

Departmental Disclosure Statement

Dairy Industry Restructuring Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by Jarred Mair of the Ministry for Primary Industries.

The Ministry for Primary Industries certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

3 February 2017

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Part One: General Policy Statement

This Bill amends the Dairy Industry Restructuring Act 2001 (the DIRA) to prevent the expiry of certain provisions in May 2018, and provide for future periodic reviews of the need for regulation to promote the efficient operation of dairy markets in New Zealand. It also removes an element of the regime that contributes least to the DIRA's efficiency and contestability objectives.

Part 2 of the DIRA regulates 4 key aspects of the New Zealand dairy industry: the dairy export quota management system (subpart 3), herd testing and the New Zealand dairy core database (subpart 4), the activities of Fonterra, to promote the efficient operation of dairy markets in New Zealand (subpart 5), and the monitoring of Fonterra's farm gate milk price (subpart 5A).

The need for the DIRA regulatory provisions on Fonterra in subparts 5 and 5A of Part 2 is contingent on sufficient competition developing in New Zealand dairy markets. If or when sufficient competition develops, competitive pressure will drive the efficiency of New Zealand dairy markets, removing the need for the DIRA regulatory provisions to do the same.

An automatic expiry of key provisions in subpart 5 and all of subpart 5A in the South Island was triggered in 2015. A statutorily required report on the state of competition, undertaken by the Commerce Commission, found that competition is not yet sufficient, and that subparts 5 and 5A should remain in place for the time being. The report also recommended that any transition pathway to deregulation should take a staged approach and initially involve removing elements of the regulatory regime that contribute least to efficiency and contestability.

Removal of default expiry, and future reviews

To ensure the efficient operation of New Zealand dairy markets, the Bill prevents parts of subpart 5 and all of subpart 5A from expiring in the South Island, removes the automatic expiry provisions and the market share thresholds that would trigger them, and establishes a process for periodic reviews of the state of competition and the need for regulation of dairy markets in the future.

The Bill requires that the Minister must, during the year beginning 1 June 2020, commission the next report on the state of competition. Following receipt of the report, the Minister must publish a response in the *Gazette* and on the Internet site of the Ministry for Primary Industries. The Minister's response must include a statement as to whether the Minister intends to promote legislation to repeal or amend subpart 5 or 5A before requesting another report. If subparts 5 and 5A are not repealed or amended, the Minister must request a further report on the state of competition no later than 5 years following his or her response.

The Bill also enables a more flexible process for future reviews of the state of competition. Future reviews will allow the Government to assess whether competition is sufficient to ensure the efficient and contestable operation of dairy markets in the absence of the DIRA regulatory regime, and to determine the appropriate regulatory response.

Allowing Fonterra discretion to accept supply from new dairy conversions

The DIRA requires Fonterra to accept all applications to become a shareholding farmer (with limited exceptions that relate to minimum volume to be supplied, and transport costs). This is the “open entry” provision. The “open exit” provisions of the DIRA require that Fonterra must allow shareholding farmers to withdraw without unreasonable restrictions or penalties.

The open entry and exit provisions reduce farmers’ switching costs and risks by enabling them to freely enter and exit Fonterra. This lowers the barriers to entry for independent processors by enabling farmers to leave Fonterra and supply someone else, with the confidence of being able to return to Fonterra in the future. This ensures contestability of the market for farmers’ milk and simulates the competitive pressures that Fonterra would face in a competitive market.

The Bill establishes a third exception to open entry, which allows Fonterra discretion to accept applications that pertain to new dairy conversions. This exception applies only where an application relates to a new collection point that has not been used to supply milk in the 5 years immediately prior to the application being made to Fonterra. In some situations, a new collection point may be established on existing dairy land. The Bill provides that these situations are not captured by the new exception.

The effect of the provisions for the third exception is that Fonterra has discretion to accept an application to become a shareholding farmer that relates to a new collection point if less than 50 % of the land used to supply milk to that point has been used as dairy land in the previous 5 years. The exception allows for existing dairy farms to expand and the references to 5 years allow for land use to change over time to the most efficient use.

To facilitate the application process for Fonterra and farmers, the Bill requires entering farmers, who are not already Fonterra suppliers, to provide evidence that their farm is not a new dairy conversion. The Bill establishes several types of commonly held information as being conclusive evidence that must be accepted by Fonterra.

Other minor and technical amendments

The Bill establishes a new regulation-making power to enable monitoring of the factory gate market (processors selling raw milk to other processors). This

mirrors an existing regulation-making power that allows the Government to monitor the farm gate market (farmers selling raw milk to processors).

The DIRA provides that Fonterra pay a levy to cover the Commerce Commission's costs of enforcing the DIRA. The Bill simplifies the existing Fonterra levy process to no longer require the Minister for Primary Industries to make annual regulations to recover the levy from Fonterra.

The Bill also makes amendments to reflect changes in responsibility for the management of the New Zealand Dairy Core Database.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The DIRA requires that the Minister request a report on the state of competition from the Commerce Commission (or another government agency) once the market share thresholds or the time-bound threshold have been reached. The Commerce Commission's report is linked below.</p> <p><i>Final report – Review of the state of competition in the New Zealand dairy industry – 1 March 2016</i>, Commerce Commission (accessible at http://www.comcom.govt.nz/dmsdocument/14111).</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p><i>Regulatory Impact Statement; Dairy Industry Restructuring Act</i>, Ministry for Primary Industries, 7 September 2016 (accessible at https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/).</p> <p>This document informed the changes to subpart 5 of the DIRA. Small amounts of content have been withheld to protect:</p> <ul style="list-style-type: none"> • information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; and • information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source. <p><i>Regulatory Impact Statement: Transfer of the Dairy Core Database and Herd Improvement Regulatory Review</i>, April 2014 (accessible at https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/).</p> <p>This document informed the decision to enable the transfer of the dairy core database from Livestock Improvement Corporation to DairyNZ. Small amounts of content have been withheld:</p> <ul style="list-style-type: none"> • to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; and • maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty. <p><i>Requirements on Livestock Improvement Corporation and the role of the Access Panel; Regulatory Impact Statement</i>, Ministry for Primary Industries, July 2014 (accessible at https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/).</p> <p>This document informed the changes to subpart 4 of the DIRA. Small amounts of content have been withheld:</p> <ul style="list-style-type: none"> • to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; and • maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty. 	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p>The Treasury provided the following opinion on the regulatory impact statement relating to changes to subpart 5 of the DIRA (and associated regulations):</p> <p>“The RIS relies on analysis by the Commerce Commission and sets out a possible future direction for regulatory decision makers. However, both the costs of the existing regime and the impacts of uncertainty for investors about future regulatory arrangements is unclear – particularly for smaller players and potential entrants. Importantly, the RIS does not identify a preferred option regarding the entrance pathway (the Raw Milk Regulations).” 6 September 2016.</p> <p>The Treasury did not assess the regulatory impact statements relating to changes to subpart 4 of the DIRA. Independent quality assurance was undertaken by the Ministry for Primary Industries.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES
<p>Analysis of the Bill does not indicate any potential for any group of persons to suffer a substantial unavoidable loss of income or wealth. Providing Fonterra discretion to accept applications that relate to new conversions may affect future conversions, which would have otherwise had right of entry to Fonterra, but it will not affect existing dairy farms. The regulatory impact statement for the changes to subpart 5 analysed the impact of the policy to be given effect by this Bill, as did the Commerce Commission's report on the state of competition – both are linked below, along with the regulatory impact statements pertaining to subpart 4.</p> <p><i>Final report – Review of the state of competition in the New Zealand dairy industry – 1 March 2016</i>, Commerce Commission (accessible at http://www.comcom.govt.nz/dmsdocument/14111).</p> <p><i>Regulatory Impact Statement: Transfer of the Dairy Core Database and Herd Improvement Regulatory Review</i>, Ministry for Primary Industries, April 2014 (accessible at https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/).</p> <p><i>Requirements on Livestock Improvement Corporation and the role of the Access Panel; Regulatory Impact Statement</i>, Ministry for Primary Industries, July 2014 (accessible at https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/).</p> <p><i>Regulatory Impact Statement; Dairy Industry Restructuring Act</i>, Ministry for Primary Industries, 7 September 2016 (accessible at https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/).</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The Bill slightly lessens the regulatory requirements on Fonterra by allowing it discretion to accept applications relating to new dairy conversions. The Bill seeks to make the discretion as clear as possible for both Fonterra and applicants, and puts in place an evidentiary process to minimise time for decisions and the possibility of disputes. In the event of any dispute with Fonterra's application of any part of subpart 5 (including the new exception), a person may apply to the Commerce Commission for a determination.</p> <p>MPI will monitor the effect of the new exception to ascertain whether there are any concerns about compliance.</p> <p><i>Final report – Review of the state of competition in the New Zealand dairy industry – 1 March 2016</i>, Commerce Commission (accessible at http://www.comcom.govt.nz/dmsdocument/14111).</p> <p><i>Regulatory Impact Statement; Dairy Industry Restructuring Act</i>, Ministry for Primary Industries, 7 September 2016 (accessible at https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements/).</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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Consultation with the Ministry of Foreign Affairs and Trade. Consultation with MPI's Legal and International Policy teams.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Consultation with Te Puni Kōkiri. Consultation with MPI's Legal team.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at http://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/ .

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?
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YES

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

While the Bill does not create or remove offences or penalties, it does provide that existing offences and penalties that apply to a particular party (Livestock Improvement Corporation Limited) as the manager of the New Zealand Dairy Core Database will now also apply to any other party appointed as the manager of the New Zealand Dairy Core Database.

3.4.1. Was the Ministry of Justice consulted about these provisions?

NO

The Ministry of Justice was not consulted on these provisions, as the amendments to existing penalties are minor, as described above. The Ministry of Justice was consulted regarding any implications for the Bill of Rights Act.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>MPI released a discussion document seeking feedback on proposed amendments to subpart 5 of the DIRA and regulations made under it in response to the Commerce Commission's report on the state of competition.</p> <p>Public meetings were held in Wellington, Hamilton, Stratford, Christchurch, and Invercargill. These meetings were well attended, with between 20 and 70 attendees at each meeting. Participants were a mix of dairy farmers, representatives from Fonterra and other processors, and other interested parties. Individual meetings were held with Fonterra, Goodman Fielder, Federated Farmers, and the six largest independent processors.</p> <p>Submissions could be made over a four week period ending 29 June 2016 through standard post, email and via a survey on MPI's website. MPI received 105 submissions. These submissions expressed a range of views, from those who believed competition was sufficient and that the DIRA provisions should be allowed to expire in the South Island or removed entirely, to those that advocated no lessening of the DIRA requirements.</p> <p>DairyNZ consulted on a proposal to transfer the New Zealand Dairy Core Database from LIC to DairyNZ in 2010, following a recommendation by the Anderson Committee in 2009. MPI consulted on this in 2011 and formally issued a discussion document covering the regulatory regime for the dairy core database in 2012. LIC consulted with its farmer shareholders in 2012, who voted in support of the transfer.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The new exception to open entry for new dairy conversions has been tested at a high level with a dairy farm consultant.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
In clause 26, the Bill amends the regulation-making power to levy Fonterra for the costs of the Commerce Commission to enforce the DIRA. The power to make levy regulations already existed in section 134 of the DIRA, and has been amended to streamline the process for making regulations. The general scope of the power remains the same, and the standard requirements and process for making regulations would apply. The regulation-making power places restrictions around what can be included when calculating the levy, and establishes a specific requirement for the Minister to consult with both Fonterra and the Commerce Commission before recommending the making of regulations.	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill establishes a new exception to the requirement on Fonterra to accept all applications to become a shareholding farmer, relating to new dairy conversions.</p> <p>The Bill also establishes safeguards around this new discretion to accept applications in setting strict criteria around when it may be applied, and a clear process for Fonterra to seek further information if required. The new exception will also be subject to the existing section 120 provisions, which provide that a person can apply to the Commerce Commission for a determination if they have a dispute with Fonterra about the application of subpart 5.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill includes an expansion of existing regulation-making powers at clauses 15-17 to provide for the confidentiality and maintenance of the dairy core database. It extends current regulation making powers, which are able to be applied to LIC, to any previous, current and intended managers of the dairy core database.</p> <p>The Bill includes a new regulation-making power at clause 25 to enable the Minister to require the provision of information from Fonterra and independent processors to monitor the factory gate market. This mirrors an existing power to require the provision of information to monitor the farm gate market, which applies to the same parties (Fonterra and independent processors).</p> <p>The Bill includes a new regulation-making power at clause 25 that enables regulations to specify types of conclusive evidence for applicants to supply to Fonterra to demonstrate that their farm is not a new dairy conversion. The ability to specify conclusive evidence will give Fonterra and applicants greater clarity around what is needed, and make the application and determination process more straightforward.</p> <p>The Bill also amends an existing regulation-making power that enables regulations to levy Fonterra for the Commerce Commission's costs of enforcing the DIRA. The amendments simplify the process, and remove the requirement for the Minister to issue annual regulations for this purpose. The Bill requires that the Minister must consult with Fonterra and the Commerce Commission before making these regulations.</p> <p>The normal process for the development and approval of regulations will apply to all new regulation-making powers.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>The Bill removes the automatic expiry provisions of the DIRA.</p> <p>Currently, these provide that once a 20 percent market share by independent processors is achieved in either the North or South Island, the Minister must request a report on the state of competition. Once the Minister has received the report and gazetted his or her response to it, the Governor-General must by Order in Council declare that most of subpart 5 and all of subpart 5A will cease to apply to the Island in which the market share threshold was reached. The Bill also provides that the Minister must request a report on the state of competition as soon as practicable after 1 June 2015, if the market share thresholds have not been reached at that point.</p> <p>The default expiry requirement imposes an unhelpful additional administrative step, creates uncertainty for the industry, and imposes time and scope constraints on both the report on the state of competition, and the regulatory response. The Bill retains the requirement for a report on the state of competition to be carried out at regular intervals, but at time-bound intervals, rather than being triggered by a market share threshold being reached. The Bill also retains the requirement for the Minister to formally respond to the report, including a requirement to state whether he or she intends to promote legislation to repeal or amend subpart 5 or 5A before requesting another report. This ensures that the need for ongoing regulation of the dairy industry is regularly reviewed.</p>	