

Regulations under a Fuel Industry Bill and other matters - Have your say

Introduction

*** 1. Name (first and last name)**

Jimmy Ormsby

*** 2. Email**

[REDACTED]

*** 3. Is this an individual submission, or is it on behalf of a group or organisation?**

Individual

On behalf of a group or organisation

*** 4. Which group do you most identify with, or are representing?**

Iwi or hapū

General public

Environmental

Local government

Research institute / academia

Industry or industry advocates

Central government agency

Other (please specify)

[REDACTED]

Fuel importer or wholesaler

Fuel retailer

Large fuel user

Other fuel sector stakeholder

Oil and gas sector

Consultant, financial services etc.

***5. Business name or organisation (if applicable)**

Waitomo Group

***6. Position title (if applicable)**

[REDACTED]

*** 7. Important information about your submission (important to read)**

The information provided in submissions will be used to inform the Ministry of Business, Innovation and Employment's (MBIE's) work on *Regulations under a Fuel Industry Bill and other matters*.

We will upload the submissions we receive and publish them on our website. If your submission contains any sensitive information that you do not want published, please indicate this in your submission.

The Privacy Act 1993 applies to submissions. Any personal information you supply to MBIE in the course of making a submission will only be known by the team working on the *Accelerating renewable energy and energy efficiency*.

Submissions may be requested under the Official Information Act 1982. Submissions provided in confidence can usually be withheld. MBIE will consult with submitters when responding to requests under the Official Information Act 1982.

We intend to upload submissions to our website at www.mbie.govt.nz. Can we include your submission on the website?

Yes

No

*** 8. Can we include your name?**

Yes

No

*** 9. Can we include your organisation (if submitting on behalf of an organisation)?**

Yes

No

10. All other personal information will not be proactively released, although it may need to be released if required under the Official Information Act.

Please indicate if there is any other information you would like withheld.

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Wholesale markets

Terminal Gate Pricing

- Should fuel products other than regular 91 grade petrol, premium 95 grade petrol and regular diesel be subject to the TGP regime, for example, aviation and marine fuels, or premium 98 grade petrol? Please give reasons.
- 1 Our view is that all grades of ground fuels should be treated the same to ensure pricing transparency across all grades. This includes Premium 98 and all other ethanol-blended fuel and biofuels.
- If the regime should apply to other fuel products, what are the standards used by industry for defining these fuel products?
- In our view, this is a question for the suppliers, not distributors like us. The industry already has comprehensive standards for product quality, which are closely monitored by MBIE.
- 2 The Material Safety Data Sheets provided by suppliers for each fuel grade would provide a good starting point for defining these products. You can find examples of the Mobil Material Safety Data Sheets on our website here: <https://www.waitomogroup.co.nz/fuel/>
- Mobil is the supplier of Waitomo fuel products.
- Should there be a notice period for changes in the TGP price during a day?
- 3 Yes – the TGP price should be made available by website and should be updated every 24 hours, displaying the price for the following day. E.g., From 00:00 am (midnight) on x date to 00:00am (midnight) on x date, the price is per litre is xx.

4

Do you have any comments on how terminal gate prices should be set and publicly posted?

Pricing should be as transparent as possible – calculated on a cost plus basis, with each cost element included specified (this includes any Government taxes and ETS costs). These individual cost elements should also be indexed.

Terminal gate prices should be made available via a website that is easily accessible 24-7, either by log in or open access.

Pricing information that should be provided would include:

- By terminal.
- By fuel grade.
- Product availability – litres available.

See below (Q.14) for further details around pricing methodologies and itemised cost elements.

5

Is the prescribed minimum of 30,000 litres per week to one retailer or wholesaler appropriate?

No comment – this would not be relevant to our business.

6

Should the prescribed minimum be able to be changed, or varied? For example, could the prescribed minimum be different for different storage facilities, given some terminals supply larger fuel volumes than others?

As above.

7

Should there be any additional grounds for refusal, such as the quantity demanded being below a de minimis amount, or reasons of force majeure? If you consider there should be, please suggest a de minimis amount or identify which force majeure reasons should apply.

Reasonable grounds for refusal would include any health and safety non-compliance or where term-contracted fuel supply obligations would prohibit supply.

In some circumstances force majeure or act of god events (e.g., a global pandemic impacting international supply) may result in reasonable grounds for refusal because of an industry-wide supply impact. However, there are already processes in place to deal with these types of incidents (e.g., port coordination events).

8

We seek your feedback on whether occupational, health and safety requirements and creditworthiness could be determined on the day TGP supply is sought with minimal impact on the customer or the wholesale supplier?

If not, is it necessary to specify a pre-certification process with potential terminal gate customers in advance to allow an efficient assessment of whether these grounds for refusal have been met.

In our view, there should be no compromise on the health and safety requirements imposed on TGP supply. Like all terminal pick-ups, all potential customers must be required to complete a pre-certification process prior to any supply being given i.e. a licence to operate. This is the only fair and reasonable solution, in line with other terminal supply arrangements and industry best practice.

If a distributor is in breach of any health and safety requirements or other contractual obligations (e.g., credit terms), we would not expect that the supplier should supply product.

9

What other standard terms and conditions should be prescribed for sales by a wholesale supplier for the TGP at the storage facility?

Any company or individual seeking TGP supply must be subject to the same regulatory framework and best practice as any other operator in the industry. This includes all health and safety requirements and compliance, including pre-certification. Otherwise, the TGP will create an unfair and unequitable playing field for wholesale supply which, in turn, creates inequity in the retail market.

10

Please provide comments on any other matters related to the terminal gate pricing regime.

Waitomo is a significant independent distributor in the New Zealand market. As such, we would seek to have contracted offtake with suppliers, including under a terminal gate pricing regime. Our expectation is that contracted fuel customers would have preferential access to product (quantity and access arrangements to pick up) over non-contracted customers seeking supply.

Regulating terms in wholesale contracts

11

Should either or both of the TGP or an industry-recognised price reporting agency's price based (MOPS or equivalent) pricing methodologies be deemed to be transparent pricing methodologies?

Pricing transparency and visibility is key to delivering competition in the wholesale market.

In our view, both a TGP and MOPS plus costs methodology would make it easier for distributors like Waitomo to compare and negotiate wholesale prices. Currently, we work on a MOPS plus costs methodology. However, including a TGP pricing methodology would create even greater transparency and therefore increase competition.

Cost elements included must also be indexed.

See below (Q.14) for further details around itemised cost elements.

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Should any other pricing methodology be deemed a transparent pricing methodology?

There are other price benchmarking / indexing products available to the market that could be used. The wholesale market will respond positively to pricing that is transparent and competitive, so any methodology that allows for this could be used.

We agree that parties to a supply contract should be prohibited from unilaterally changing the pricing methodology during a contract without notice, and that if the new methodology is unacceptable to a party they can terminate the contract. Other requirements under the Bill will then ensure that distributors have the flexibility to 'shop around' or change suppliers for more attractive pricing transparency and competitive pricing.

13

Should there be any other reasonable exceptions?

No comment.

14

What cost elements of a deemed pricing methodology should be itemised?

Waitomo has sought guidance on this issue from industry expert consultants Hale and Twomey. Their view, which Waitomo shares, is that the following costs elements should be itemised:

- Product marker (NZcpl)
- Quality premium (NZcpl)
- Insurance and loss (NZcpl)
- Shipping / freight (NZcpl)
- Exchange rate US/NZ
- Emissions Trading Scheme (ETS) (NZcpl)
- Excise (NZcpl)
- Terminal costs (NZcpl)
- Wharfage (NZcpl)
- Supplier margin (NZcpl)

Cost elements included must also be indexed.

15

What would be an appropriate prescribed period after which distributors can terminate their wholesale fuel supply contracts?

In our view, supply contracts should be for a maximum five years after which the contract can be terminated by the distributor, should they choose to do so. The Bill would make this mandatory. The prescribed period could also be shorter, by agreement in commercial negotiations between the parties.

As discussed in our teleconference with MBIE, it was good to confirm that the Bill will also apply retrospectively to existing contracts. Waitomo is currently in a supply contract that exceeds the proposed five-year maximum after which a contract can be terminated. Once the legislation is passed, Waitomo would have the option to terminate our existing contract if we choose to do so, on reasonable notice because it is longer than the prescribed length i.e., five years. This is an essential component of the Bill if you want to stimulate increased competition in both the wholesale and retail markets in the short to medium term.

What proportion of a distributor's annual requirements should be permitted to be subject to exclusive supply provisions?

As stated in our submission to the Commerce Commission, we can't currently terminate our supply contract, so when asked what proportion of a distributor's annual requirements should be permitted to be subject to exclusive supply provisions, we suggested a reasonable cap or maximum would be 80 percent.

16

However, as the Bill will also apply retrospectively to existing contracts, we will be in the position to terminate our existing contract if we choose to do so, on reasonable notice because it is longer than the prescribed length i.e., five years.

Any future contracts, and their terms, including exclusivity provisions, would be negotiated between the parties.

Should the maximum exclusivity requirement apply as an average across the whole length of the contract? If not, how should it be applied?

17

In our view, absolutely not. Applying an average across the whole length of the contract would not encourage competition or competitive pricing for volume growth.

Should the exclusivity requirement apply to the total fuel requirement of distributors, or to each fuel type?

18

In our view, any exclusivity requirement should apply to the total fuel requirement. It would be far too complex and onerous on distributors like Waitomo to manage this grade by grade over the course of a contract term.

Do these terms hinder the ability of dealers or distributors to compete?

19

As the Bill will also apply retrospectively to existing contracts, we will be in the position to terminate our existing contract if we choose to do so, on reasonable notice because it is longer than the prescribed length i.e., five years.

We would then be able to negotiate new contract terms. Terms like exclusivity, mediation, dispute resolution, conditions and product allocation are best left to the contract negotiations between the supplier and distributor.

Are there any other terms that are likely to hinder the ability of dealers or distributors to compete?

The key elements that will create competitive tension in the wholesale fuel market have been addressed. They are:

- 20
1. Price transparency (TGP or MOPS plus costs, with cost elements itemised and indexed).
 2. Limits on the length of wholesale distributor contracts - capped at a maximum of five years.

Should a term in wholesale contracts which prioritises supply to a supplier's own retail sites over that of a term customer be considered as likely to limit the ability of the dealers or distributors to compete?

A contractual term that prioritised a supplier's own retail sites over that of a term customer (i.e., a distributor like Waitomo) would certainly limit our ability to compete. As such, we would not agree to such terms in a negotiated supply contract.

- 21
- In times of tight supply e.g., port coordination events, supply should be allocated on a proportional basis that treats all market participants fairly and equally. In practice, this is what currently happens, and we wouldn't expect to see any change in supplier behaviour.

If supply was prioritised to a wholesale suppliers own retail sites, this should be regarded as anti-competitive and would require intervention. E.g., enforcement by the Commerce Commission.

Dispute resolution processes for wholesale markets

Do your wholesale supply contracts currently provide for a means of dispute resolution? If so, what does this look like?

- 22
- Yes – there is a mediation clause.

23

Do you consider the existing arrangements for dispute resolution to be sufficient? If not, how much use do you think would be made of a new dispute resolution scheme?

As the Bill will apply retrospectively to existing contracts, we will be in the position to terminate our existing contract if we choose to do so, on reasonable notice because it is longer than the prescribed length i.e., five years.

We would then be able to negotiate new contract terms. Terms like exclusivity, mediation, dispute resolution, conditions and product allocation are best left to the contract negotiations. Waitomo is comfortable that we can negotiate appropriate dispute resolution processes and remedies as part of the contract negotiations.

24

Should participating in mediation be mandatory for the other party if one party wishes to attempt to resolve the dispute using this dispute resolution process?

As above.

25

Should the dispute resolution scheme apply if a wholesale supplier refuses to supply fuel at TGP?

As above.

26

Should the dispute resolution scheme apply to disputes that result from the new wholesale contract terms?

As above.

27

Should the dispute resolution scheme apply to disputes that result from any provision that relates to the terminal gate pricing regime?

As above.

28

Are there any other aspects of the new regime you think the dispute resolution scheme should apply to?

As above.

29

In your view, how can we ensure the dispute resolution scheme is affordable, easily accessible, and timely for all parties involved?

No comment.

30

Should each party to a dispute be required to pay half the cost of the mediation or arbitration process?

No comment.

31

In your view how can we ensure the dispute resolution scheme is effective?

No comment.

32

Who should provide the dispute resolution services set up under the new regulations?

No comment.

33

Should the dispute resolution scheme appoint an independent nominating authority to appoint dispute resolvers under the scheme?

No comment.

34

Is there a specific skillset / background the mediator / arbitrator should have?

No comment.

35

Please feel free to provide comments on any other matters related to the dispute resolution process.

Nothing further to add.

Regulatory backstop

36

What should be the threshold and process for whether backstop regulation should be imposed on the TGP supply of specified fuel products at a terminal or terminals? Please give reasons.

In our view, a regulatory backstop should not be required if the Fuel Industry Bill and its intent is met.

Waitomo is not in favour of additional regulatory powers being bestowed on the Minister. The Fuel Industry Bill should be sufficient to create competition in the wholesale and retail market that is needed, and the market will react accordingly.

37

How should the backstop price control regime be designed to apply to specified fuel products at a terminal or terminals? Please give reasons.

As above.

Consumer information

Do you have any comments on the costs of or time required to modify or install price boards?

We believe the cost of compliance for smaller distributors like us will be onerous, but have very little impact on retail competition and pump prices for consumers. Forcing fuel companies to display premium prices on price boards is, at best, tinkering around the edges - at worst, an election stunt.

In fact, in some instances it could actually have the opposite effect, if the costs are passed on to consumers.

38

One estimate we have received put the price at \$10,000 per sign, which would equate to a minimum total outlay of \$400,000 for our business. As a low-cost operator we don't believe this level investment is warranted, given it won't have any material impact on lowering pump prices. Our Premium 95 price is easily accessible to consumers via the pump or on price comparison app Gaspy.

In light of the Covid-19 crisis, this requirement will have even more of a cost impact on fuel distributors like us who had their volumes impacted by more than 80 percent during lockdown and are only now starting to recover some of that volume.

If the decision is to continue with this requirement then, in our view, companies should be given longer to implement premium pricing on price boards and / or the capital investment required should be supported by Government funding.

Which grades of fuel should the requirement to display apply to? Should it apply to all grades of fuel including premium, or to premium fuels only?

39

There is currently no regulatory, legal or other industry requirement to display pricing on a price board at a retail fuel site. While we don't agree with the requirement to display premium prices, if this is implemented, then it should apply to all grades of fuel.

Please also note our comments below around conditional discount pricing (i.e., bait advertising) on price boards.

Do you consider that an obligation to display price should apply to all grades of premium fuel, or only to the main grades of premium fuel sold?

40

As above – if there is a requirement to display prices for fuel on price boards, then this should apply to all fuel grades, including all premium fuel grades e.g., 95, 98, ethanol-blended fuels etc.

Likewise, retailers who choose to display a conditional discounted price for a fuel grade (i.e., bait advertising) should be compelled to display both the pump price and the conditional discounted price for all fuel grades, not just some that they choose to display.

Do you consider that there should be specifications in regulations on the layout, size or other requirements of a price board?

- For example, should there be a requirement for a particular ordering or colour coding of prices that are displayed on a price board?
- Are there any other requirements you consider should be applied consistently across price boards?

In our view, it would be too complex and costly to monitor compliance with requirements for a particular ordering or colour coding of prices displayed on a price board. All retail brands do this differently, and to retrospectively require companies to change or upgrade all price boards to meet new colour or ordering requirements would simply add further unnecessary compliance costs, which would likely be passed on to consumers.

However, each fuel grade pricing should be displayed consistently on a single price board, without drawing attention to the conditional discount (i.e., bait advertising) price.

In many current price boards, the conditional discounted price is given extra prominence with colours, fonts, lighting and other marketing techniques so they stand out more. This is misleading, deceptive and deliberately designed to lure consumers onto a forecourt by confusing them into thinking they're getting a better deal when they're not. In our view, this practice of bait advertising should be banned, as it is in many Australian states.

41





If this practice is not going to be banned, then retailers who choose to display a conditional discounted price for a fuel grade (i.e., bait advertising) should be compelled to display both the pump price and the conditional discounted price for all fuel grades, not just some that they choose to display. This is the only fair and fully transparent way to do it.

42

Should there be an exception from the requirement to display a price of a particular grade of fuel if the volume of that type of fuel being sold at a particular retail site is below a certain minimum volume? If so, why, and what would be a reasonable threshold for such an exception?

No – if the industry is moving to a requirement to display prices, this should apply to all fuel grades sold.

43

Should there be an exception from the requirement to have a price board displaying fuel prices if the total volume of fuel sold at a particular retail site is below a certain minimum volume? If so, why, and what would be a reasonable threshold for such an exception?

As above.

44

Is an exception needed for the situation where sellers must comply with NZTA requirements for signage on state highways?

Are there any other situations where an exception might be needed? For example:

- Is an exception required in relation to local authority bylaws?
- Are you aware of any issues that would mean that requirements on the display of price boards would conflict with local council requirements for signs under bylaws or the Resource Management Act? If so, describe these issues?

We have no comment, other than to confirm we are aware of specific NZTA signage requirements on state highways that may need to be taken into account.

45

Are there any other issues that you think should be considered in development of regulations relating to the display of prices on price boards?

As mentioned above, and reiterated in all of our submissions on the Commerce Commission's retail fuel market study, we're disappointed and concerned that stronger action won't be taken on conditional discount pricing (i.e., bait advertising) at retail sites.

Conditional discounting schemes that deliberately misled and distort the true pump price Kiwis pay are now commonplace. "Monitoring" this activity does not go far enough – we should be following the lead of our Australian counterparts who have banned bait advertising in many states.

Waitomo doesn't operate any conditional discounting schemes – we simply offer the lowest price we can deliver, while still ensuring our business is sustainable. We believe this is more transparent, less discriminatory, and there are no strings attached to get that price.

If you want to create true price competition in the retail fuel market, regulate to make all fuel companies display the actual pump price consumers will pay and let Kiwis truly compare like for like.

Do you have any comments that you wish to make on other matters relating to transparency of information for consumers?

We are interested to understand how conditional discount pricing (i.e., bait advertising) will be monitored and how this will be reported on within the industry. As far as we can see, there is no specific information in the consultation paper on this point, other than a general comment in section 153 stating that the “Government proposes to monitor the display of price boards, rather than making regulations on this issue at this time. However, the regulations will be able to be made to prohibit the display of discounts and discounted prices if necessary.”

46 We question:

1. How this will be effectively monitored?
2. Over what time frames?
3. How the need for regulation to prohibit displaying conditional discounted pricing will be assessed? For example, will retailers be required to provide information on volumes sold in conditional discounting or loyalty programmes?
4. Why the Government is not taking a stronger stance on this misleading and deceptive practice, which is already banned in many Australian states.

Information disclosure and monitoring

Do you have any specific feedback or comments on the information identified in the above table that industry participants would be required to collect and disclose?

Is there any other information not identified above that should be collected and disclosed to enable monitoring?

In Waitomo's view, additional record keeping and disclosure of information is not required if the Bill delivers its intent – that is to increase transparency and competition in the New Zealand fuel market. If there is greater competition in the market, prices will come down. Pricing data is public and easily accessible now.

47 As a low-cost operator, any additional administrative and compliance costs simply impacts our ability to pass on the lowest pump price to consumers, while ensuring our business remains sustainable.

As the Government and Commerce Commission has acknowledged, the growth of low cost distributors like Waitomo, and the competition and choice we offer in the markets where we operate, has had a direct impact on lowering pump prices. Any additional costs for administration to comply with additional record keeping and information disclosure is simply another operating cost we either have to absorb or pass on to consumers.

For Fuel Industry participants, what costs would there be for your business to collect and disclose this information?

48 This is hard to quantify, but the costs of administration and compliance for the Auckland regional fuel tax exceeded \$150K per annum to set up, with an additional \$50K per annum for a FTE employee to maintain the information and disclosure on an ongoing basis.

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| 49 | <p>For Fuel Industry participants, is the information outlined above currently collected by your business?</p> <ul style="list-style-type: none"> • If so, is it collected in a form or manner that would be consistent with what's outlined above, or would changes to your information collection processes be required? • If not, what costs would be incurred in collecting this information? <p>Changes to our information collection processes would be required for the information outlined in Table One: Retail market.</p> <p>We prepare annual financial statements as outlined in Table One: Financial statements. However, as a private business we should not be compelled to disclose these on request. We are not a listed company.</p> <p>If there is increased transparency and visibility of wholesale market, this will create the competitive tension needed to bring pump prices down. We fail to see why companies should then be compelled to disclose annual financial statements. Profitability is about how you operate your business and therefore is commercially sensitive. Nor would any comparison between different operators' financial statements be useful or meaningful, as each operator works under significantly different operating models, structures and overheads.</p> |
| 50 | <p>Are there any other factors not discussed above that could have an impact on the compliance cost of collecting and disclosing information? What are these factors?</p> <p>As above.</p> |
| 51 | <p>Are there any importing costs not captured in Table One that are relevant to understanding the cost of supplying fuel from a terminal in New Zealand?</p> <p>Not applicable to Waitomo.</p> |
| 52 | <p>Have the proposed parties outlined as the owners and suppliers of information in Table One been correctly identified?</p> <ul style="list-style-type: none"> • Could data returns for dealers who sell fuel under the brand of a wholesaler, and do not set their own price, be completed by suppliers? If not, do you have any comments on options for minimising compliance costs in this situation? <p>Yes.</p> |

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| 53 | <p>Do you have any comments on the proposed frequencies for collection and disclosure of information outlined in Table One?</p> <p>If we were compelled to provide this information - and again we don't believe it is warranted if the Bill meets its intent of increasing competition in the market – then this should be provided on an annual basis. Anything more regular would simply be too onerous and time-consuming for our low-cost business. We do not have large teams of support staff, like our competitors, to support this kind of additional record keeping and information disclosure.</p> |
| 54 | <p>Do you consider that the proposals outlined above strike the right balance between certainty and adaptability? Would you prefer that requirements such as frequency of information collection are set by agencies or set out in regulations?</p> <p>See question 47.</p> |
| 55 | <p>Do you have any comments on proposals for agencies to develop templates to ensure that information is disclosed in a consistent format?</p> <p>See question 47.</p> |
| 56 | <p>For information that is proposed to be used for periodic analysis:</p> <ul style="list-style-type: none">• Should such information still be required to be disclosed on a regular basis, or should that information be held by the companies until needed? <p>See above.</p> |
| 57 | <p>Do you have any other comments that you wish to make on matters relating to information disclosure and monitoring?</p> <p>Nothing further to add.</p> |