



## COVERSHEET

<b>Minister</b>	Hon Dr Megan Woods	<b>Portfolio</b>	Energy and Resources
<b>Title of Cabinet paper</b>	<b>Fuel Industry Regulations 2021</b>	<b>Date to be published</b>	23 July 2021

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
July 2021	Fuel Industry Regulations 2021	Office of the Minister of Energy and Resources
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**Information redacted**

**YES / NO** [select one]

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In confidence

Office of the Minister of Energy and Resources  
Chair, Cabinet Legislation Committee

## **Fuel Industry Regulations 2021**

### **Proposal**

- 1 This paper seeks authorisation for submission to the Executive Council of the Fuel Industry Regulations 2021 (the Regulations).

### **Executive Summary**

- 2 The Fuel Industry Act 2020 (the Act) received Royal Assent on 11 August 2020.
- 3 The Act gives the Minister of Energy and Resources the power to recommend regulations in relation to various matters related to the fuel industry. The detail of the new regime will be determined through the regulations.
- 4 On 22 March 2021, Cabinet agreed [CAB-21-MIN-0074] to the development of regulations for the following parts of the Act:
  - 4.1 terminal gate pricing;
  - 4.2 fixed wholesale contractual terms;
  - 4.3 consumer information requirements; and
  - 4.4 dispute resolution.
- 5 These Regulations have been drafted (see attached) to implement the policy proposals agreed to by Cabinet.
- 6 However, before any regulations can be prescribed, the Act requires that the Minister of Energy and Resources:
  - 6.1 has consulted with the fuel industry participants that they consider are likely to be significantly affected by the proposed regulations; and
  - 6.2 is satisfied that the regulations are necessary or desirable after having regard to the purpose of the Act.
- 7 I have consulted with fuel industry participants that I consider are likely to be significantly affected by the proposed regulations.
- 8 I am satisfied that the Regulations are necessary or desirable after having regard to the purpose of the Act and the associated subpart.

- 9 I seek approval from Cabinet to submit the Regulations to the Executive Council.

## **Background**

- 10 The Fuel Industry Act 2020 (the Act) received Royal Assent on 11 August 2020.
- 11 The Act addresses the findings from the retail fuel market study undertaken by the Commerce Commission (the 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.
- 12 The Act establishes:
- 12.1 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;
  - 12.2 rules to ensure contracts between wholesale fuel suppliers and their wholesale customers are fair and support competition;
  - 12.3 requirements for retail fuel sites to display premium fuel prices on forecourt price boards;
  - 12.4 improvements to enable the monitoring of the fuel market by requiring fuel companies to collect and disclose certain information; and
  - 12.5 a dispute resolution scheme for the new regime under the Act.

## **Regulations for approval**

- 13 The Act gives the Minister of Energy and Resources the power to recommend regulations in relation to various matters related to the fuel industry. A lot of the detail of the new regime will be prescribed through the regulations.
- 14 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.
- 15 The preliminary, procedural and miscellaneous provisions came into force on 12 August 2020.
- 16 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 requirements and disclosure of information). These can be brought in force earlier by the Governor General by Order in Council if necessary.

- 17 On 19 March 2021, Cabinet agreed [CAB-21-MIN-0074] to the development of regulations for the following parts of the Act:
- 17.1 terminal gate pricing;
  - 17.2 fixed wholesale contractual terms;
  - 17.3 consumer information requirements; and
  - 17.4 dispute resolution.
- 18 Proposals for regulations for the disclosure of information aspect of the Act are still under development and approval will be sought from Cabinet in the coming months. The regime is due to come into force on 11 February 2022.
- 19 The Regulations have been drafted (see attached) to implement the policy proposals agreed by Cabinet.
- 20 The main requirements in the Regulations are set out below (paragraphs 22 – 41).
- 21 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*

- 22 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.
- 23 Section 13(1) of the Act sets out the detail of the terminal gate pricing regime that can be prescribed in regulations, including requirements to publicly post the terminal gate price and requirements for requests by the reseller.
- 24 The key details prescribed in the attached Regulations include:
- 24.1 excluding premium grades of petrol of 98 octane or higher, and bio-ethanol-blended petrol or diesel from the terminal gate pricing regime; and
  - 24.2 setting the minimum supply amount at a specified location at 30,000 litres per calendar week for regular diesel and regular grade petrol and 30,000 litres per calendar month for premium 95 octane petrol.
- 25 In March, Cabinet agreed 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.

- 26 The Parliamentary Counsel Office considers this is a very unusual provision that is not normally inserted in legislation as it would self-evidently be a strong ground for choosing not to enforce or to impose penalties. In the event that a wholesale supplier is unable to supply due to an unforeseeable event outside of their control, the Commerce Commission is very unlikely to take enforcement actions against the wholesale supplier. In addition, a court determining the appropriate level of a pecuniary penalty in the event of an enforcement action, under section 20(6) of the Act, must have regard to the “circumstances in which the contravention or other act or omission took place (including whether it was intentional, inadvertent, or caused by negligence)”. Consequently, these grounds will not be explicitly provided for in the Regulations.

#### *Fixed wholesale contractual terms*

- 27 The Act provides for a regime governing fixed wholesale contracts between wholesale suppliers and their wholesale customers which will make it easier for wholesale customers to switch suppliers.
- 28 The Act sets out the details of the fixed wholesale contractual terms regime that can be prescribed in regulations; including rules for how pricing methods are varied and how they can be specified and the maximum duration after which a distributor can terminate a fixed wholesale contract with a wholesale supplier.
- 29 The key details prescribed in the attached Regulations include:
- 29.1 maximum duration after which a distributor can terminate a fixed wholesale contract with a wholesale supplier is five years; and
  - 29.2 maximum percentage of the distributor’s annual requirement for engine fuel that a wholesale contract can require the distributor to purchase from the wholesale supplier is 80 per cent.

#### *Consumer information requirements*

- 30 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.
- 31 The Act further sets out the details of the consumer information requirements that can be prescribed in regulations, including the engine fuels and kinds of retail fuel sites the regulations apply to and the information in relation to the price of those engine fuels that must be displayed.
- 32 The key details prescribed in the attached Regulations include:
- 32.1 requiring the display of the standard retail price of regular grade petrol, diesel and each grade of premium petrol on price boards; and

32.2 requiring the standard retail price to be visible to a person in a motor vehicle passing by the site.

### *Dispute Resolution*

- 33 The Act introduces a process for dispute resolution for disputes that arise between a wholesale supplier and a reseller relating to the terminal gate pricing and fixed wholesale contractual term regimes.
- 34 Section 47 of the Act enables regulations to prescribe procedures and the split of cost between parties for the dispute resolution regime.
- 35 In March 2021 Cabinet agreed [CAB-21-MIN-0074] that if the parties to a dispute cannot agree on a mediator, an independent nominating authority will appoint a mediator from their membership pool with qualifications and experience relevant to the dispute for them, and that independent nominating authorities will be appointed by the Minister of Energy and Resources.
- 36 Instead of the Minister of Energy and Resources appointing these independent nominating authorities at a later date, I propose that the parties are appointed directly in the Regulations.
- 37 In New Zealand there are four organisations that have been approved by the Secretary for Justice as Approved Dispute Resolution Organisations (ADRO). These are:
- 37.1 Arbitrators' and Mediators' Institute of New Zealand (AMINZ);
  - 37.2 Resolution Institute;
  - 37.3 New Zealand Law Society; and
  - 37.4 Māori Allied Dispute Resolution Organisation (MADRO).
- 38 These organisations are the only ones in New Zealand that currently have the capability to fulfil the role of independent nominating authorities.
- 39 All four bodies were approached but only AMINZ, Resolution Institute and MADRO agreed to act as independent nominating authorities for the purposes of the Fuel Industry Act 2020. In future, other organisations could be added to this list when the Regulations are reviewed.
- 40 I seek Cabinet's approval to appoint AMINZ, Resolution Institute and MADRO as independent nominating authorities for the purposes of the Fuel Industry Act 2020.
- 41 Other key details prescribed in the attached Regulations include:
- 41.1 Mediation must be carried out by a mediator who is accredited as a mediator by AMINZ or the Resolution Institute;

- 41.2 Each party to the dispute pays its own costs and expenses in relation to the mediation and splits the fees and expenses of the mediator 50/50.

### **Timing and 28-day rule**

- 42 The Fuel Industry Regulations will adhere to the 28-day rule following its notification in the *New Zealand Gazette*.
- 43 The terminal gate pricing, fixed wholesale contractual terms and dispute resolution regulations will commence on 11 August 2021, and the consumer information requirements will commence on 11 February 2022.

### **Compliance**

- 44 The proposed regulations comply with:
- 44.1 the principles of the Treaty of Waitangi;
  - 44.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
  - 44.3 the principles and guidelines set out in the Privacy Act 2020;
  - 44.4 relevant international standards and obligations; and
  - 44.5 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

### *Statutory pre-requisites*

- 45 For regulations to be made under Part 2 Subpart 1 (Terminal Gate Pricing) of the Act, sections 13(2)(a) requires that the Minister must have consulted with the fuel industry participants that they consider are likely to be significantly affected by the proposed regulations.
- 46 For regulations specifying engine fuels that are included in, or excluded from, the definition of specified engine fuel, section 13(2) of the Act requires that the Minister:
- 46.1 has had regard to the impact of the regulations on incentives to innovate and to invest in the markets for specified engine fuels; and
  - 46.2 is satisfied that:
    - 46.2.1 a significant proportion of the fuel is used by motor vehicles; and
    - 46.2.2 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).

- 47 For regulations to be made under Part 1 Subpart 2 (Fixed Wholesale Contractual Terms) and Part 1 Subpart 3 (Consumer Information Requirements) of the Act, sections 20(2) and 24(3) require that the Minister must:
- 47.1 have consulted with the fuel industry participants that they consider are likely to be significantly affected by the proposed regulations; and
  - 47.2 be satisfied that the regulations are necessary or desirable after having regard to the purpose of the Act.
- 48 For regulations to be made under section 47(1) (Dispute Resolution and residual empowering provision), section 47(2) requires that the Minister must have consulted with fuel industry participants that the Minister considers are likely to be significantly affected by the regulations.
- 49 I have considered all of the necessary pre-requisites under the Act and I am satisfied that they have been met.

### **Regulations Review Committee**

- 50 I do not consider there are grounds for the Regulations Review Committee to draw the regulations to the attention of the House of Representatives under Standing Order 327.

### **Certification by Parliamentary Counsel**

- 51 These draft regulations have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

### **Impact Analysis**

- 52 A Regulatory Impact Assessment was prepared in accordance with the necessary requirements and was submitted at the time that Cabinet approval was sought for the policy relating to the relevant regulations [CAB-21-MIN-0074].

### **Publicity**

- 53 I intend to publish a press release regarding the making of these regulations, following approval by the Executive Council. The Ministry of Business, Innovation and Employment (MBIE) will notify interested stakeholders.

### **Proactive release**

- 54 I intend to release the paper proactively in whole within 30 days of Cabinet decision. MBIE will publish a copy on its website.

### **Consultation**

- 55 The Ministry of Transport, the Ministry for the Environment, the Treasury, Waka Kotahi New Zealand Transport Agency and the Commerce Commission



have been consulted with throughout the development of the policy and draft regulations. The Department of Prime Minister and Cabinet have been informed.

- 56 In November 2020, I undertook targeted engagement with fuel industry participants that I consider likely to be significantly affected by the proposed regulations during the policy development process including major fuel suppliers, Gull, Timaru Oil Service Limited (TOSL), distributors, the Automobile Association and the Motor Trade Association.
- 57 On 22 March 2021, Cabinet agreed to consult on a draft of the Regulations with fuel industry participants the Minister of Energy and Resources considered likely to be significantly affected by the proposed regulations [CAB-21-MIN-0074].
- 58 In May 2021, I undertook further targeted engagement on the draft of the Regulations with fuel industry participants that I considered likely to be significantly affected by the proposed regulations, and with other interested stakeholders.
- 59 Nine submissions were received. Most of the submissions suggested minor technical changes to the drafting of the regulations. These have been considered and changes have been incorporated where appropriate to improve the regulations.
- 60 Several more substantial changes policy changes were suggested. These were:
- 60.1 Z Energy suggested premium 98 octane petrol should be included in the terminal gate pricing regime, as 95 octane petrol can be produced by blending 91 and 98 together. They consider it would be possible for wholesale suppliers to supply only 91 (which would be captured by the regime) and 98 (which would not) from terminals, and not 95. The supplier could then blend 91 and 98 itself beyond the terminal gate, so that it could supply 95 downstream but would not have to supply 95 at the terminal gate.
- 60.2 DealerCo NZ Limited and Mobil both submitted that independent retailers should be excluded from requirements to display premium 95 prices on price boards. They consider the requirement to display all grades has the potential to have a major impact on small independent operators in requiring them to redesign or replace current price boards to add all 3 grades.
- 60.3 Waitomo submitted that conditional discounting practices should be prohibited, as they are in Australia. They are of the view that this is the only way to create true price competition in the retail fuel market.
- 61 I will not be recommending major policy changes. However, I note that the regulations are intended to be reviewed regularly to ensure that regulatory parameters are set at the right level to best meet the purpose of the Act.

Changes can be made to the regime at a later date if we find the parameters are not working as intended.

62 No feedback was received during consultation with my Cabinet colleagues.

## Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that on 22 March 2021, Cabinet agreed [CAB-21-MIN-0074] to the development of regulations for the following parts of the Fuel Industry Act:
  - 1.1. terminal gate pricing;
  - 1.2. fixed wholesale contractual terms;
  - 1.3. consumer information requirements; and
  - 1.4. dispute resolution;
- 2 **note** that on 22 March 2021, Cabinet also agreed to consult on a draft of the Fuel Industry Regulations with fuel industry participants the Minister of Energy and Resources considered likely to be significantly affected by the proposed regulations;
- 3 **note** that this targeted consultation took place from 26 May to 4 June;
- 4 **note** that the Fuel Industry Regulations 2021 will give effect to the decision referred to in paragraph 1 above;
- 5 **note** that Cabinet previously agreed [CAB-21-MIN-0074] that independent nominating authorities will be appointed by the Minister of Energy and Resources;
- 6 **agree** that Cabinet rescind the decision referred to in recommendation 5;
- 7 **agree** to appoint the following bodies as independent nominating authorities for the purposes of the Fuel Industry Act 2020:
  - 7.1 the Arbitrators and Mediators Institute of New Zealand;
  - 7.2 the Resolution Institute;
  - 7.3 Māori Allied Dispute Resolution Organisation;
- 8 **note** that Cabinet previously agreed [CAB-21-MIN-0074] that 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;
- 9 **agree** that Cabinet rescind the decision referred to in recommendation eight;

- 10 **authorise** the submission to the Executive Council of the Fuel Industry Regulations 2021;
- 11 **note** that the terminal gate pricing, fixed wholesale contractual terms and dispute resolution provisions will come into force on 11 August 2021;
- 12 **note** that the consumer information requirements provisions will come into force on 11 February 2022;
- 13 **note** that proposals for the information disclosure regulations are still under development and approval will be sought from Cabinet in the coming months to make these regulations, with a view to these coming into force on 11 February 2022.

Authorised for lodgement

Hon Dr Megan Woods

Minister of Energy and Resources