

Supplementary Departmental Disclosure Statement

Dairy Industry Restructuring Amendment Bill (No 3)

A supplementary departmental disclosure statement for a Bill the government is proposing to amend seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill in amended form.

It highlights material changes to previous disclosures relating to:

- 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.

The original disclosure statement for the Dairy Industry Restructuring Amendment Bill (No 3) 2019, dated 23 July 2019, can be found at this link:

<http://disclosure.legislation.govt.nz/bill/government/2019/166/>

This supplementary disclosure statement was prepared by 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.

16 July 2020

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The Main Areas of Change to the Original Disclosures

This is a supplementary disclosure statement for the Dairy Industry Restructuring Amendment Bill (No.3) 2019.

A supplementary disclosure statement supplements the original disclosure statement for the Bill by reporting the additions and changes that would need to be made to the original disclosure statement to accurately reflect the Bill with the proposed government amendments incorporated.

Where the Bill now also incorporates changes made by a select committee of the House, the supplementary disclosure statement will note these if relevant but will not explain them further.

The main areas of change to the original disclosure statement include:

- providing for the removal of open entry to Fonterra on a different basis than that recommended by the Primary Production Select Committee in its report on this Bill;
- clarifying the difference between the base milk price and the farm gate milk price;
- improving the definition of the term asset beta in section 150C of the Dairy Industry Restructuring Act 2001;
- changing commencement dates to allow a further year for the commencement of various provisions; and
- making consequential and technical drafting changes.

Part One: General Policy Statement

The original policy statement for the Bill as introduced can be found at:

<http://disclosure.legislation.govt.nz/bill/government/2019/166/>

The Primary Production Select Committee reported the Bill back to Parliament with a significant policy change. It recommended that the open entry requirements on Fonterra be repealed. These requirements, introduced in 2001, were the cornerstone of the original Act, and were intended to incentivise Fonterra to price its input (farmers' milk) efficiently.

The Bill as reported back removes this regulatory discipline on Fonterra. The Select Committee's rationale for removal was that open entry imposed costs on Fonterra by forcing the company to maintain excess processing capacity to accommodate unforeseen additional milk supply.

The Select Committee retained open entry in two instances:

- Existing Fonterra shareholders continue to have the right to increase supply to Fonterra and Fonterra must accept all additional milk that existing shareholders wish to sell.
- The Select Committee also recommended a new provision to give automatic right of entry and supply to Fonterra for 'first-time' farmers, in order to encourage succession in dairying.

The SOP makes a change to the Bill as reported back. It removes the 'first-time' farmer provision, which the Select Committee acknowledged presented definitional challenges, and which risked unintended consequences.

Instead, the SOP requires that Fonterra, when exercising discretion as to whether to accept or reject an application to become a shareholder, must have regard to:

- the effect of its decision on the ongoing viability of the farm, if the farm had a supply agreement with Fonterra in the previous season (so that, if the farm was sold in the previous season, Fonterra must consider the effect on the farm's viability if it does not obtain a new supply contract with Fonterra); and
- the importance of farmers having the opportunity to enter the dairy industry (so that Fonterra could give some weight to whether or not the application is from a new farmer).

These amendments balance the importance of these issues to farmers with Fonterra's ability to better manage its milk supply and investment in processing capacity.

As a consequence of this change in policy, the SOP also repeals existing exceptions by which Fonterra may decline an application, and removes two new exceptions. This is because Fonterra will have more discretion as to whether or not to accept an application and therefore does not need to rely on specific exceptions.

Similarly, Fonterra does not need to rely on extended periods for capacity constraint notices and the SOP therefore removes a provision in the Bill as introduced which would have extended the period for such notices from one season to three.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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| 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 Commerce Commission's report, titled: <i>Final report – Review of the state of competition in the New Zealand dairy industry – 1 March 2016</i>, is accessible at: https://comcom.govt.nz/_data/assets/pdf_file/0018/62370/Final-report-Review-of-the-state-of-competition-in-the-New-Zealand-Dairy-Industry-1-March-2016.pdf</p> <p>Independent economic analysis commissioned by the Ministry for Primary Industries from Frontier Economics, which can be found at: https://www.mpi.govt.nz/dmsdocument/31389/direct https://www.mpi.govt.nz/dmsdocument/31392/direct</p> | |

Relevant international treaties

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

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| 2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill? | YES |
| <p>A RIA was prepared in 2018 that informed the original decisions that gave rise to the Bill as introduced. See: https://www.mpi.govt.nz/dmsdocument/34782-mo-redactions-for-public-release-regulatory-impact-assessments-watermarked-redacted</p> <p>For information on previous Regulatory Impact Assessment for the Bill as introduced, see: http://disclosure.legislation.govt.nz/bill/government/2019/166/</p> <p>A further RIA was prepared to inform decisions relating to policy changes considered by Cabinet when the Bill was reported back to Parliament. This addressed the Select Committee's recommendation to remove the open entry requirements in the original Act. This RIA, <i>Regulatory Impact Assessments: Proposed Amendments to the Dairy Industry Restructuring Amendment Bill No 3</i>, has, at time of writing this disclosure statement, not yet been published, but it will be available on MPI's website: https://www.mpi.govt.nz/law-and-policy/legal-overviews/regulatory-impact-statements</p> | |

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| 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>On 14 May 2020, the Treasury provided the following opinion on the latest Regulatory Impact Assessment:</p> <p>A joint review panel with representatives from Treasury's Regulatory Quality Team, the Ministry for Business, Innovation and Employment and Ministry for Primary Industries has reviewed the Regulatory Impact Assessment (RIA) "Proposed Amendments to the Dairy Industry Restructuring Amendment Bill No 3" produced by the Ministry for Primary Industries and dated 2 June 2020. The review team considers that it meets the Quality Assurance criteria.</p> <p>The RIA compares the option recommended in the Cabinet paper (remove open entry) with the option originally in the Bill (maintain open entry with additional exceptions). Overall, the RIA clearly identifies the costs, benefits, impacts and uncertainties of the two options.</p> <p>The preferred option in the RIA differs from the Cabinet paper. Retaining open entry is the preferred option in the RIA because the estimated loss in dynamic efficiency and innovation from removing open entry is greater than the potential savings to Fonterra through the reduction in spare processing capacity.</p> <p>There has been no specific consultation on this option. However, a number of alternatives were canvassed before the Select Committee process.</p> <p>For the opinion provided by Treasury on the Regulatory Impact Assessment for the Bill as introduced, see http://disclosure.legislation.govt.nz/bill/government/2019/166/</p> | |

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| 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? | YES |
| <p>The SOP makes a change to the Bill as introduced and to the Bill as reported back to Parliament by the Select Committee. It requires Fonterra, when exercising its discretion to accept or decline an application to become a shareholder, to have regard to:</p> <ul style="list-style-type: none"> • the effect of its decision on the ongoing viability of the farm, where a Fonterra farm has changed hands; and • the importance of farmers having the opportunity to enter the dairy industry. <p>This addition has not been the subject of a RIA.</p> | |

Extent of impact analysis available

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

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| 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>There is analysis available on the potential impacts of removing open entry, which was undertaken in relation to the Bill as introduced. See: http://disclosure.legislation.govt.nz/bill/government/2019/166/ and associated regulatory impact analysis referenced above.</p> <p>However, no analysis has been specifically undertaken on the new obligation on Fonterra introduced by the SOP, as outlined above.</p> | |

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| 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? | NO |
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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?

Consultation with the Ministry of Foreign Affairs and Trade.

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 and Te Arawhiti.

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

The Ministry of Justice was consulted on the Bill as introduced. 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:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

NO

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

NO

The SOP does not introduce any new penalties or offences.

The Bill as introduced applies the existing offence in section 150E(3) to a new provision that would require Fonterra to appoint one member of its Milk Price Panel on the nomination of the Minister of Agriculture.

The Bill as introduced provides for the existing offences and penalties that currently apply to Livestock Improvement Corporation Limited, as the manager of the New Zealand Dairy Core Database, to now 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?

YES

The Ministry of Justice was consulted.

Privacy issues

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| 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 |
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External consultation

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| 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>There has been no consultation on the amendments implemented by the SOP, namely an obligation on Fonterra to have regard to certain criteria when considering whether to accept or decline an application.</p> <p>Extensive consultation informed the Bill as introduced, on the basis of the discussion paper found here :</p> <p>https://www.mpi.govt.nz/dmsdocument/31410-review-of-the-dairy-industry-restructuring-act-2001-discussion-document .</p> <p>The Select Committee heard numerous submissions prior to reporting an amended Bill back to Parliament.</p> | |

Other testing of proposals

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| 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? | NO |
| <p>As discussed above, the amendments given effect by the SOP have not been the subject of analysis or consultation.</p> | |

Part Four: Significant Legislative Features

Compulsory acquisition of private property

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

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| 4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax? | YES |
| The SOP does not make any changes in respect of fees, levies or charges. | |
| The Bill as introduced amends the regulation-making power to levy Fonterra for the costs of the Commerce Commission to administer the DIRA. The power to make levy regulations already existed in section 134 of the DIRA, and is being 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. | |

Retrospective effect

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| 4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively? | NO |
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Strict liability or reversal of the usual burden of proof for offences

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| 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 |
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Civil or criminal immunity

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| 4.5. Does this Bill create or amend a civil or criminal immunity for any person? | NO |
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Significant decision-making powers

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| 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 SOP requires Fonterra to have regard to specific criteria when making a decision as to whether to accept or reject an application to become a shareholder.</p> <p>It also removes two exceptions included in the Bill as introduced that permitted Fonterra to reject an application if the application was in relation to a new conversion or the applicant would be unlikely to comply with Fonterra’s terms of supply. These exceptions were predicated on the retention of the open entry requirement. As this requirement is to be repealed, Fonterra will not need to rely on specific exceptions to reject an application.</p> | |

Powers to make delegated legislation

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| 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 |
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| 4.8. Does this Bill create or amend any other powers to make delegated legislation? | YES |
| <p>The SOP does not introduce any powers to make delegated legislation.</p> <p>The Bill as introduced included a number of provisions that are unchanged by the SOP:</p> <ul style="list-style-type: none"> • A new regulation-making power and regulations to require the provision of information from Fonterra and independent processors to enable MPI to monitor the developments in the wholesale (e.g., processor to processor trades) milk market. This mirrors an existing power to require the provision of information to monitor the farm gate (farmers to processors trades) milk market. • A new regulation-making power to enable 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 could provide Fonterra and farmers with greater clarity, and make the application and determination process more straightforward. • Amendment of an existing regulation-making power that provides for a levy to be imposed on Fonterra to recover the costs incurred by the Commerce Commission in administering the DIRA. The amendments would allow for the current levy regulation-making process to be simplified, while retaining the existing requirement for the Minister to consult with Fonterra and the Commerce Commission before making these regulations. • 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 Livestock Improvement Corporation, to any previous, current and intended managers of the Dairy Core Database. <p>The standard process for the development and approval of regulations will apply to all new regulation-making powers.</p> | |

Any other unusual provisions or features

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| 4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment? | NO |
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