

Departmental Disclosure Statement

Fuel Industry 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 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.

9 November 2022

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Part One: General Policy Statement

On 5 December 2019, the Commerce Commission (the 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. To give effect to the Commission's recommendations, the Fuel Industry Act 2020 (the Act) introduced interventions to improve competition in the wholesale and retail fuel markets. A key intervention is the terminal gate pricing (TGP) regime which requires wholesale suppliers that draw fuel from wholesale terminal storage to post a daily spot price at which they must supply fuel. This creation of a wholesale spot market encourages new entry and expansion in new areas by existing players.

The Commission also recommended the development of a regulatory backstop to the TGP regime to address the following risks:

- that the TGP regime is used as a vehicle for coordination; and
- that wholesale suppliers set TGPs that incorporate a return on market power.

To address these risks, the Bill provides a threat of price regulation, subject to a recommendation from the Commission, to incentivise wholesale suppliers to offer competitive TGPs. Enabling price regulation of TGPs in the event these risks materialise would better promote wholesale competition in fuel markets. This would then flow through to a more competitive retail market for the long-term benefit of consumers.

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
Market study into the retail fuel sector: Final report, Commerce Commission, 5 December 2019 (available at https://comcom.govt.nz/_data/assets/pdf_file/0028/193915/Retail-fuel-market-study-Final-report-5-December-2019.PDF).	

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?	NO
<p>A Regulatory Impact Statement had been completed at the time Cabinet was making decisions on this proposal, but the quality assurance rating had not yet been confirmed by MBIE's quality assurance panel. On behalf of respective Ministers, the Treasury's Regulatory Impact Analysis team and MBIE agreed that a Supplementary Analysis Report would be provided to the Minister of Energy and Resources in August 2022. Supplementary Analysis Reports are subject to the same assessment criteria as Regulatory Impact Statements.</p> <p>Supplementary Analysis Report: Regulatory backstop under the Fuel Industry Act 2020, Ministry of Business, Innovation and Employment (MBIE), 29 August 2022 was provided to the Minister of Energy and Resources on 31 August 2022.</p>	

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?	YES
Supplementary Analysis Report: Regulatory backstop under the Fuel Industry Act 2020, Ministry of Business, Innovation and Employment (MBIE), 29 August 2022 Supplementary Analysis Report: Regulatory backstop under the Fuel Industry Act 2020 (treasury.govt.nz)	

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 Supplementary Analysis Report referenced in section 2.4 discusses the potential costs and benefits of the policy to be given effect by this Bill, but does not quantify those costs and benefits.	

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>Poor effective compliance or non-compliance with the Bill would see regulated wholesale suppliers setting TGPs inconsistent with the Commission’s determination. This would undermine the purpose of the Bill, which is to promote competition in fuel markets. This would also result in higher compliance activities, and associated costs, being undertaken by the Commission.</p> <p>The level of regulator comfort</p> <p>The Commission has monitoring powers under the Act, which can be used to send signals to industry about levels of comfort regarding TGPs and the regulatory backstop threshold. These signals can help encourage fuel companies understand what is required of them to avoid triggering an inquiry and meeting the threshold within the backstop regime, which could lead to price regulation.</p> <p>The new functions for the Commission will not be able to be met within existing baselines. Cabinet has agreed for further funding to be sought as part of Budget 2023 [DEV-22-MIN-0170].</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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The Ministry of Foreign Affairs and Trade was consulted during the development of this disclosure statement and does not consider that this policy gives rise to any inconsistencies with New Zealand's international trade obligations.

MBIE considers the Bill is consistent 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 wholesale suppliers of fuel in New Zealand that supply from wholesale terminal storage. The Bill does not impact on the extraction or development of mineral resources within New Zealand. MBIE considers that the Bill is consistent with the principles of the Treaty of Waitangi.

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

A copy of this advice will be available shortly on the Ministry of Justice's website.

<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>

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)?	NO
<p>The Bill would introduce:</p> <ul style="list-style-type: none"> • a new pecuniary penalty for a breach of price regulation that is set by the Commission; and • offences for failing to provide information to the Commission for the purposes of; carrying out its functions and exercising its powers, and monitoring compliance. <p>The new pecuniary penalty would be consistent with those already provided for in the Act, being that the amount of any pecuniary penalty must not, in respect of each act or omission, exceed:</p> <ul style="list-style-type: none"> • in the case of an individual, \$500,000; or • in any other case, \$5,000,000. <p>The new offences would also be consistent with an existing provision in the Act that provides that a person that contravenes the relevant provisions commits an offence and is liable upon conviction to a fine not exceeding:</p> <ul style="list-style-type: none"> • in the case of an individual \$100,000; or • in any other case \$300,000. 	

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. The Ministry of Justice did not raise any 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
<p>The Bill will enable the Commission to require information in relation to its new functions and powers (see proposed section 29O).</p> <p>Proposed section 29O(1)(b) would incorporate section 53N of the Commerce Act into the Act, which would allow the Commission to require information for the purpose of monitoring compliance with price regulation, including: written statements; audit requirements; further information; and a certificate signed by a director of the wholesale supplier.</p> <p>Proposed section 29O(1)(c) would incorporate section 53ZD of the Commerce Act into the Act, which would allow the Commission to require information from wholesale suppliers, for the purpose of carrying out its functions and exercising its powers under the Act.</p> <p>Although the focus of these provisions is to obtain commercial information relating to wholesale suppliers, the use of these provisions could see personal information incidentally disclosed, such as directors names.</p>	

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

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
In March 2020, MBIE released a Consultation paper: <i>Regulations under a Fuel Industry Bill and other matters</i> (see here: https://www.mbie.govt.nz/dmsdocument/11336-consultation-paper-regulations-under-fuel-industry-bill-and-other-matters). The Consultation paper sought views on: the problem that a regulatory backstop seeks to address; the threshold and process for triggering a regulatory backstop; and how price regulation should apply. Submissions on the Consultation paper informed the proposals in the Bill.	

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
MBIE engaged closely with the Commission in developing the policy proposals and on a draft of this Bill. In reaching the policy recommendations that underpin the Bill, consideration was given to existing regimes for backstop economic regulation under the Commerce Act 1986, Telecommunications Act 2001 and Retail Payment System Act 2022.	

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
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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?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
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The Bill creates two powers to make delegated legislation.

The first is proposed section 29J which would allow the Governor-General, on the recommendation of the Minister, to make an Order in Council imposing regulation on particular TGPs.

The second is proposed section 29L which would allow the Commission, following an Order in Council as described above, and after consulting with interested parties, to make determinations specifying how price regulation applies to the regulated TGPs. Neither of these proposed powers can be exercised without the Commission first conducting an inquiry into the TGPs, consulting on a draft recommendation, and then providing a final recommendation to the Minister of Energy and Resources regarding whether these should be price regulated.

It is appropriate for these to sit in delegated legislation to allow for the regulatory backstop to function as intended, as a threat of further regulation if a certain threshold has been met, rather than price regulation from the outset. To provide a credible threat, a timely but robust process must be available. Setting these powers in delegated legislation also allows for flexibility so that the most appropriate form of price regulation can be put in place for the particular wholesale supplier.

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?	NO
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