require a certain number of Independent Directors before a resolution can be passed, are not inadvertently reduced during the period of the waiver; and
- f. there is precedent for this decision.

## Confidentiality

- 8. FCG has requested that certain information in its waiver application be kept confidential, indefinitely.
- 9. In accordance with Footnote 1 to Rule 1.10.2, NZXR grants FCG's request.



## Appendix One

1. Fonterra Co-Operative Group Limited (**FCG**) is a Listed Issuer with Equity Securities Quoted on the Fonterra Shareholders' Market (**NZZX**) and Debt Securities Quoted on the NZX Debt Market.
2. FCG currently has thirteen directors on its Board. In accordance with FSM Rule (**Rule**) 3.2.1(c), its Independent Directors are Mr John Waller, Clinton Dines, Simon Israel and David Jackson.
3. In mid-August, Mr Waller advised FCG that he would resign from his position on the FCG Board, as well as his positions on FCG's Audit and Finance Committee, Risk Committee and Milk Price Panel, effective 31 August 2016. FCG announced this to the market on 17 August 2016.
4. FCG has actively implemented a succession planning process to find a replacement Independent Director for Mr Waller. Given the nature of the specific roles and responsibilities of Independent Directors of FCG, the selection process is a comprehensive one, which can take several months.
5. FCG has been unable to identify a replacement Independent Director in time to allow it appoint Mr Waller's replacement by 31 August 2016.
6. FCG continues to actively search for a new Independent Director.
7. On 25 August 2016, FCG sought a temporary waiver from the requirements of Rule 3.2.1(c).



## Appendix Two

### **Rule 3.2      Appointment of Directors**

Rule 3.2.1      The composition of the Board shall include the following:

- (a) the minimum number of Directors of Fonterra (other than alternate Directors) shall be three; and
- (b) at least two Directors of Fonterra shall be ordinarily resident in New Zealand; and
- (c) the minimum number of Independent Directors shall be two or, if there are eight or more Directors of Fonterra, three or one-third (rounded down to the nearest whole number of Directors of Fonterra) of the total number of Directors of Fonterra, whichever is the greater.

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