



Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Act 2022

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Date of assent 28 November 2022
Commencement see section 2

Contents

	Page
1 Title	3
2 Commencement	3
3 Principal Act	3
Part 1	
Amendments to subpart 5 of Part 2	
4 Section 72 amended (Overview)	3
5 Section 109L amended (New co-op's obligations in relation to market in co-operative shares and to new co-op fund)	3
6 New sections 109LA and 109LB inserted	3
109LA New co-op must commission financial markets research and analysis about its performance	4
109LB New co-op must keep list of financial markets research and analysis about its performance	4
7 Section 109M amended (Restrictions on new co-op)	4
8 Section 118 amended (Offences)	5
9 Section 134 amended (New co-op must pay levy)	5
10 New section 135A inserted (Dividends and retentions policy)	5
135A Dividends and retentions policy	5
11 Sections 140 to 146 and cross-heading above section 140 repealed	5
12 Section 148 amended (Commission input)	5
Part 2	
Other amendments	
13 Section 5 amended (Interpretation)	6

14	Section 150B amended (Certain assumptions do not detract from purpose of subpart)	6
15	Section 150D amended (Milk Price Panel)	6
16	Section 150E amended (Appointment of members of panel)	6
17	New section 150EA inserted (Calculation of base milk price)	7
	150EA Calculation of base milk price	7
18	Section 150I amended (Commission's report)	8
19	New section 150JA inserted (Milk price manual review information to be published)	8
	150JA Milk price manual review information to be published	8
20	Section 150L amended (New co-op must provide Commission with milk price manual and other information)	9
21	Section 150P amended (Commission's report)	9
22	New section 150QA inserted (Base milk price calculation review information to be published)	9
	150QA Base milk price calculation review information to be published	9
23	Section 150T amended (New co-op must provide Commission with certain information)	9
24	Section 150U amended (Draft Commission report)	9
25	New sections 150UA to 150UD and cross-heading inserted	9
	<i>Directions relating to Commission reviews</i>	
	150UA Commission may give directions in relation to reviews	10
	150UB Criteria for giving directions	10
	150UC Process for giving directions	10
	150UD Amendment and revocation of directions	11
26	Section 150V and cross-heading repealed	11
27	New subpart 5B of Part 2 inserted	11
	Subpart 5B—Enforcement	
	150W Jurisdiction of High Court	11
	150X Meaning of relevant provision	11
	150Y Court may order new co-op to comply with direction	11
	150Z Pecuniary penalties	11
	150ZA Defences for person in contravention of relevant provision	12
	150ZB Defences for person involved in contravention of relevant provision	12
	150ZC Injunctions	13
	150ZD Actions for damages	13
	150ZE Miscellaneous	13
	150ZF Application of Commerce Act 1986 provisions	14
	150ZG Additional proceedings	15
28	Schedule 1 amended	15

Schedule
New Part 2 inserted into Schedule 1

16

The Parliament of New Zealand enacts as follows:**1 Title**

This Act is the Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Act 2022.

2 Commencement

- (1) This Act, other than the provisions specified in subsection (2), comes into force on 1 June 2023.
- (2) Sections 9(1) and (2), 14, 18, 21, 23(1), and 24 come into force on 1 January 2023.

3 Principal Act

This Act amends the Dairy Industry Restructuring Act 2001.

Part 1
Amendments to subpart 5 of Part 2

4 Section 72 amended (Overview)

Replace section 72(10) with:

- (10) Sections 135 to 139 contain general provisions.

5 Section 109L amended (New co-op's obligations in relation to market in co-operative shares and to new co-op fund)

- (1) Replace section 109L(1) with:
 - (1) New co-op must ensure that there are 1 or more market makers in co-operative shares who—
 - (a) are designated a market maker under the market rules of the licensed market on which the co-operative shares are quoted; and
 - (b) operate during the periods of operation of the licensed market on which the co-operative shares are quoted.
- (2) After section 109L(2), insert:
- (3) In this section, **market rules** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013.

6 New sections 109LA and 109LB inserted

After section 109L, insert:

109LA New co-op must commission financial markets research and analysis about its performance

- (1) New co-op must commission, on an ongoing basis, financial markets research and analysis in respect of new co-op's performance.
- (2) New co-op must ensure that the commissioned financial markets research and analysis—
 - (a) is free from bias and independent of new co-op; and
 - (b) provides credible analysis.
- (3) New co-op must make the commissioned financial markets research and analysis publicly accessible.

109LB New co-op must keep list of financial markets research and analysis about its performance

- (1) New co-op must keep and maintain a list of financial markets research and analysis relating to new co-op's performance.
- (2) New co-op must ensure that the list—
 - (a) reflects a diverse range of financial markets research and analysis of new co-op's performance (to the extent that the research and analysis is readily available); and
 - (b) is regularly updated to maintain currency.
- (3) New co-op must make the list publicly accessible.
- (4) New co-op must ensure that the following are complied with in relation to each item of financial markets research and analysis on the list:
 - (a) the item is a credible analysis of new co-op's performance; and
 - (b) the item is accompanied by information that describes the extent, if any, of new co-op's involvement in the preparation of the item; and
 - (c) the item is available to be accessed; and
 - (d) the item is accompanied by information about how to access the item or a means of accessing the item.
- (5) New co-op may include in the list additional information that is not an item of analysis. Any additional information must be clearly identified in the list as additional information.

7 Section 109M amended (Restrictions on new co-op)

- (1) After section 109M(1), insert:
 - (1A) Despite subsection (1)(c) and (d), subsection (2) does not apply to conduct by new co-op that—
 - (a) restricts the exchange of co-operative shares for new co-op fund securities by setting a limit on the number of new co-op shares that may be exchanged for new co-op fund securities; or

(b) prevents the exchange of co-operative shares for new co-op fund securities when a limit referred to in paragraph (a) has been reached.

- (2) In section 109M(2)(a), replace “section 73(1)” with “section 73(2)”.
- (3) In section 109M(2)(b), replace “section 73(2)” with “section 73(1)”.

8 Section 118 amended (Offences)

After section 118(1)(b), insert:

- (c) fails, without reasonable excuse, to comply with the requirements of section 109LA; and
- (d) fails, without reasonable excuse, to comply with the requirements of section 109LB; and
- (e) fails, without reasonable excuse, to comply with the requirements of section 135A:
- (f) fails, without reasonable excuse, to comply with the requirements of a notice given under section 150ZF(2)(a), (b), or (c).

9 Section 134 amended (New co-op must pay levy)

- (1) In section 134(1), replace “in each financial year” with “for each financial year”.
- (2) In section 134(3), replace “in each of those years” with “for each of those years”.
- (3) In section 134(4)(a)(i), after “determinations”, insert “and directions”.
- (4) In section 134(4)(a)(iii), after “determinations”, insert “and directions”.
- (5) In section 134(4)(b)(ii), after “this subpart”, insert “, or directions made under subpart 5A”.

10 New section 135A inserted (Dividends and retentions policy)

After section 135, insert:

135A Dividends and retentions policy

- (1) New co-op must keep and maintain a dividends and retentions policy.
- (2) New co-op must make the policy publicly accessible.

11 Sections 140 to 146 and cross-heading above section 140 repealed

Repeal sections 140 to 146 and the cross-heading above section 140.

12 Section 148 amended (Commission input)

In section 148(2), replace “section 145” with “section 150ZF”.

Part 2

Other amendments

13 Section 5 amended (Interpretation)

In section 5(1), insert in their appropriate alphabetical order:

personal information has the meaning given by section 7(1) of the Privacy Act 2020

publicly accessible, in relation to making a document or information accessible, means that the document or information is available for inspection, free of charge, on an Internet site that is accessible to the public at all reasonable times (except to the extent that making the document or information available would infringe copyright in the material in question or is inconsistent with any enactment or rule of law)

14 Section 150B amended (Certain assumptions do not detract from purpose of subpart)

In section 150B, insert as subsection (2):

- (2) Subsection (1) does not extend to the way in which new co-op uses an assumption in setting the base milk price.

15 Section 150D amended (Milk Price Panel)

In section 150D(3)(a), after “price”, insert “carried out by the person or persons engaged under section 150EA”.

16 Section 150E amended (Appointment of members of panel)

- (1) Replace section 150E(1) and (1A) with:

- (1) New co-op must appoint—
- (a) 2 members nominated by the Minister to the panel; and
 - (b) a chair of the panel nominated by new co-op who has been approved by the Minister; and
 - (c) 2, 3, or 4 more members to the panel; and
 - (d) an additional member nominated by the Minister if the chair is a member nominated by the Minister.

- (1A) Members appointed on the nomination of the Minister must be appointed on the same terms and conditions as other members appointed by new co-op to the panel.

- (2) After section 150E(2), insert:

- (2A) New co-op must ensure at all times that the chair does not have a meaningful association with new co-op or with a shareholding farmer, for example, the chair must not be—

- (a) a sitting director of new co-op, a member of new co-op's Co-operative Council, or a current panel member appointed by that council; or
 - (b) a relative of a person described in paragraph (a); or
 - (c) an associated person or an employee of a person described in paragraph (a).
- (2B) The obligation in subsection (2A)—
- (a) is in addition to the obligation in subsection (2); and
 - (b) applies regardless of how a position or relationship referred to in subsection (2A)(a) to (c) is described in new co-op's constitution or any other document.
- (3) In section 150E(3), replace “(1A) or (2)” with “(1), (1A), (2), or (2A)”.

17 New section 150EA inserted (Calculation of base milk price)

After section 150E, insert:

150EA Calculation of base milk price

- (1) New co-op must engage 1 or more persons to calculate a base milk price that will enable the panel to perform its function under section 150D(3).
- (2) New co-op must ensure that a person—
 - (a) is engaged to provide the service for a term of no more than 6 consecutive seasons; and
 - (b) is not re-engaged to provide the service until at least 4 seasons have passed since the end of their previous term.
- (3) New co-op must ensure that a person it engages to provide the service—
 - (a) is independent of new co-op; and
 - (b) operates at arm's length in relation to new co-op when providing the service.
- (4) The requirements in subsection (2) apply, in respect of a person that is an entity, to the entity and its key personnel.
- (5) In this section,—

arm's length includes, without limiting the ordinary meaning of the expression, having relationships, dealings, and transactions that—

 - (a) do not include elements that parties in their respective positions would usually omit, if the parties were—
 - (i) connected or related only by the transaction or dealing in question; and
 - (ii) acting independently; and
 - (iii) each acting in their own best interests; and

- (b) do not omit elements that parties in their respective positions would usually include, if the parties were—
 - (i) connected or related only by the transaction or dealing in question; and
 - (ii) acting independently; and
 - (iii) each acting in their own best interests

key personnel, in respect of an entity, means—

- (a) a director, partner, trustee, or senior manager of the entity who has a role in providing the service; and
- (b) senior personnel engaged by the entity for the purpose of providing the service

service means the calculation of the base milk price described in subsection (1).

- (6) If, without reasonable excuse, new co-op contravenes subsection (1), (2), or (3), it commits an offence and is liable on conviction to a fine not exceeding \$200,000 and a fine of \$10,000 for each day that the offence continues.

18 Section 150I amended (Commission’s report)

After section 150I(1), insert:

- (1A) To avoid doubt, a report under subsection (1) may include the extent to which the way new co-op uses an assumption described in section 150B(1) in relation to the milk price manual is consistent with the achievement of the purpose set out in section 150A.

19 New section 150JA inserted (Milk price manual review information to be published)

After section 150J, insert:

150JA Milk price manual review information to be published

- (1) New co-op must make all non-sensitive information publicly accessible within 20 working days after the date on which the Commission makes its final report publicly available under section 150J.
- (2) In this section, **non-sensitive information** means information that has been requested by or provided to the Commission in relation to the review of the milk price manual and that new co-op reasonably considers is not—
 - (a) commercially sensitive; or
 - (b) subject to legal professional privilege; or
 - (c) personal information.

20 Section 150L amended (New co-op must provide Commission with milk price manual and other information)

In section 150L(b), replace “setting of the base milk price” with “milk price manual”.

21 Section 150P amended (Commission’s report)

After section 150P(1), insert:

- (1A) To avoid doubt, a report under subsection (1) may include the extent to which the way new co-op uses an assumption described in section 150B(1) in calculating the base milk price is consistent with the achievement of the purpose set out in section 150A.

22 New section 150QA inserted (Base milk price calculation review information to be published)

After section 150Q, insert:

150QA Base milk price calculation review information to be published

- (1) New co-op must make all non-sensitive information publicly accessible within 20 working days after the date on which the Commission makes its final report publicly available under section 150Q.
- (2) In this section, **non-sensitive information** means information that has been requested by or provided to the Commission in relation to the review of the calculation of the base milk price and that new co-op reasonably considers is not—
- (a) commercially sensitive; or
 - (b) subject to legal professional privilege; or
 - (c) personal information.

23 Section 150T amended (New co-op must provide Commission with certain information)

- (1) In section 150T, replace “1 July” with “15 June”.
- (2) In section 150T, insert as subsection (2):
- (2) New co-op must, no later than 5 working days before 15 September in each year, provide to the Commission the panel recommendations described in section 150D(3)(c) in relation to the setting of the base milk price.

24 Section 150U amended (Draft Commission report)

- (1) In section 150U(1), replace “15 August” with “1 August”.
- (2) In section 150U(2), replace “1 September” with “15 August”.

25 New sections 150UA to 150UD and cross-heading inserted

After section 150U, insert:

*Directions relating to Commission reviews***150UA Commission may give directions in relation to reviews**

- (1) The Commission may, by notice, direct new co-op to do 1 or more of the following in the manner specified in the notice:
 - (a) take any action in relation to a matter referred to in any of the following reports:
 - (i) a report made under section 150I:
 - (ii) a report made under section 150P:
 - (b) publish any information requested by or provided to the Commission as part of a review under section 150H or 150O (whether or not the information is actually provided to the Commission).
- (2) A direction must state—
 - (a) the date by which, or period within which, the direction must be complied with; and
 - (b) the reasons for which it is given.
- (3) New co-op must comply with a direction given under this section.

150UB Criteria for giving directions

- (1) The Commission may only give a direction that is consistent with the purpose set out in section 150A.
- (2) A direction under section 150UA(1)(b) is consistent with the purpose set out in section 150A for the purpose of subsection (1).
- (3) A direction under section 150UA(1)(b) to publish information applies despite sections 150JA and 150QA if the Commission is satisfied that the information is not—
 - (a) commercially sensitive; or
 - (b) subject to legal professional privilege; or
 - (c) personal information.

150UC Process for giving directions

- (1) Before giving a direction (the **proposed direction**), the Commission must—
 - (a) make the proposed direction and the reasons for the proposed direction publicly available; and
 - (b) consult new co-op about the proposed direction (including the Commission's reasons for giving the proposed direction); and
 - (c) have regard to any submissions or evidence provided by the persons consulted.
- (2) If the Commission gives a direction, it must provide the direction to new co-op.

- (3) After providing the direction to new co-op, the Commission must make the direction, and the Commission's reasons for giving the direction, publicly available.

150UD Amendment and revocation of directions

- (1) The Commission may amend or revoke a direction—
- (a) on its own initiative; or
 - (b) at the request of new co-op, if the Commission is satisfied that new co-op has provided the Commission with evidence of reasonable grounds to amend or revoke the direction.
- (2) A direction may be amended or revoked in the same way in which it may be made, except that section 150UC(1) does not apply to an amendment of a direction if the Commission is satisfied that the amendment is only correcting a minor error or is otherwise of a minor nature.

26 Section 150V and cross-heading repealed

Repeal section 150V and the cross-heading above section 150V.

27 New subpart 5B of Part 2 inserted

After section 150V, insert:

Subpart 5B—Enforcement

150W Jurisdiction of High Court

The High Court may hear and determine the following matters:

- (a) applications for orders under section 150Y;
- (b) proceedings for recovering pecuniary penalties under section 150Z;
- (c) applications for injunctions under section 150ZC;
- (d) actions for damages under section 150ZD.

150X Meaning of relevant provision

In this subpart, **relevant provision** means subpart 5 or 5A or regulations made under section 115.

150Y Court may order new co-op to comply with direction

The court may, on application by the Commission, order new co-op to comply with a direction given under section 150UA by a specified date or within a specified period.

150Z Pecuniary penalties

- (1) The court may, on application by the Commission, order a person to pay to the Crown a pecuniary penalty if satisfied that the person—

- (a) has contravened a relevant provision; or
 - (b) has been involved in a contravention of a relevant provision.
- (2) The maximum amount of a pecuniary penalty under subsection (1) is,—
- (a) for contravention of section 150UA or 150Y, \$500,000 in respect of each act or omission; and
 - (b) for any other contravention, the same as the amount that applies under section 80 of the Commerce Act 1986.
- (3) Despite section 150ZF, section 79 of the Commerce Act 1986 does not apply to proceedings under this section.
- (4) In this section and section 150ZB, a person is **involved in a contravention** of a relevant provision if the person—
- (a) has attempted to contravene the provision; or
 - (b) has aided, abetted, counselled, or procured any other person to contravene the provision; or
 - (c) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene the provision; or
 - (d) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of the provision; or
 - (e) has conspired with any other person to contravene the provision.

150ZA Defences for person in contravention of relevant provision

- (1) In any proceeding under section 150Z against a person (**A**) for a contravention of a relevant provision, it is a defence if A proves that—
- (a) A's contravention was due to reasonable reliance on information supplied by another person; or
 - (b) both of the following apply:
 - (i) A's contravention was due to the act or default of another person, or to an accident or to some other cause beyond A's control; and
 - (ii) A took reasonable precautions and exercised due diligence to avoid the contravention.
- (2) For the purposes of subsection (1)(a) and (b)(i), **another person** does not include a director, an employee, or an agent of A.

150ZB Defences for person involved in contravention of relevant provision

- (1) This section applies if—
- (a) a person (**A**) contravenes a relevant provision; and
 - (b) another person (**B**) is involved in the contravention.
- (2) In any proceeding under section 150Z against B for involvement in the contravention of a relevant provision, it is a defence if B proves that—

- (a) B's involvement in the contravention was due to reasonable reliance on information supplied by another person; or
 - (b) B took all reasonable steps to ensure that A complied with the provision.
- (3) For the purposes of subsection (2)(a), **another person** does not include a director, an employee, or an agent of B.

150ZC Injunctions

- (1) If the court is satisfied, on application under subsection (2), that a person has contravened a relevant provision, the court may grant an injunction restraining a person from continuing the contravention.
- (2) An application may be made by—
- (a) the Commission, if the application relates to the contravention of any relevant provision:
 - (b) any other person, if the application relates to the contravention of subpart 5 or regulations made under section 115.

150ZD Actions for damages

- (1) Every person (other than the Commerce Commission) is liable for damages for loss or damage caused by that person engaging in conduct that constitutes a contravention of subpart 5 or regulations made under section 115.
- (2) Sections 82(1) and 82A of the Commerce Act 1986 apply to actions for damages under this section.

150ZE Miscellaneous

- (1) In determining an appropriate penalty under section 150Z, the court must have regard to all relevant matters, including the following:
- (a) for a contravention of subpart 5 or regulations made under section 115, the purpose and principles of subpart 5, as expressed in sections 70 and 71; and
 - (b) for a contravention of subpart 5A, the purpose of subpart 5A, as expressed in section 150A; and
 - (c) the nature and extent of the contravention; and
 - (d) the nature and extent of any loss or damage suffered by any person because of the contravention; and
 - (e) any gains made or losses avoided by the person in contravention; and
 - (f) whether the person in contravention has paid an amount in compensation or taken other steps for reparation or restitution; and
 - (g) the circumstances in which the contravention or other act or omission took place (including whether it was intentional, inadvertent, or caused by negligence); and

- (h) any previous contraventions of a similar nature; and
 - (i) any other relevant matter.
- (2) The standard of proof in proceedings under this subpart is the standard of proof that applies in civil proceedings.
- (3) In any proceedings under this subpart, the Commission, on the order of the court, may obtain discovery and administer interrogatories.
- (4) Proceedings under this subpart may be commenced within 3 years after the matter giving rise to the contravention arose.
- (5) If conduct by a person constitutes a contravention of 2 or more provisions of subpart 5 or 5A, proceedings may be instituted under this subpart against that person in relation to the contravention of 1 or more of the provisions, but no person is liable to more than 1 pecuniary penalty under this subpart for the same conduct.

150ZF Application of Commerce Act 1986 provisions

- (1) The following provisions of the Commerce Act 1986 apply in respect of this subpart and subparts 5 and 5A with all necessary modifications:
- (a) sections 15 to 17 (proceedings of the Commission):
 - (b) sections 74A to 74C (provisions relating to undertakings):
 - (c) sections 77 and 78 (lay members):
 - (d) section 79 (evidence not otherwise admissible):
 - (e) section 88 (general provisions relating to granting of injunctions):
 - (f) section 88A (when undertakings as to damages not required):
 - (g) section 89 (other orders):
 - (h) section 90 (conduct by employees or agents):
 - (i) section 98 (Commission may require person to supply information or documents or give evidence):
 - (j) section 98A (power to search):
 - (k) section 98G (relating to warrants, etc):
 - (l) section 99 (powers of Commission to take evidence):
 - (m) section 100 (powers of Commission to prohibit disclosure of information, documents, and evidence):
 - (n) section 100A (stating case for High Court):
 - (o) sections 101 and 102 (notices):
 - (p) section 103 (offences):
 - (q) section 104 (determinations of Commission):
 - (r) section 106 (proceedings privileged):
 - (s) section 106A (judicial notice):

- (t) section 109 (Commission may prescribe forms).
- (2) For the purpose of carrying out its functions and exercising its powers under a relevant provision, the Commission may, in addition to exercising its powers under section 98 of the Commerce Act 1986, by notice in writing, require new co-op—
- (a) to do either or both of the following, at the time and place specified in the notice, if the Commission has reason to believe new co-op may have information relevant for that purpose:
- (i) prepare and produce, or supply to the Commission, documents and information in relation to any matter specified in the notice:
- (ii) answer any questions in relation to any matter specified in the notice; and
- (b) to have prepared and to produce, or to supply to the Commission, at the time and place specified in the notice, an expert opinion from an appropriately qualified person, or from a member of a class of appropriately qualified persons, as determined by the Commission in relation to any matter specified in the notice; and
- (c) to provide any or all of the following:
- (i) a written statement that states whether or not new co-op has complied with relevant provisions:
- (ii) a report on the written statement referred to in subparagraph (i) that is signed by an auditor in accordance with any form specified by the Commission:
- (iii) sufficient information to enable the Commission to properly determine whether relevant provisions have been complied with:
- (iv) a certificate, in the form specified by the Commission and signed by at least 1 director of new co-op, confirming the truth and accuracy of any information provided under this section.

150ZG Additional proceedings

Proceedings brought under this Part are in addition to any proceedings brought under any other Act.

28 Schedule 1 amended

- (1) In Schedule 1, clause 5(3), replace “sections 140 to 146” with “sections 150W to 150ZG”.
- (2) In Schedule 1,—
- (a) insert the Part set out in the Schedule of this Act as the last Part; and
- (b) make all necessary consequential amendments.

Schedule

New Part 2 inserted into Schedule 1

s 28

Part 2

Provisions relating to Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Act 2022

6 Interpretation

In this Part, **commencement date** means the date on which section 28 of the Dairy Industry Restructuring (Fonterra Capital Restructuring) Amendment Act 2022 comes into force.

7 Calculation of base milk price

- (1) A person that, immediately before the commencement date, was engaged by new co-op to calculate a base milk price is a person engaged by new co-op under section 150EA(1) if the person meets the requirements in section 150EA(3).
- (2) Despite section 150EA(2)(a), the maximum term of engagement for a person referred to in subclause (1) is 2 consecutive seasons starting on the day after the commencement date.

Legislative history

13 September 2022	Introduction (Bill 165–1)
27 September 2022	First reading and referral to Primary Production Committee
10 November 2022	Reported from Primary Production Committee (Bill 165–2)
15 November 2022	Second reading
22 November 2022	Committee of the whole House, third reading
28 November 2022	Royal assent

This Act is administered by the Ministry for Primary Industries.