



COVERSHEET

Minister	Hon Dr Megan Woods	Portfolio	Energy and Resources
Title of Cabinet paper	Fuel Industry Act 2020 – Regulations	Date to be published	25 May 2021

List of documents that have been proactively released

Date	Title	Author
March 2021	Fuel Industry Act 2020 – Regulations	Office of the Minister of Energy and Resources
17 March 2021	Fuel Industry Act 2020: Proposed Regulations DEV-21-MIN-0030	Cabinet Office
March 2021	Impact Statement: Regulations under the Fuel Industry Act	MBIE

Information redacted

YES / NO

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of constitutional conventions.

[In Confidence]

Office of the Minister of Energy and Resources
Cabinet Legislation Committee

Fuel Industry Act 2020 - Regulations

Proposal

- 1 This paper seeks agreement to make regulations for the following sections of the Fuel Industry Act 2020:
 - 1.1 terminal gate pricing;
 - 1.2 fixed wholesale contractual terms;
 - 1.3 consumer information requirements; and
 - 1.4 dispute resolution.

Relation to government priorities

- 2 Last term this Government made a commitment to fairer fuel prices for consumers. The passing of the Fuel Industry Act 2020 (the Act) in August last year was a huge step towards achieving this. However, the regulations contain the detail necessary to make the regime work, and these should be in place before the relevant provisions of the Act come into force.

Executive Summary

- 3 The Fuel Industry Act 2020 received Royal Assent on 11 August 2020.
- 4 The Act gives the Minister of Energy and Resources the power to recommend regulations on various matters related to the fuel industry. The detail of the new regime will be determined through the regulations.
- 5 However, before regulations can be prescribed, the Act requires that the Minister of Energy and Resources:
 - 5.1 has consulted with the fuel industry participants that they consider are likely to be significantly affected by the proposed regulations; and
 - 5.2 is satisfied that the regulations are necessary or desirable after having regard to the purpose of the Act.
- 6 I have consulted with fuel industry participants that I consider are likely to be significantly affected by the proposed regulations. I propose to undertake a further brief consultation round with these stakeholders on an exposure draft of the regulations.

- 7 I am satisfied that the regulations proposed in this Cabinet paper are necessary or desirable after having regard to the purpose of the Act and the associated subpart (for consumer information).
- 8 I seek approval from Cabinet to make regulations for the terminal gate price, fixed wholesale contractual terms, consumer information requirements, and dispute resolution sections of the Act.

Background

- 9 The Fuel Industry Act 2020 received Royal Assent on 11 August 2020.
- 10 The Act addresses the findings from the retail fuel market study undertaken by the Commerce Commission in 2019 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 were higher than it would expect in a workably competitive market and that this flowed through to consumers paying higher pump prices.
- 11 The Act establishes:
- 11.1 a terminal gate pricing regime to improve competition in the wholesale market by making it easier for a fuel reseller to access fuel more cheaply and in more locations;
 - 11.2 rules to ensure contracts between wholesale fuel suppliers and their wholesale customers are fair and support competition;
 - 11.3 requirements for retail fuel sites to display premium fuel prices on forecourt price boards;
 - 11.4 improvements to the monitoring of the fuel market by requiring fuel companies to collect and disclose certain information; and
 - 11.5 a dispute resolution scheme for the new regime under the Act.

Fuel Industry Act Regulations

- 12 The Act gives the Minister of Energy and Resources the power to recommend regulations on various matters related to the fuel industry. A lot of the detail of the new regime will be prescribed through the regulations.
- 13 It is important that the supporting regulations are developed before the relevant parts of the Act come into force. Only parts of the Act are currently in force. The preliminary, procedural and miscellaneous provisions came into force on 12 August 2020.
- 14 The substantive parts of the Act come into force on either 11 August 2021 (terminal gate pricing, fixed wholesale contractual terms and dispute resolution), or on 11 February 2022 (consumer information and disclosure of information). These can be brought into force earlier by the Governor General by Order in Council if necessary.

- 15 However, before regulations can be prescribed, it is a requirement in the Act that the Minister of Energy and Resources:
- 15.1 has consulted with the fuel industry participants that they consider are likely to be significantly affected by the proposed regulations; and
 - 15.2 is satisfied that the regulations are necessary or desirable after having regard to the purpose of the Act.
- 16 In March 2020, following Cabinet approval (CAB-20-MIN-0100 refers) I consulted publicly on the proposed content of regulations under the Fuel Industry Bill. Submissions relevant to the regulations were also made during the Select Committee process for the Fuel Industry Bill.
- 17 In November 2020 following the passing of the Bill, I released a more targeted consultation paper to the stakeholders that I considered to be most significantly impacted by the proposed regulations. This consultation paper covered terminal gate pricing, fixed wholesale contractual terms, consumer information requirements and dispute resolution.
- 18 The purpose of the Act is to promote competition in engine fuel markets for the long-term benefit of end users of engine fuel products. I am satisfied that the proposed regulations in this Cabinet paper are necessary or desirable after having regard to the purpose of the Act and the associated subpart (for consumer information).
- 19 The consumer information requirements do not need to come into force until 11 February 2022. However, many stakeholders have requested that the requirements are signalled as soon as possible. I therefore propose that the Parliamentary Counsel Office draft the consumer information regulations at the same time as the regulations for terminal gate pricing, fixed wholesale contractual terms and dispute resolution.
- 20 Proposals for regulations for the disclosure of information aspect of the Act are still under development and approval will be sought from Cabinet in mid-2021. The regime is due to come into force on 11 February 2022.

Terminal gate pricing

- 21 The Act introduces a 'terminal gate pricing' regime, which requires wholesale fuel suppliers to publicly post a price at which they must supply specified types of fuel to wholesale customers at a particular terminal. This regime is expected to provide for greater transparency of wholesale pricing, and could provide a source of fuel supply for potential entrants to retail fuel markets on a nationwide basis.

Specified engine fuel subject to the terminal gate pricing regime

- 22 Section 13 of the Act provides that regulations may be made prescribing any engine fuels that are included within, or excluded from, the definition of specified engine fuel in section 8(2) of the Act.

IN CONFIDENCE

- 23 The definition of engine fuel in section 8(2) of the Act covers 91 octane, all premium grades of petrol, and diesel used in land transport. So unless specifically excluded in regulations, all will be subject to the terminal gate pricing regime.
- 24 The three types of fuel in New Zealand that are sold by all major fuel retailers are 91 octane, 95 octane and diesel. These engine fuels are clearly necessary for a retail fuel supplier to make a competitive service offering. I therefore consider that these fuels should be subject to the terminal gate pricing regime.
- 25 During consultation submitters expressed contrasting views regarding whether 98 octane and higher and blended fuels should be excluded from the terminal gate pricing regime.
- 26 Currently only three wholesale suppliers (two in the South Island) and Nelson Petroleum Distributors Ltd (NPD) sell 98 octane or higher. In addition, Gull and Z Energy are the only retailers that sell bio-ethanol blended fuels. The sale of these fuels is a point of competitive difference between the industry participants. These fuels are not part of the major suppliers' 'borrow and loan' scheme, through which each supplier can access fuel at a terminal (within the scheme) owned by another supplier.
- 27 When considering whether to exclude any fuels from the terminal gate pricing regime, section 13(2) of the Act requires that I:
- 27.1 have regard to the impact of the regulations on incentives to innovate and to invest in the markets for specified engine fuels; and
 - 27.2 am satisfied that:
 - 27.2.1 a significant proportion of the fuel is used by motor vehicles; and
 - 27.2.2 the regulations are necessary or desirable after having regard to the purpose of the Act (being to promote competition in engine fuel markets for the long-term benefit of end users of engine fuel products).
- 28 I consider that if 98 octane petrol (and higher) and blended fuels were to be included in the terminal gate pricing regime that it would likely impose disproportionate costs on those wholesale suppliers who supply them, given the specialised supply chains and storage facilities that would be required.
- 29 While these costs could in part be recovered by the wholesale suppliers through higher terminal gate prices, the benefits for competition of requiring them to do so are limited. In particular, new entrants do not require access to these fuels to make a competitive service offering. In addition, some of the benefits for competition of transparency of wholesale prices can be achieved through the proposed monitoring regime by the Commerce Commission and MBIE. Finally, the sale of these lower volume fuels is also a point of

competitive difference between the industry participants, and including them in the regime at this point could lessen incentives to invest in specialised supply chains and storage facilities.

- 30 I propose that premium fuel with an octane of 98 or higher, and bio-ethanol-blended petrol or diesel, are excluded from the terminal gate pricing regime at this time. This decision does not preclude subsequently adding one or more of these fuels to the regime if market circumstances change, such as wider market penetration of bio-ethanol-blended fuels.

Requirements for publicly posting the terminal gate price

- 31 Subsection 13(1)(b) allows the making of regulations that prescribe requirements relating to posting terminal gate prices for the purpose of section 9(2), for example,—
- 31.1 how terminal gate prices must be expressed (for example, as cents per litre and whether they are inclusive or exclusive of tax); or
 - 31.2 how any additional charges must be itemised (for example, that additional charges, fees, duties, or taxes must be identified separately); or
 - 31.3 where terminal gate prices must be posted (for example, on a wholesale supplier's website).
- 32 I consider that the expression of the terminal gate price should be kept as simple as possible and should be easily comparable between suppliers. I consider that this would be best achieved by requiring the terminal gate price to be expressed inclusive of costs such as excise taxes, levies, ACC charges, ETS levies and throughput fees. This is similar to what is required in Australia, where wholesale suppliers post terminal gate prices inclusive of GST and excise taxes, and generally do not itemise these costs.
- 33 During consultation some submitters suggested a common repository (such as an MBIE operated website) to allow wholesale suppliers to post prices in one place. However, I consider that this is not necessary at this time as it would impose additional costs to operate the regime, including putting in place appropriate functionality to allow the wholesale suppliers access to update the prices to avoid mistakes.
- 34 I consider that wholesale suppliers should be required to post the terminal gate price on their own website. This would be administratively simple, transparent and would not impose the additional costs of a common repository. A commercial operator could develop a common repository outside the regulations if this is desired by the industry.
- 35 I propose that the regulations prescribe that the terminal gate price should be posted by each wholesale supplier:

IN CONFIDENCE

- 35.1 by bulk storage facility and by specified engine fuel that the supplier has a right to draw at that facility;
 - 35.2 with the price in cents per litre, on an ambient temperature basis;¹
 - 35.3 specifying the time that the price is posted; and
 - 35.4 that covers all costs incurred behind the terminal gate in supplying the fuel (i.e. taxes, charges and throughput fees, as relevant) but excluding amounts charged for additional services (e.g. delivery beyond the terminal gate or fuel card services).
- 36 I also propose that the regulations prescribe that the wholesale supplier must post:
- 36.1 the current terminal gate prices on their own website in a way that is accessible to the public; and
 - 36.2 a phone number or contact details for making requests.

Requirements relating to requests by resellers

- 37 Section 10 of the Act confers a right for a reseller to request a wholesale supplier to supply, at a bulk storage facility and on the day of the request, an amount of a specified engine fuel at its terminal gate price.
- 38 Subsection 13(1)(c) allows the making of regulations prescribing requirements relating to requests by resellers under section 10.
- 39 I consider that the parties should be able to work out most of the detail themselves, but that the regulations should specify some basic matters. These matters include the interface with the obligation on the wholesale supplier for same day supply and the grounds to refuse supply.
- 40 I propose that the regulations should prescribe that the reseller is required to make the request at the wholesale supplier's designated contact point and during working hours. If requested by the wholesale supplier, the reseller should be required to advise:
- 40.1 the bulk storage facility, the specified engine fuel, and the amount in litres that is requested;
 - 40.2 the estimated time of pick-up of the fuel, which must be within operating hours for the bulk storage facility;
 - 40.3 the proposed means of payment;
 - 40.4 whether the driver has met any relevant site access requirements; and

¹ Ambient temperature means the assessment of the volume of the specified engine fuel by reference to the number of litres that the specified engine fuel occupies, or would occupy, at the air temperature applying at the time of supply.

40.5 whether the vehicle has any relevant certification.

Documents to be provided to resellers for each sale at terminal gate price

- 41 In relation to the obligation to supply, subsection 11(3) of the Act provides that a wholesale supplier must comply with any terms and conditions set in regulations made under subsection 13(1)(d) relating to the documentation that must be provided by wholesale suppliers to resellers for each sale at the terminal gate price.
- 42 During consultation submitters did not support regulations setting out documentation requirements. Generic law covers the sale of goods and this provides sufficient protections. I consider that the benefits of specifying further documentation requirements do not outweigh the costs to suppliers.
- 43 I propose that no regulations are prescribed for this purpose at this time.

Providing for pre-certification of resellers

- 44 Section 13(d)(ii) of the Act allows the making of regulations prescribing pre-certification which would allow wholesale suppliers to determine before supply if the reseller is likely to pay or to meet health and safety requirements.
- 45 I consider that resellers need to have clarity about what information is necessary to be pre-certified, should they wish to be pre-certified. Some submitters have raised concern about the supplier setting anticompetitive or unreasonable requirements. I consider that an obligation for the supplier to publish these requirements should deter this.
- 46 I propose that the regulations provide that:
- 46.1 each wholesale supplier must prepare and publish on its website a procedure for pre-certification and what evidence would be required to enable the wholesale supplier to assess the resellers' ability to pay and comply with health and safety requirements, which (without limiting those requirements) may include:
 - 46.1.1 that the driver is certified to transport fuel;
 - 46.1.2 that the vehicle is certified to transport fuel; and
 - 46.1.3 the materials that are prohibited from being brought onto the site of the bulk storage facility; and
 - 46.2 if the wholesale supplier is not the operator of the bulk storage facility for which they have a right to draw fuel, they should ensure that the relevant site requirements are readily accessible.
- 47 I consider that at this time it is not necessary to prescribe any details related to the process, such as time requirements for the wholesale supplier to process requests for pre-certification.

The minimum purchase amount

- 48 Subsection 12(1)(a) of the Act provides that one of the reasonable grounds to refuse to supply a reseller is if the amount of specified engine fuel requested is below some minimum purchase amount (or de minimis) prescribed in regulations made under subsection 13(1)(e).
- 49 The Australian Oil Code provides for something similar in that a wholesale supplier may advertise a minimum amount of declared petroleum product that it will supply as a spot sale, and, if they do so, the wholesale supplier is not required to accept a request for an amount less than the advertised minimum amount.
- 50 I consider that a wholesale supplier should not have to supply small amounts of fuel as this would impose undue costs. Leaving wholesale suppliers to set the minimum purchase amount is possible, but it would create some uncertainty for resellers.
- 51 It is important that the minimum purchase amount is less than the minimum supply amount which a wholesale supplier is obligated to supply. But it should also allow terminal gate pricing to be used by a reseller to test the market or supplement their contracted supply.
- 52 I consider that 5,000 litres (which is slightly less than a typical mini-tanker) for each specified engine at each bulk storage facility is an appropriate minimum purchase amount. This avoids imposing unreasonable demands on the supplier, but gives the reseller some flexibility to seek supply of amounts smaller than a standard tanker load if required by its business needs.

The period over which fuel demand is forecast

- 53 Subsection 12(1)(e) of the Act sets out that it is a reasonable ground for a wholesale supplier to refuse supply if the wholesale supplier requires the requested amount to meet:
- 53.1 its obligations under its contracts with end users or its fixed wholesale contracts; or
- 53.2 forecast demand, over a prescribed period, for the specified engine fuel sold by the wholesale supplier at retail fuel sites to end users. This would include fuel sold at the wholesale suppliers' own retail fuel sites (which includes truck stops) and fuel sold at a fuel site under an agency agreement with the wholesale supplier.
- 54 Subsection 13(1)(e)(ii) provides for regulations to be made to specify the period over which demand should be forecast for this purpose.
- 55 I consider that wholesale suppliers are best able to manage supply chain risks and I do not want this prescribed period to impose additional costs by forcing changes to refuelling schedules. I understand that the current forecast period used as a trigger for a port coordination event (during which a supplier

imposes a fuel management regime because of low inventories) is three months.

56 However, this is a relatively lengthy period and there can be considerable uncertainty as to the accuracy of forecasts. The uncertainty could mean that the supplier would always have some arguable grounds for asserting it required the requested amount. A shorter period would be more certain and therefore more practical.

57 I propose that the period over which forecast demand shall be set for the purposes of assessing whether to restrain supply is a rolling 28 day period. It does not need to be differentiated by port or engine fuel.

The minimum supply amount and the period to which it relates

58 Subsection 12(2) of the Act provides a specific exception whereby a wholesale supplier is not entitled to refuse supply on the grounds that the specified engine fuel is required to meet the wholesale supplier's own, agency or contracted fuel requirements. This exception relates to where the request is from an independent reseller and the request would not require the wholesale supplier to supply more than a prescribed minimum supply amount to that or any other independent reseller in a prescribed period.

59 Subsections 13(1)(h) and (i) of the Act provide for regulations to be made to specify the minimum supply amount and the relevant period to which it applies. In determining the minimum supply amount, it is desirable to consider the likely demand by independent resellers for specified engine fuel at the terminal gate, and the likely costs of supply for wholesale suppliers.

60 On the demand-side, an average full service site would sell in the region of 4.4 million litres of fuel per annum (or 85,000 litres per week). This 85,000 litres would be a mix of diesel, regular petrol and premium petrol, and the likely mix may vary by site. The Commerce Commission estimated this mix makes up on average (nation-wide) about 46.2 per cent diesel (39,118 litres), 41.4 per cent regular (35,112 litres) and 12.4 per cent premium (10,524 litres).

61 However, as the majority of new sites in recent years are unmanned and in secondary locations, this estimate is likely to be at the upper end. The 85,000 litres sold by an average retail site each week roughly equates to one tanker load each of diesel and regular petrol, and a third of a tanker load of premium petrol (assuming a standard tanker size of about 30,000 to 35,000 litres).

62 On the supply-side, there are currently 11 main locations for bulk storage facilities. As a consequence of the borrow and loan arrangement within the industry, often at least three wholesale suppliers would be obligated to supply the minimum amount at each location.

63 I consider there needs to be a balance between availability of a reasonable amount of fuel to resellers and avoiding imposing unreasonable costs on suppliers. I have also sought to avoid unnecessary complexity, which could arise from setting different minimum offtakes by both fuel type and location.

- 64 I propose that the prescribed minimum is:
- 64.1 30,000 litres per calendar week by specified location for regular diesel and regular grade petrol. This would mean that, with at least 3 wholesale suppliers per specified location, there should be 90,000 litres of each specified engine fuel available each week pursuant to this regime (i.e. enough to support approximately 3 retail sites):
 - 64.2 30,000 litres per calendar month by specified location for premium 95 octane petrol.
- 65 The minimum supply amount will also apply to independent wholesale suppliers in relation to their own bulk storage facilities.
- 66 I propose that bulk storage facilities at the following specified locations will be subject to the terminal gate pricing regime: Bluff, Dunedin, Christchurch (Lyttelton/Woolston), Mount Manganui, Napier, Nelson, New Plymouth, Timaru, Whangarei (Marsden Point), Wellington and, Auckland (Wiri/Wynyard Wharf).

Any other grounds for refusal to supply

- 67 Subsection 13(1)(g) of the Act provides that regulations can be made specifying any other grounds for a wholesale supplier to refuse supply to a reseller. Refusal of supply on health and safety and creditworthiness grounds are provided for elsewhere.
- 68 I propose that a wholesale supplier should be able to refuse to supply if:
- 68.1 there is an event outside the control of the wholesale supplier that makes it unreasonable for the wholesale supplier to be required to supply at that bulk storage facility. Examples include fuel contamination, industrial action, or force majeure grounds.

Requirements relating to notices

- 69 Subsections 12(3) and (4) of the Act set out obligations on a wholesale supplier to provide or publish a notice in particular circumstances where the wholesale supplier is relying on certain grounds for refusing supply. The two circumstances are if the wholesale supplier:
- 69.1 requires the specified engine fuel to meet its contractual obligations with end users or fixed wholesale contracts or forecast demand over the prescribed period; and
 - 69.2 has supplied the prescribed minimum amount to an independent reseller (or independent resellers) during the prescribed period.
- 70 Subsection 13(1)(j) allows regulations to be made relating to these notices, relating to the information that must be contained in the notice, the form and

manner in which it must be published or provided, or to whom it must be provided.

- 71 The intention of this provision was to inform resellers of the period when fuel from any wholesale supplier was not available due to a shortage. However, after consideration of submissions, I understand that public notification of this sort could provide a signal to other wholesale suppliers to raise prices. Instead of publication, I propose that a wholesale supplier should provide a notice to the Commerce Commission and another to the requesting reseller in these circumstances, and should not be required to publish that notice.
- 72 I also note here that there is potential for coordination from the publishing of the terminal gate price itself, and wholesale prices may rise in advance of, or in tandem with, supply shortages. I consider that the Commerce Commission's monitoring regime of the terminal gate prices should mitigate this risk. The regulators of the terminal gate pricing regime in Australia have not identified any major price coordination concerns with the publication of the terminal gate price.
- 73 The following information should be included in the notice provided to the Commerce Commission where a wholesale supplier has refused supply under section 12(1)(e):
- 73.1 the grounds for refusal to supply;
 - 73.2 any evidence to support a conclusion that the fuel was required to meet the wholesale supplier's contractual obligations or forecast demand for its own sales; and
 - 73.3 advice on whether the wholesale supplier has supplied the minimum supply amount in the relevant period.
- 74 The notice must be provided to the Commerce Commission within 5 working days of the refusal to supply.
- 75 The following information should be included in the notice provided to the reseller who has been declined supply under section 12(1)(e):
- 75.1 the grounds for the refusal to supply.
- 76 If requested by the reseller, this notice must be provided in writing to the reseller on the day that the request is declined.

Fixed wholesale contractual terms

- 77 The Act provides for a regime governing contract terms between wholesale suppliers and their wholesale customers which will make it easier for wholesale customers to switch suppliers.

Transparent pricing under fixed wholesale contracts

- 78 Section 16(1)(a) of the Act requires wholesale suppliers to ensure that their fixed wholesale contracts specify the method by which the price is to be calculated. Section 20(1)(a) allows for regulations to be made relating to the specification of a pricing method in a fixed wholesale contract for the purpose of section 16(1)(a).
- 79 The regulations cannot prescribe the exact method or methods by which the price of fuel supplied under wholesale contracts is to be calculated, they can only specify how the transparent pricing method is expressed. This allows participants to choose from a range of pricing methods.
- 80 In order to ensure that the pricing methods are clearly understood and transparent I propose:
- 80.1 that all significant elements of the pricing method must be identified in the fixed wholesale contract and how they fit together as a pricing method must be explained; and
 - 80.2 that if the pricing method is a formula then the formula must be set out in the fixed wholesale contract.
- 81 During consultation some submitters sought clarification on whether a pricing method that was expressed as the terminal gate price less a discount would be consistent with this proposal. I consider that it is consistent and it would be useful for the regulations to include an example for how this could work for a TGP minus pricing method.

Varying a transparent pricing method

- 82 Section 20(1)(b) of the Act provides for regulations to set the circumstances whereby the pricing method in a fixed wholesale contract can be varied.
- 83 I consider that the unilateral ability of wholesale suppliers to change pricing methods would leave dealers and distributors bearing the risks associated with any increase in wholesale margin. The regulations should limit the scope for such behaviour.
- 84 I therefore propose that the regulations provide that the pricing method can be changed to another pricing method only when sufficient notice has been given and both parties agree to the new pricing method.

Right to terminate wholesale contracts after a maximum duration

- 85 Section 17 of the Act allows distributors, in some circumstances, to terminate their fixed wholesale supply contract with a wholesale supplier on reasonable notice once the contract has exceeded a prescribed maximum duration. Section 20(1)(c) allows regulations to be made to prescribe the maximum duration.

- 86 I consider there needs to be a balance between having a maximum duration that is too:
- 86.1 long and limits the opportunity for distributors to 'shop around' for competitive supply; and
 - 86.2 short and therefore is likely to increase the cost for distributors, as suppliers have less volume certainty and ability to organise their supply chains. In addition, the increase in transaction costs for wholesale suppliers and distributors of more frequent tendering for supply could offset the competitive gains for distributors.
- 87 I consider that a maximum of five years achieves this balance. Five years allows for a reasonable period of certainty for suppliers and distributors, but would not impose unreasonable transaction costs.
- 88 During consultation a majority of submitters supported this proposal. One submitter requested a period of two years, however, I consider this would be too brief to provide certainty and would create transaction costs because the parties would need to begin negotiating a new contract not long after finalising the previous fixed wholesale contract.
- 89 I consider going beyond five years would preserve the status quo where wholesale relationships are subject to the long term lock-ins. This was identified as a concern by the Commerce Commission in the retail fuel market study.

Maximum exclusivity of wholesale contracts

- 90 Section 18 of the Act prohibits any exclusivity provision(s) in a distributor's fixed wholesale supply contract from applying to more than a prescribed share of the distributor's annual requirement for engine fuel. Section 20(1)(d) provides the ability to set the maximum percentage of the distributor's annual requirement for engine fuel that a fixed wholesale contract can require the distributor to purchase from the wholesale supplier (prescribed share).
- 91 I propose that the regulations should provide that 80 per cent is the maximum percentage of the distributor's annual requirement for engine fuel that a fixed wholesale contract can require the distributor to purchase from the wholesale supplier.
- 92 I consider that a prescribed share higher than 80 per cent would reduce the competition benefits for distributors as it will make it more difficult for new importers to gain market share. It would also reduce the bargaining power that distributors have to seek contracts with other suppliers, due to the smaller volume with which they will be testing the market.
- 93 I consider a prescribed share lower than 80 per cent may increase the cost a distributor pays for its prescribed share as it is purchasing a lower volume. This would, however, be offset to some degree by the distributors' greater

bargaining power with the larger share of their demand than they would be purchasing from other suppliers.

Consumer information requirements

- 94 The Act introduces requirements for the display of the price of fuel at retail fuel sites to assist consumers to compare prices, thereby promoting competition in the fuel market.
- 95 Section 21 of the Act provides that the purpose of the consumer information requirements is to provide transparency in retail fuel prices so that end users are able to make informed purchasing decisions.
- 96 Section 22 of the Act requires a retailer, or the person responsible for displaying information at a retail fuel site, to comply with any requirements prescribed by the regulations.

The engine fuels to which the regulations apply

- 97 Section 24(2)(a) of the Act enables regulations to be made prescribing the engine fuels to which the regulations apply.
- 98 I consider that in order to enable consumers to make more informed purchasing decisions the 'standard retail price'² - the price that is available to all consumers - of the most common fuel products sold in New Zealand should be displayed. This was largely supported by submitters during consultation.
- 99 The four most common grades of retail fuel sold in New Zealand are diesel, 91 octane, 95 octane and 98 octane.
- 100 I propose that the retail sites must display the 'standard retail price' of:
- 100.1 91 octane;
 - 100.2 diesel; and
 - 100.3 all grades of premium petrol.
- 101 There were some submissions regarding the display of premium fuel prices, that thought only 95 octane should be required to be displayed, or that if a retail site displayed more than one grade of premium fuel, then only the most common grade of premium fuel should be displayed.
- 102 I note that the Commerce Commission considered in its market study that the absence of premium fuel prices on these boards makes it harder for customers to shop around for the best price, which may adversely affect competition, prices and margins for premium fuel. I consider that requiring the display of all premium fuel prices will enable all users of any grade of fuel the

² The price at which the fuel can be purchased by any member of the public. I.e. the price before any discounts are applied.

ability to compare prices, and this will promote greater retail price transparency and informed consumer choice.

- 103 I propose that the requirement should not apply to very low volume fuel types such as LPG because requiring the display of too many fuel types may result in overly cluttered price boards which may overwhelm and confuse consumers.
- 104 I recognise that in the future different fuel types may be sold. The regulations are intended to be reviewed regularly and the engine fuel types required to be displayed can be updated as necessary. I do not propose to regulate for future fuels at this time.

The kind of retail fuel sites the regulations will apply to

- 105 Section 24(2)(a) of the Act enables regulations to be made prescribing the kind of retail fuel sites to which the regulations should apply.
- 106 To ensure consumers have the information available to them to make informed purchasing decisions, I consider that the regulations should apply to all retail fuel sites in New Zealand.
- 107 I recognise that the cost of modifying price boards or putting up a new price board could disproportionately impact smaller sites. I therefore do not propose to prescribe the type of price board, only to require that it is visible to passing motorists. This is similar to requirements in Australia. This will allow businesses to determine the best way within their financial capability to meet the regulations. It is intended that all service stations and unmanned sites are captured.
- 108 I propose that the regulations do not apply to truck stops,³ because a majority of transactions at these sites occur at a pre-negotiated price anyway, so I do not consider in this instance the benefit to consumers would outweigh the cost to the retailer. However, truck stops that cater substantially to the broader public should be captured by the regulations. The exclusion of truck stops had the support of a majority of submissions.

The information in relation to the prices of those engine fuels that must be displayed

- 109 Section 24(2)(b) of the Act enables regulations to be made prescribing the information in relation to the price of engine fuels that must be displayed.
- 110 I consider that to provide transparency of prices to consumers of fuel products 'the standard retail price' - the price that is available to all consumers – should be displayed on price boards.
- 111 I propose the regulations require the display of the 'standard retail price' of the required fuel types. This was supported by all submitters during consultation.

³ A fuel station often on a major highway where truck drivers stop for fuel. Often these sites are only accessible to larger vehicles and payment can only be made by a fuel card.

The circumstances in which the information must be displayed

- 112 Section 24(2)(c) of the Act enables regulations to be made prescribing the circumstances in which the information must be displayed.
- 113 The purpose of these regulations is to provide transparency in retail fuel prices so that end users are able to make informed purchasing decisions. Therefore, I consider that in order to achieve this purpose, prices for the regulated fuels must be displayed at any time the fuel is available for purchase at a site.
- 114 Submitters agreed with this but noted that consideration needs to be given to circumstances outside of a retailer's control that might mean that prices cannot be displayed for a period of time e.g. power outages. I agree that the regulations will need to allow for these situations.
- 115 I also consider that the regulations should recognise that price boards may also be subject to New Zealand Transport Authority, Regional Council and Local Council bylaws e.g. there are bylaws that prohibit advertising on motorways. I consider that price boards must comply with other relevant bylaws.

The form and manner in which the information must be displayed

- 116 Section 24(2)(d) of the Act enables regulations to be made prescribing the form and manner in which the information must be displayed.
- 117 Most submitters did not support regulations being too prescriptive on the form and manner of which the prices must be displayed i.e. the layout size and colour of the prices.
- 118 I recognise that any specific regulation around the type of price board, order of grades, size and colour would significantly increase compliance costs and would likely require substantial upgrading of existing price boards.
- 119 The purpose of the price board requirements is to provide transparency in retail fuel prices so that end users are able to make informed purchasing decisions. I consider that as long as 'standard retail prices' are displayed on a price board, and these prices are visible to passing motorists, this transparency can be achieved without further specification as to form and manner.
- 120 As discussed in paragraph 107, I also recognise that the cost of modifying price boards or putting up a new price board could disproportionately impact smaller sites. I do not propose to prescribe the type of price board, only requiring that it is visible to passing motorists. This will allow businesses to determine the best way within their financial capability to meet the regulations.
- 121 I note that some states in Australia take a similar approach, for example in Queensland a price board is defined as "a board, sign or notice that is visible to a person in a motor vehicle at, or passing by, a service station that displays

information about the price of types of fuel for retail sale at the service station.”

122 I propose that the regulations should:

122.1 require the regulated information to be displayed on a “price board”;

122.2 not dictate the type of price board; and

122.3 require that the prices must be visible to passing motorists.

Information that must not be displayed

123 Section 24(2)(b) of the Act enables regulations to be made prescribing the information that must not be displayed.

124 During consultation several submitters have raised concern with the discounting practices of some fuel retailers and would like to see the regulations prohibit conditional discounting.

125 In their market study, the Commerce Commission raised a number of concerns about the display of discount information at retail outlets. However, they also noted that discounted pricing had evolved over the course of its market study. While the Commerce Commission had some reservations about the way market practices are evolving, it did not recommend regulation at this time. It instead recommended that the Government monitor the display of discount prices on price boards to assess whether the practice benefits consumers or limits competition.

126 Cabinet agreed in February 2020 [CAB-20-MIN-003] that monitoring of discounts is the most appropriate response at this time.

127 I propose that no regulations are prescribed for this purpose at this time.

128 Should prohibiting the display of discounted prices be warranted in the future, regulations can be made to this effect.

Dispute Resolution

129 Section 46 of the Act deals with disputes between a wholesale supplier and a reseller relating to the rights and obligations set out in subpart 1 (terminal gate pricing) and subpart 2 (fixed wholesale contractual terms) of Part 2 of the Act.

130 It enables parties who are unable to resolve a dispute to refer the dispute to mediation and follow the process set out in the regulations. If the parties are unable to resolve a dispute by mediation then they may refer the dispute to arbitration.

Procedure

- 131 Section 47 of the Act enables the regulations to prescribe procedures for the purpose of section 46 (disputes arising from subpart 1 or 2 of Part 2 must be referred to mediation).
- 132 I consider that the procedure for dispute resolution in the regulations should be kept as simple as possible and not be overly prescriptive so that the parties, together with their mediator, can decide on the best process and timetable for resolving their particular dispute.
- 133 Mediation may be initiated by either party by writing to the other party and identifying the dispute which is being suggested for mediation within 20 working days of the dispute arising, though the events giving rise to the dispute may have occurred earlier. The other party must respond within 10 working days of receiving the dispute notice.
- 134 I consider the parties should have the opportunity to select a suitable mediator of their choice. If they can't agree then an independent nominating authority will appoint a mediator or arbitrator with qualifications and experience relevant to the dispute.
- 135 The Minister of Energy and Resources will appoint the independent nominating authorities.
- 136 The mediator should, as a minimum requirement, be appropriately qualified and certified by either of the two professional bodies for alternative dispute resolution practitioners in New Zealand. These are the Arbitrators and Mediators Institute of New Zealand (AMINZ) or the Resolution Institute; which also intend to act as independent nominating authorities. The nominated mediator should have appropriate experience and/or training. The ability of the parties to pay should also be considered in making the appointment, so the parties must give the nominating authority some indication of their budgets.
- 137 I consider mediation must proceed within 20 working days of all notices having been served as long as the parties have agreed on the mediator and the procedure for mediation. If not, an independent nominating authority will appoint a mediator.
- 138 Once one party has initiated the mediation by serving a notice of dispute, the served party must participate in the mediation procedure. Until mediation has been attempted in accordance with the procedures prescribed in regulations, neither party can access other methods of dispute resolution.
- 139 If one party refuses to participate from the start, or withdraws from the mediation process, they must provide reasons in writing to the other party. The other party may then refer the matter to arbitration. The dispute should also proceed to arbitration if the mediator considers that it is not suitable for mediation.

IN CONFIDENCE

- 140 If resolution is reached on the whole or part of a dispute, the terms of the settlement must be recorded in a written settlement agreement signed by the parties. The settlement agreement will be binding on the parties. A party may enforce the settlement agreement by way of proceedings in a court of appropriate jurisdiction.
- 141 Section 46(4) provides that if the parties are unable to resolve the dispute at mediation within any timeframe prescribed by regulations made under this subpart, either party may refer the dispute to arbitration.
- 142 I propose that the prescribed timeframe is 60 working days from the date the dispute notice is served. Once this 60 working days has expired, if the dispute is to be referred to arbitration, this must be done within 10 working days and is achieved by any party serving a Referral to Arbitration Notice on the other party(s). Once this notice has been served the Arbitration Act 1996 will govern the arbitration procedure moving forward.
- 143 I consider that the regulations do not need to set out a procedure for arbitration. It is already covered in the Arbitration Act 1996.

Split of costs

- 144 Section 47(1)(b) of the Act enables the regulations to specify or set out a method of calculation for how mediation costs incurred under section 46 must be split between the parties.
- 145 I propose that for mediation each party to the dispute:
- 145.1 pays its own costs and expenses in relation to the mediation; and
 - 145.2 splits the fees and expenses of the mediator and nominating authority (if required) 50/50.
- 146 This is typically standard practice for commercial disputes in New Zealand.
- 147 Once the mediator has been appointed, both parties will agree to the mediation procedure, through the mediator. At this point they can choose to deviate from the default split if they choose. They may also agree this at any other time, including in the settlement agreement. This allows some flexibility in terms of how the costs are split.
- 148 During consultation one submitter disagreed with splitting the fees 50/50 and requested differential treatment and differential funding of dispute resolution processes. They were concerned about costs to smaller players in the industry. I note that the parties can agree on the mediator so, if a suggested mediator is too expensive for one party, they can refuse to agree to that mediator. If the parties still cannot agree and the nominating authority appoints the mediator, it must also consider the ability of the parties to pay in making the appointment.

- 149 I consider that the availability of mediation is in itself a significant way to reduce costs, as opposed to going through the courts. There is also the option of going to the Dispute Tribunal, if smaller participants in the industry still find the costs of mediation prohibitive. This tribunal is a low-cost option as it has low application fees and only allows lawyers at members' discretion.
- 150 For arbitration, the Arbitration Act 1996 applies to all disputes under the Act and deals with costs. I consider that this will suffice and the regulations do not need to deal with costs for arbitration separately.

Dispute Resolution Schemes

- 151 Section 47 of the Act enables the regulations to prescribe one or more dispute resolution schemes for the purpose of section 46.
- 152 I have considered a wide range of options ranging from using an existing scheme, such as schemes in the electricity or telecommunications industries, to having a mandatory, voluntary or ad hoc scheme.
- 153 In Australia, which operates a similar Terminal Gate Pricing regime, a review of their dispute scheme found that the service had averaged 1.5 mediations per year. It is hard to estimate how many disputes might result in mediation in New Zealand. However, based on the Australian regime and what we have been told by industry participants so far, we expect that the volume of disputes likely to be taken to mediation would be low. If this were to be the case, then investment to create a new scheme with a centralised decision maker or even to expand the jurisdiction of an existing scheme to take on these issues might not be warranted.
- 154 I propose that no regulations should be prescribed for this purpose at this time but this decision may be revisited if the volume of disputes is much higher than expected.

Financial Implications

- 155 The Act created new functions, powers and duties under the Act for the Commerce Commission and MBIE. The regulatory proposals in this paper further set out the detail of the regime to enable the Act to come into effect.

156 Constitutional conventions



Legislative Implications

- 157 Regulations will need to be developed to give effect to the proposals in this Cabinet paper.

158 The regulations will need to be drafted by PCO.

Regulatory Impact Statement

159 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Climate Implications of Policy Assessment

- 160 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the impact on emissions is indirect.
- 161 When Cabinet considered final policy decisions on the Fuel Industry Bill last year, it was noted that analysis indicated that emissions increases could range from between approximately 11 Kt CO₂ per annum for a price change of 1cpl (cents per litre) in the short run, through to approximately 219 Kt CO₂ per annum in the long run for a price change of 12cpl.
- 162 While the regime set out in the Act may lead to a fall in prices, the technical details of the regulations as set out in this proposal are not considered to have a direct impact beyond the overall framework set out in the Act.
- 163 Although greenhouse gas and air pollutant emissions from transport can be expected to increase as a result of a decrease in fuel prices, other initiatives are being advanced to drive emissions reductions in the transport sector.

Population Implications

164 There are no population implications in regards to the proposals in this paper.

Human Rights

165 The proposals in this paper are not inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

- 166 The Ministry of Transport, the Ministry for the Environment, the Treasury, New Zealand Transport Authority and the Commerce Commission were consulted on this paper. The Department of Prime Minister and Cabinet were informed.
- 167 I undertook targeted engagement with fuel industry participants that I consider likely to be significantly affected by the proposed regulations on the proposals in this paper including major fuel suppliers, Gull, Timaru Oil Service Limited (TOSL), distributors, the AA and the Motor Trades Association.

Communications

168 I intend to publish the submissions received during the last consultation round on the Ministry of Business, Innovation and Employment's website, alongside the proactively released Cabinet paper, and a news release.

Proactive Release

169 I propose to proactively release this Cabinet paper and minutes within 30 business days.

Next step

170 I propose to undertake targeted consultation on an exposure draft of the regulations with fuel industry participants I consider likely to be significantly affected by the proposed regulations.

Recommendations

The Minister of Energy and Resources recommends that the Committee:

- 1 **note** that the Fuel Industry Act 2020 received Royal Assent on 11 August 2020;
- 2 **note** that the Act gives the Minister of Energy and Resources the power to recommend regulations in relation to various matters related to the fuel industry;
- 3 **note** that I consider it important that the supporting regulations are developed before the relevant sections of the Act come into force;
- 4 **note** that the terminal gate pricing, fixed wholesale contractual terms and dispute resolution provisions come into force on 11 August 2021 (unless brought into force earlier by the Governor General by Order in Council);
- 5 **note** that consumer information requirements and disclosure of information provisions come into force on 11 February 2022 (unless brought into force earlier by the Governor General by Order in Council);
- 6 **note** that I intend to publish the consumer information requirements provisions at the same time as terminal gate pricing, fixed wholesale contractual terms and dispute resolution provisions, however, I do not intend for them to come into force until 11 February 2022;
- 7 **note** that the Act provides that before regulations can be made the Minister of Energy and Resources must have consulted with fuel industry participants they consider likely to be significantly affected by the proposed regulations;
- 8 **note** that in November 2020, I released a targeted consultation paper on the proposals in this paper to the fuel industry participants I consider likely to be significantly affected by the proposed regulations;

- 9 **note** that the Act provides that before regulations can be made the Minister of Energy and Resources must be satisfied that the regulations are necessary or desirable after having regard to the purpose of the Act, and the relevant subpart;
- 10 **note** that I am satisfied that the proposals for regulations in this Cabinet paper are necessary or desirable after having regard to the purpose of this Act, and/or the relevant subpart;
- 11 **note** that proposals for the information disclosure regulations are still under development and approval will be sought from Cabinet in mid-2021 to make these regulations;
- 12 **note** the regulations are intended to be reviewed regularly, so that we can ensure that regulatory parameters are set at the right level to best meet the purpose of the Act;

Terminal gate pricing

- 13 **agree** that premium petrol with an octane 98 and higher is not subject to the terminal gate pricing regime;
- 14 **agree** that any bio- or ethanol-blended petrol or diesel is not subject to the terminal gate pricing regime;
- 15 **agree** that the terminal gate price should be posted by each wholesale supplier:
- 15.1 by bulk storage facility and by specified engine fuel that the supplier has a right to draw at that facility;
 - 15.2 with the price in cents per litre, on an ambient temperature basis;
 - 15.3 specifying the time when the price is posted; and
 - 15.4 covering all costs incurred behind the terminal gate in supplying the fuel (i.e. taxes, charges and throughput fees, as relevant) but excluding amounts charged for additional services (e.g. delivery beyond the terminal gate or fuel card services);
- 16 **agree** that the wholesale supplier must post:
- 16.1 the current terminal gate prices on their own website in a way that is accessible to the public; and
 - 16.2 a phone number or contact details for making requests;
- 17 **agree** that the reseller should be required to make the request at the wholesale supplier's designated contact point and during working hours. If requested by the wholesale supplier, the reseller should be required to advise:

IN CONFIDENCE

- 17.1 the bulk storage facility, the specified engine fuel, and the amount in litres that is requested;
 - 17.2 the estimated time of pick-up of the fuel, which must be within operating hours for the bulk storage facility;
 - 17.3 the proposed means of payment;
 - 17.4 whether the driver has met any relevant site access requirements; and
 - 17.5 whether the vehicle has any relevant certification;
- 18 **agree** each wholesale supplier must prepare and publish on its website a procedure for pre-certification and what evidence would be required to enable the wholesale supplier to assess the reseller's ability to pay and compliance with health and safety requirements; which (without limiting those requirements) may include:
- 18.1 that the driver is certified to transport fuel;
 - 18.2 that the vehicle is certified to transport fuel; and
 - 18.3 the materials that are prohibited from being brought onto the site of the bulk storage facility;
- 19 **agree** if the wholesale supplier is not the operator of the bulk storage facility for which they have a right to draw fuel, they should ensure that the relevant site requirements are readily accessible;
- 20 **agree** that the regulations should provide that there is a minimum purchase amount of 5,000 litres for each specified engine fuel at each bulk storage facility;
- 21 **agree** that the period over which forecast demand shall be set for the purposes of assessing whether to restrain supply is a rolling 28 day period. It does not need to be differentiated by port or engine fuel;
- 22 **agree** that the prescribed minimum is:
- 22.1 30,000 litres per week by specified location for regular diesel and regular grade petrol;
 - 22.2 30,000 litres per month by specified location for premium 95 octane petrol;
- 23 **agree** that bulk storage facilities at the following specified locations will be subject to the terminal gate pricing regime: Bluff, Dunedin, Christchurch (Lyttelton/Woolston), Mount Manganui, Napier, Nelson, New Plymouth, Timaru, Whangarei (Marsden Point), Wellington and, Auckland (Wiri/Wynyard Wharf);

IN CONFIDENCE

- 24 **agree** that the a wholesale supplier should be able to refuse supply if there is an event outside the control of the wholesale supplier that makes it unreasonable for the wholesale supplier to be required to supply at that bulk storage facility. Examples include fuel contamination, industrial action, or force majeure grounds;
- 25 **agree** that where a wholesale supplier has refused supply to a reseller under section 12(1)(e), the wholesale provider must provide a notice to the Commerce Commission within 5 working days of the circumstance occurring. The notice must include:
- 25.1 the grounds for refusing to supply;
 - 25.2 any evidence to support a conclusion that the requested fuel was required to meet the wholesale supplier's contractual obligations or forecast demand for its own sales; and
 - 25.3 advice on whether or not the wholesale supplier has supplied the minimum supply amount in the relevant period;
- 26 **agree** that on the day that a wholesale supplier refuses supply to a reseller under section 12(1)(e), the wholesale supplier must provide a written notice (if requested by the reseller) to the reseller advising of the grounds for refusal;

Fixed wholesale contractual terms

- 27 **agree** that all significant elements of the pricing method must be identified in the fixed wholesale contract and how they fit together as a pricing method must be explained;
- 28 **agree** that if the pricing method is a formula then the formula must be set out in the fixed wholesale contract;
- 29 **agree** that the pricing method in a fixed wholesale contract can be changed to another pricing method only when:
- 29.1 sufficient notice has been given; and
 - 29.2 both parties agree to the new pricing method;
- 30 **agree** that the maximum duration after which a distributor can terminate a fixed wholesale contract with a wholesale supplier is five years;
- 31 **agree** that eighty per cent is the maximum percentage of the distributor's annual requirement for engine fuel that a fixed wholesale contract can require the distributor to purchase from the wholesale supplier;

Consumer information requirements

- 32 **agree** that retail sites must display the 'standard retail price' of:
- 32.1 91 octane;

I N C O N F I D E N C E

- 32.2 diesel; and
- 32.3 all premium grades of fuel;
- 33 **agree** that the consumer information requirements apply to all retail fuel sites, other than truck stops;
- 34 **agree** that regulations should require the display of the 'standard retail price' of the required fuel types;
- 35 **agree** that prices are to be displayed at any time that the retail fuel site is open for business for the supply of the prescribed fuel, unless prohibited by other bylaws;
- 36 **agree** that price boards must still comply with any relevant bylaws;
- 37 **agree** that the regulations should recognise that there may be circumstances outside of a retailer's control that might mean that prices cannot be displayed for a period of time e.g. power outages;
- 38 **agree** that the 'standard retail price' is required to be displayed on a "price board" and that the 'standard retail price' must be visible to passing motorists;

Dispute resolution

- 39 **agree** that mediation may be initiated by either party writing to the other party and identifying the dispute which is being suggested for mediation within 20 working days of the dispute arising, though the events giving rise to the dispute may have occurred earlier;
- 40 **agree** that the party served the dispute notice must respond within 10 days of receiving the dispute notice;
- 41 **agree** that if the parties cannot agree on a mediator an independent nominating authority will appoint a mediator with qualifications and experience relevant to the dispute for them;
- 42 **agree** that independent nominating authorities will be appointed by the Minister of Energy and Resources;
- 43 **agree** that the mediator should at a minimum be appropriately qualified and certified by either of the two professional bodies for alternative dispute resolution practitioners in New Zealand: the Arbitrators and Mediators Institute of New Zealand (AMINZ) or the Resolution Institute;
- 44 **agree** that the appointed mediator should have appropriate experience and/or training and the ability of the parties to pay should be considered in making the appointment;
- 45 **agree** that mediation must proceed within 20 working days of all notices having been served as long as the parties have agreed on the mediator and

I N C O N F I D E N C E

the procedure for mediation, and, if not, an independent nominating authority will appoint a mediator;

- 46 **agree** that once one party has initiated the mediation by serving a notice of dispute, the served party must participate in the mediation procedure. Until mediation has been attempted in accordance with the procedures prescribed in regulations, neither party can access other methods of dispute resolution;
- 47 **agree** if one party refuses to participate from the start, or withdraws from the mediation process, they must provide reasons in writing to the other party. The other party may then refer the matter to arbitration;
- 48 **agree** if resolution is reached on the whole or part of a dispute, the terms of the settlement must be recorded in a settlement agreement;
- 49 **agree** that the settlement agreement will be binding on the parties;
- 50 **agree** that the parties may enforce the settlement agreement by way of proceedings in a court of competent jurisdiction;
- 51 **agree** that if the parties are unable to resolve the dispute at mediation within 60 days from the date the dispute notice is issued, the dispute may be referred to arbitration;
- 52 **agree** that once this 60 days has expired, if the dispute is to be referred to arbitration, this must be done within 10 days;
- 53 **agree** that each party to the dispute:
- 53.1 pays their own costs and expenses in relation to the mediation; and
 - 53.2 splits the fees and expenses of the mediator and nominating authority (if required) 50/50;

Other recommendations

- 54 **invite** the Minister of Energy and Resources to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above recommendations;
- 55 **authorise** the Minister of Energy and Resources to make decisions, consistent with the proposals in these recommendations, on any issues that arise during the drafting process;
- 56 **authorise** the Minister of Energy and Resources to make decisions on minor and technical matters that may arise during the drafting process;
- 57 **agree** to release an exposure draft of the regulations for the purposes of targeted consultation with fuel industry participants the Minister of Energy and Resources considers likely to be significantly affected by the proposed regulations.

Authorised for lodgement

Hon Dr Megan Woods

Minister of Energy and Resources