

Departmental Disclosure Statement

Fuel Industry 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 the Ministry of Business, Innovation and Employment (MBIE).

MBIE certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

25 June 2020

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Part One: General Policy Statement

On 5 December 2019, the Commerce Commission published its final report on its retail fuel market study, which concluded that fuel companies have been making higher profits than would be expected in a workably competitive market. The Commission also found that wholesale prices are higher than it would expect in a workably competitive market and that this flows through to consumers paying higher pump prices.

To address the Commission's findings, the Government is introducing changes to improve competition in the wholesale and retail fuel markets. Cumulatively, these measures are designed to promote greater competition for the long-term benefit of end-users of engine fuel products.

The Bill introduces a number of changes to wholesale market arrangements in the fuel sector to improve transparency of pricing and to provide for rules to ensure that wholesale contracts are transparent and fair. These changes aim to increase wholesale market competition, which should over time lead to lower fuel prices for consumers. These changes include–

- introducing a wholesale pricing regime: 'terminal gate pricing', which requires wholesale fuel suppliers at a storage terminal to publicly post a price at which they will sell specified engine fuel to wholesale customers at that storage terminal on a spot basis. This regime will provide for greater transparency of pricing through requiring posted prices for spot sales of wholesale fuel, and could provide a source of fuel supply for potential entrants to the retail fuel market:
- providing for a regime governing contract terms between wholesale suppliers and their wholesale customers (excluding large end users/commercial customers, such as Fonterra) to ensure that contracts are fair and promote competition:
- providing for dispute resolution scheme (namely mediation and arbitration procedures) to address disputes relating to wholesale market changes outlined above in an accessible, independent, and cost-effective manner:
- providing for regulation-making powers in relation to a range of matters such as terms and conditions for supply under terminal gate pricing, details for contractual requirements and mediation and arbitration procedures.

Additionally, the Bill also provides for–

- requirements for display of certain prescribed information relating to the price of fuel at retail fuel sites. The Bill includes regulation-making powers to prescribe requirements for consumer information relating to the price of engine fuels. Requiring better display of information at retail outlets will assist consumers to compare prices, thereby promoting competition in the fuels market:
- requirements for some fuel industry participants to collect and disclose certain information. This will improve transparency to enable monitoring of the performance of the engine fuels market and to assist in determining whether competition is being promoted for the long term benefit of consumers. The Bill also provides a regulation-making power to prescribe information disclosure requirements:
- powers for the Commerce Commission to enforce the new requirements to carry out any new functions, including civil pecuniary penalties based on those in the Commerce Act 1986 (with maximum penalties of \$500,000 for an individual or \$5,000,000 in any other case).

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 Bill provides for the Government's response to the Commerce Commission's market study into the retail fuel sector. Full information about the market study is available on the Commerce Commission's website, including a copy of the final report which was published on 5 December 2019.</p> <p>https://comcom.govt.nz/about-us/our-role/competition-studies/fuel-market-study#projecttab</p> <p>Other information that informed the development of this Bill includes:</p> <ul style="list-style-type: none">• The 2017 fuel market financial performance study commissioned by MBIE looking at whether retail prices for petrol and diesel were reasonable https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-generation-and-markets/liquid-fuel-market/fuel-market-financial-performance-study-2017/• Weekly monitoring by MBIE of importer margins for petrol and diesel: https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-statistics-and-modelling/energy-statistics/weekly-fuel-price-monitoring/	

Relevant international treaties

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

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Regulatory impact statements for the Fuel Industry Bill are available on the MBIE website:</p> <p>RIS for initial policy decisions 11 December 2019 https://www.mbie.govt.nz/dmsdocument/11214-regulatory-impact-statement-government-response-to-commerce-commissions-retail-fuel-sector-market-study-high-level-decisions</p> <p>RIS for final policy decisions 31 January 2020 https://www.mbie.govt.nz/dmsdocument/11217-regulatory-impact-statement-fuel-industry-bill</p> <p>Annex to RIS May 2020: https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/market-studies/</p>	
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

A Quality Assurance Panel with representatives from the Regulatory Quality Team at the Treasury and Ministry of Business, Innovation, and Employment (MBIE) has reviewed the 'Government response to Commerce Commission Retail Fuel Sector Market Study' Regulatory Impact Assessment (RIA) produced by MBIE in December 2019. On 31 January 2020, the Panel advised that it considers that the RIA meets the Quality Assurance criteria.

While the RIA has been prepared under significant time constraints, MBIE has clearly and completely described the status quo and the problem definition. The RIA outlines a range of options based on the recommendations in the Final Report of the Retail Fuel Sector Market Study by the Commerce Commission, and recognises the interrelationships between the options. It clearly identifies the main beneficiaries and who will likely bear the associated costs.

However, due to time constraints and the complexity of the design, a regulatory backstop regime as part of the terminal gate regime has not been considered at this time. MBIE will continue to develop it with a view that it should be considered by Ministers at a future date and added to the Fuel Industry Bill or Act.

Further, as recognised in the RIA, this regime requires effective monitoring of industry practices to maintain incentives for competitive conduct and allow timely intervention if the regime is not working as intended. There are risks if there is no adequate level of resources from MBIE and the Commerce Commission to carry out these functions.

The updated version of the RIA provided in May 2020 clearly outlines additional policy changes, reasons for these changes, and how these changes affect the preferred option and the overall objectives. It also incorporates stakeholders' views and notes that there will not be significant cost implications.

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
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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
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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?	NO

The MBIE regulatory impact statement referenced in section 2.3 discusses the potential costs and benefits of the policy to be given effect by this Bill, but does not quantify those costs and benefits. More detail is contained in the Commerce Commission's final report in its retail fuel market study referenced in section 2.1.

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 level of effective compliance</p> <p>The level of effective compliance or non-compliance with the obligations outlined in this Bill is dependent on effective monitoring by the Commerce Commission and MBIE of the regime's performance and the realistic prospect of further regulatory intervention if competition does not emerge in a reasonable timeframe.</p> <p>The Government accepted in principle the Commerce Commission's recommendation that a regulatory backstop should be developed to impose price controls if there was evidence of substantial market power in the wholesale supply of petrol and diesel on a local or national basis. However, given the complexity of developing a backstop price control regime, and the urgency in addressing the immediate competition problems identified, a regulatory backstop is not included in this Bill.</p> <p>MBIE is continuing to develop a regime and it is proposed to be incorporated into the regime through a future legislative amendment. In the meantime, the greater transparency provided by the measures in this Bill, and the greater competitive pressure that will result from the regime as a whole, will support a more competitive market.</p> <p>The level of regulator effort</p> <p>MBIE and the Commerce Commission will have new or enhanced functions under the Bill with a particular focus on monitoring and information dissemination about the performance of the regime.</p> <p>The new functions for the Commerce Commission will not be able to be met within existing baselines. MBIE is working with the Commerce Commission to establish what funding would be required to enable it to carry out these new functions, to enable this to be secured before the regime comes into full effect.</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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No separate formal steps have been taken to determine whether the policy to be given effect by the Bill is consistent with New Zealand's international obligations, as the normal policy process did not identify any policy measures as raising any questions of consistency with New Zealand's international obligations.

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?

The provisions in this Bill apply generally to the New Zealand public as participants in the wholesale and retail supply of petrol and diesel. The Bill does not impact on the extraction or development of mineral resources within New Zealand. We consider that the Bill is consistent with the principles of the Treaty of Waitangi.
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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
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Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website at:

https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/

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)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>New offences or penalties</p> <p>Section 29 creates a new civil pecuniary penalty regime for contraventions of the provisions relating to:</p> <ul style="list-style-type: none"> • sections 8 or 10 (terminal gate pricing regime) • sections 14,15, 17(2), or 18(1) (wholesale contractual terms) • section 20 (consumer information requirements) • section 24 (information disclosure requirements) • any ancillary acts related to the provisions in those sections. <p>The amount of any pecuniary penalty must not, in respect of each act or omission, exceed, in the case of an individual, \$500,000, or in any other case, \$5,000,000.</p> <p>Section 28(3) creates a new civil pecuniary penalty for contravention of the provisions of a notice to take corrective action that is given by the Commerce Commission under section 22. The maximum amount of any pecuniary penalty is, in the case of an individual, \$10,000, and in any other case, \$30,000.</p> <p>Only the Commerce Commission may apply for pecuniary penalty orders.</p> <p>Section 41 creates an offence of a range of conduct that would obstruct or knowingly mislead the Commerce Commission, which replicates the offence in section 103 of the Commerce Act 1986.</p> <p>Section 32(i) provides that the offence in section 100 of the Commerce Act 1986, relating to breach of confidentiality orders, also applies to this Act with any necessary modifications.</p> <p>Jurisdiction of the court</p> <p>Further information in response to this question is outlined in Annex One.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>MBIE consulted with the Offences and Penalties team at the Ministry of Justice, including in relation to the civil liability and pecuniary penalty provisions. We responded to a range of queries regarding the design of the regime. The Ministry of Justice did not have any remaining concerns.</p>	

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?	YES
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Subpart 4 of Part 2 provides for a new information disclosure regime for fuel industry participants. This regime is focused on commercial information, but some personal information of company directors or employees may be incidentally included.

Section 25 provides that regulations may specify the information required to be kept or disclosed to the Commerce Commission and MBIE. Section 27 provides that the Commerce Commission and MBIE may periodically publish summary and analysis of the disclosed information.

Section 28 provides that the Commerce Commission and MBIE may share information that they hold in relation their powers, functions or duties under this Act if it would assist the other agency for the purpose of section 23. The two regulators may only share information subject to the appropriate protections to maintain the confidentiality of the information, including the protection of personal information within the meaning of the Privacy Act 1993. Nothing in this section limits the Privacy Act 1993.

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Privacy Commissioner has been consulted and has no comment.	

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>MBIE engaged closely with the Commerce Commission in developing the policy proposals and on a draft of this Bill. MBIE also commissioned Hale & Twomey to provide technical advice and quality assurance on aspects of the policy to be given effect in this Bill.</p> <p>MBIE also conducted targeted consultation with fuel industry participants following the release of the Commerce Commission’s final report for the retail fuel market study to inform the advice to Ministers prior to the Cabinet policy decisions in February 2020.</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 terminal gate pricing regime in subpart 1 of Part 2, the wholesale contract provisions in Subpart 2 of Part 2, and the dispute resolution scheme in sections 43 and 45, are broadly based on the Australian Oil Code (although there are some differences). The Australian Oil Code first came into effect in 2006, but was amended following a review in 2016. This review found that the Australian Oil Code was fit for purpose, and the benefits outweighed any associated costs. A copy of the report can be found here:</p> <p>Oil Code Review Final Report, May 2016, Australian Government Department of Industry, Innovation and Science. https://www.energy.gov.au/publications/oilcode-review-final-report</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
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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?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
See also discussion of impacts on existing wholesale contracts in response to question 4.9.	

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
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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?	NO
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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?	YES
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The Bill allows for certain terms to be defined in regulations and the granting of exemptions in certain cases.

Section 12 provides for regulations to be made to give effect to the terminal gate pricing regime in Part 2. Key provisions that amend or define a term include the making of regulations:

- relating to the definition of “specified engine fuels” to exclude or add a type of engine fuel for the purposes of the terminal gate pricing regime.
- setting the “minimum purchase amount” of fuel, being an amount below which a wholesale supplier is not required to supply on request.
- setting the “time period” over which forecast demand at wholesale suppliers’ own retail sites may be set for the purpose of determining own supply needs.
- specifying further “reasonable grounds to refuse to supply” for a wholesale supplier of specified engine fuel on request at the terminal gate price.
- setting the “minimum supply amount” of fuel that must be supplied by a wholesale supplier within a prescribed “time period” and which would take priority over the wholesale supplier’s own or contracted supply requirements.

Further information in response to this question is included in **Annex Two**.

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill includes a range of regulation-making powers.</p> <p>Section 2 and Clause 2 of Part 1 of Schedule 1 provide for Orders in Council to appoint dates for bringing specified provisions of the Bill into force.</p> <p>These provisions are necessary to allow transitional periods for fuel industry participants and the regulators to prepare for the new requirements. The safeguards are that the clauses include a final date by which the provisions must come into force.</p> <p>Section 12 provides for regulations to be made to give effect to the terminal gate pricing regime in subpart 1 of Part 2. Key provisions include the making of regulations:</p> <ul style="list-style-type: none"> • setting requirements relating to setting and posting terminal gate prices • setting requirements relating to requests by resellers • setting terms and conditions that apply to the sale and supply of specified engine fuel under the terminal gate pricing regime. • setting requirements to publish a notice to relating to the availability of engine fuel for supply under the terminal gate pricing regime in any period. <p>Further information in response to this question is included in Annex Two.</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
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Obligation on wholesale supplier to supply a minimum amount

Sections 10 and 11 impose an obligation on a wholesale supplier that has a right to draw specified engine fuel at a storage facility to supply amounts of that fuel to an eligible reseller on request, unless there are reasonable grounds to refuse to supply. The supply of the fuel is at a terminal gate price set by the wholesale supplier and is therefore fully compensated. However, section 11(2) provides that a wholesale supplier must not refuse to supply a prescribed minimum supply amount of fuel within a specified time period if requested by a certain class of reseller even if that fuel is required to meet the wholesale supplier's own or contracted customer requirements.

This obligation to supply a minimum amount of specified engine fuel is required given the frequency of tight supply in the New Zealand fuel market (referred to in the industry as "port coordination events"). Without this requirement, there is a risk that wholesale suppliers may refuse, or constructively refuse, to supply fuel on a daily basis when fuel supply is constrained. This would undermine the competition benefits of the regime, as any posted terminal gate price would have no information value and any wholesale customer seeking to use the terminal gate regime to bridge supply contracts (e.g. a new entrant seeking new supply) would not have security of fuel supply or leverage to negotiate a new supply contract. The Commerce Commission considered that wholesale suppliers, rather than resellers, are best able to manage tight supply risk.

The potential adverse effects of this supply obligation are mitigated by:

- Setting the prescribed minimum supply amount in regulations after consultation with affected parties. It is envisaged that the prescribed minimum supply amount would be set at an amount that will not impose significant holding costs on the wholesale supplier (e.g. a tanker load or 30,000 litres per week) but this could be varied.
- Limiting the class of reseller that can request the prescribed minimum supply amount to a person that is not interconnected to the wholesale supplier nor has a fixed wholesale contract with the wholesale supplier. These would be new customers at that location and supply to them would promote contestability in the regional wholesale market.

Treatment of existing wholesale contracts

Subpart 2 (wholesale contract terms) of Part 2 sets out new requirements for wholesale contracts for any engine fuel. These new requirements relate to matters such as: the contract being expressed in clear language (section 14), the transparency of the pricing methodology for fuel supplied (section 15), the duration and exclusivity of the contract (sections 16 and 17), and other provisions that may unreasonably limit the ability of the reseller to compete (section 18).

Part 1 of Schedule 1 of the Bill provides for a phased commencement of these provisions. That is:

- this subpart will apply to new wholesale contracts after a period of up to 1 year.
- section 16 (right to terminate certain fixed term wholesale contracts) will apply to existing wholesale contracts after a transitional period of up to 1 year.
- the rest of the subpart will apply to existing wholesale contracts after a transitional period of up to 2 years.

These provisions are not retrospective in effect. They allow a transitional period of up to two years for wholesale suppliers to amend their existing fuel supply contracts in negotiation with their distributors and dealers. After the end of the transitional period, non-compliant provisions in contracts will be unenforceable. This provision is necessary to support an active wholesale market and promote competition.

Annex One: Further Information Relating to Part Three

Offences, penalties and court jurisdictions- question 3.4

Jurisdiction of the court

Sections 39 and 40 set out the jurisdiction of the High Court and District Court respectively.

The High Court must hear and determine the following matters:

- applications by the Commerce Commission for orders to enforce undertakings under section 74C of the Commerce Act
- proceedings to determine whether a provision of a wholesale contract is prohibited under section 18
- proceedings for the recovery of pecuniary penalties under section 29(1)
- applications for orders for compensation under section 31
- applications for injunctions under sections 34 or 35
- applications for other orders under section 38.

The District Court must hear and determine the following matters:

- proceedings for the recovery of pecuniary penalties under section 29(3)
- proceedings for offences relating a range of conduct that would obstruct or knowingly mislead the Commerce Commission under section 41
- proceedings for offences relation to breach of confidentiality orders under section 100 of the Commerce Act.

Annex Two: Further Information Relating to Part Four

Powers to make delegated legislation- question 4.7

Section 19 provides for regulations to be made to give effect to the wholesale contract regime in subpart 2 of Part 2. Key provisions that amend or define a term or grant an exemption include regulations:

- prescribing “transparent pricing methodologies”
- setting the “prescribed maximum duration” of fixed wholesale contracts
- setting the “prescribed maximum percentage” of engine fuel that may be exclusive supplied on an annual basis in a wholesale contract with a distributor or dealer

The regulation-making powers in sections 12 and 19 are needed to promote competition and an active wholesale market for engine fuel. The regulations will enable the regime to be refined in the context of changing technology, circumstances, and market practice: such changes often being unforeseeable.

The general safeguards relating to delegated legislation apply, including that the regulations are legislative instruments subject to disallowance, publication requirements and review by the Regulations Review Committee. In addition, section 12 includes consultation safeguards and other statutory prerequisites. That is, these regulations may only be made if the Minister has consulted with any fuel industry participant who is likely to be significantly affected by the regulations. In addition, in the case of regulations relating to “specified engine fuels”, the Minister must have regard to the impact of the regulations on the incentives to innovate and to invest in markets for the specified engine fuels and be satisfied that the regulations are necessary to promote competition for the long-term benefit of end-users.

Powers to make delegated legislation- question 4.8

Section 19 provides for regulations to be made prescribing the circumstances when pricing methodologies may be varied in wholesale contracts.

Section 21 provides for regulations to be made prescribing consumer information requirements relating to the price of engine fuels. Key provisions include regulations setting out:

- which engine fuels and retail fuel sites the consumer information requirements will apply to
- what price-related information must be displayed and what information must not be displayed (e.g. banning the display of discounted fuel prices if this would mislead consumers)
- the circumstances in which the information must be displayed
- the form and manner in which information must be displayed.

Section 25 provides for regulations to be made prescribing requirements relating to record keeping and retention and disclosure of information about engine fuels markets. Key provisions include regulations setting out:

- which fuel industry participants, engine fuels and other matters that the information disclosure requirements relate to
- what information must be recorded, retained, and disclosed
- requirements for recording, retaining, disclosing and publishing of the information
- methodologies that must be applied in preparing the information.

Section 44 provides for regulations to be made prescribing requirements for mediation.

Section 45 provides more detail about the type of regulations that may be made under the other regulation-making provisions.

The above regulation-making powers in sections 12, 19, 21, 25 and 44 are necessary as they relate to:

- matters of detail for which it is not appropriate to utilise Parliamentary time
- flexibility in how the Act is applied, taking into account changes in business models, market conditions and circumstances, meaning that the provisions may need to be changed over time.

The general safeguards relating to delegated legislation apply, including that the regulations are legislative instruments subject to disallowance, publication requirements and review by the Regulations Review Committee. In addition, the Bill includes a range of statutory prerequisites. In particular, for:

- sections 12 and 44, the Minister must first consult with any fuel industry participant who is likely to be significantly affected by the regulations
- section 21, the Minister must first be satisfied that the regulations are needed to provide transparency of retail fuel prices to facilitate informed purchasing by end-users from retail fuel sites
- section 25, the Minister must first be satisfied that the regulations are needed for the purposes of that subpart (disclosure of information).