

In Confidence

Office of the Minister of Agriculture
Chair, Cabinet Legislation Committee

Dairy Industry (Fonterra Levy) Regulations 2019

Proposal

1. The Minister of Agriculture is seeking authorisation to submit an annual levy order to the Executive Council: the Dairy Industry (Fonterra Levy) Regulations 2019.
2. The proposed regulations would require Fonterra Co-operative Group Limited (Fonterra) to pay the Crown a total of \$509,847 (excluding GST) for the 2018/19 financial year to cover the costs of the Commerce Commission's administration of the Dairy Industry Restructuring Act 2001 (DIRA).
3. These annual levy-setting regulations are being referred directly to the Cabinet Legislation Committee, because the regulations are routine and do not require any new policy decisions.

Policy

4. The DIRA promotes the efficient operation of dairy markets in New Zealand, given Fonterra's dominant market position.
5. The Commerce Commission has a monitoring, adjudication and enforcement role under the DIRA. This includes monitoring of the base milk price setting mechanism that Fonterra uses to determine how much it pays its farmers for milk (milk price monitoring), and any investigations, determinations and enforcement that the Commerce Commission carries out in relation to Fonterra's obligations under the DIRA.
6. The DIRA provides for regulations to require Fonterra to pay a levy in each financial year to meet the Commerce Commission's costs. The policy rationale for Fonterra paying this levy is that Fonterra should meet the costs of regulation relating to its dominant market position in the dairy industry.
7. The DIRA specifies which of the Commerce Commission's functions may be included in its estimate of costs to be recovered from Fonterra, and which functions must be excluded (section 134(4)). In particular, the Fonterra levy may include the Commerce Commission's costs of:
 - 7.1 its base milk price monitoring function;
 - 7.2 making determinations in relation to Fonterra's obligations under the DIRA; and
 - 7.3 enforcing determinations in the High Court.

8. Costs that are not able to be levied and are therefore funded by the Crown include:
 - 8.1 the costs of the Commerce Commission taking other proceedings in the High Court (met from the Commerce Commission's litigation fund); and
 - 8.2 the costs of investigations not related to a complaint or determination.
9. The Commerce Commission's activities are demand-driven, which means that estimates may, and often do, differ from actual costs. In recognition of this, the DIRA allows the Minister to deduct over-recoveries or add under-recoveries from previous financial years when establishing a levy. This ensures that the levy reflects the Commerce Commission's actual costs as closely as possible.
10. The Minister of Agriculture recommends that a total levy of \$509,847 (excluding GST) be imposed on Fonterra to fund the Commerce Commission activities for the 2018/19 financial year. This levy is broken down as follows:
 - 10.1 the Commerce Commission's estimated expenditure of \$436,974 (excluding GST) for the 2018/19 financial year; and
 - 10.2 the under-recovery of \$72,873 (excluding GST) in the 2017/18 financial year, which arose due to the Commission undertaking additional work under its base milk price monitoring function during the 2017/18 financial year.
11. As anticipated when the monitoring regime commenced in 2012, the original downwards trend in the overall amount of the levy is starting to flat-line, reflecting the maturity of the base milk price monitoring regime. The table below sets out a summary of levies charged, and adjustments, in the last three financial years alongside the proposals for 2018/19.

Factors influencing levy amount	2015/16	2016/17	2017/18	2018/19 (Proposed)
Commerce Commission's actual costs for the financial year	\$540,855	\$467,151	\$574,424	N/A
Commerce Commission's estimate of costs for the financial year	\$654,303	\$516,849	\$501,551	\$436,974
Amount of adjustment from previous financial year's levy (over-recovery)	(\$36,176)	(\$113,448)	(\$49,698)	72,873
Total Levy Amount (exc. GST)	\$618,127	\$403,401	\$451,853	\$509,847

Upcoming changes to the Fonterra levy-setting process

12. The current Fonterra levy-setting process has long been identified as administratively costly. The process could be streamlined, but this requires a minor and technical legislative change. This change will be pursued as part of the upcoming legislative change process arising from the review of the DIRA and its impact on the dairy industry's performance.

Timing and 28-day rule

13. The regulations will come into force 28 days after notification in the Gazette.

Impact Analysis

14. A Regulatory Impact Assessment (RIA) was not prepared for this proposal. A RIA is not required on the basis that these regulations make minor, machinery of government changes to existing arrangements.

Compliance

15. The proposed Dairy Industry (Fonterra Levy) Regulations 2019 comply with:
 - 15.1 Principles of the Treaty of Waitangi;
 - 15.2 Rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 15.3 Principles and guidelines set out in the Privacy Act 1993;
 - 15.4 Relevant international standards and obligations; and
 - 15.5 LAC Guidelines: Guidelines on Process and Content of Legislation, a publication by the Legislation Advisory Committee.

Regulations Review Committee

16. The Minister of Agriculture does not consider that there are any grounds for the Regulations Review Committee to draw the regulations to the attention of the House under Standing Order 315.

Certification

17. The draft regulations have been certified by Parliamentary Counsel Office as being in order for submission to Cabinet.

Consultation

18. The Ministry of Business, Innovation and Employment, the Treasury, and the Commerce Commission were consulted on the proposed levy regulations. None of these agencies objected to the proposed levy amount. The Department of the Prime Minister and Cabinet was also informed of the proposed regulations.

19. As required by section 134(8) of the Dairy Industry Restructuring Act 2001, the Minister of Agriculture has consulted Fonterra on this proposal, and Fonterra has agreed to the proposed levy amount.

Proactive Release

20. Following Cabinet consideration the Minister of Agriculture intends to consider the release of this paper, with certain redactions in line with the Official Information Act 1982.
21. Once the regulations are made, the Ministry for Primary Industries will inform Fonterra to initiate payment.

Proactively Released

Recommendations

The Minister of Agriculture recommends that the Committee:

1. **note** that the Dairy Industry Restructuring Act 2001 provides for regulations to be made each financial year to require Fonterra to pay the Crown a levy to meet the Commerce Commission's costs of administering the provisions under the Act;
2. **note** that the Dairy Industry (Fonterra Levy) Regulations 2019 will require Fonterra to pay the Crown a total of \$509,847 (excluding GST) for the 2018/19 financial year;
3. **note** that Fonterra has been consulted on the proposed levy amount, as required by section 134(8) of the Dairy Industry Restructuring Act 2001, and has written accepting the proposed levy amount;
4. **agree** to authorise the submission to the Executive Council of the Dairy Industry (Fonterra Levy) Regulations 2019.

Authorised for lodgement

Hon Damien O'Connor
Minister of Agriculture