



## COVERSHEET

<b>Minister</b>	Hon Dr Megan Woods	<b>Portfolio</b>	Energy and Resources
<b>Title of Cabinet paper</b>	Fuel Industry Amendment Bill: Approval for Introduction	<b>Date to be published</b>	21 December 2022

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
November 2022	Fuel Industry Amendment Bill: Approval for Introduction	Office of the Minister of Energy and Resources
10 November 2022	Fuel Industry Amendment Bill: Approval for Introduction  LEG-22-MIN-0195 Minute	Cabinet Office

### Information redacted

**YES**

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 reasons of Commercial information and Confidential advice to Government.

In Confidence

Office of the Minister of Energy and Resources

Cabinet Legislation Committee

## **Fuel Industry Amendment Bill: Approval for Introduction**

### **Proposal**

- 1 This paper seeks approval for the introduction of the Fuel Industry Amendment Bill ('the Bill').
- 2 The Bill proposes to introduce a regulatory backstop to the Fuel Industry Act 2020 ('the Act') to promote wholesale competition in engine fuel markets which flows through to a more competitive retail market for the long-term benefit of consumers.

### **Policy**

*The Commerce Commission's market study found that price competition is not working as well as it could be*

- 3 In 2019 the Commerce Commission (the Commission) completed its retail fuel market study final report (the market study), which found that competition in fuel markets is not working as well as it could and an active wholesale fuel market does not exist in New Zealand.
- 4 The Commission found that the engine fuel (fuel) market in New Zealand is a vertically integrated oligopoly. The three major wholesale suppliers (Z Energy, Mobil and BP) import refined fuel into New Zealand and dominate the market. Gull and Timaru Oil Services Limited (TOSL) also import refined fuel but make up a small percentage of overall sales.

*Over time, I expect the Fuel Industry Act 2020 will facilitate a more active wholesale fuel market*

- 5 The Act was passed in 2020 to give effect to the Commerce Commission's recommendations, including a terminal gate pricing (TGP) regime. This intervention helps to create a wholesale spot market, encouraging entry and expansion in new areas by existing players. A TGP regime allows wholesale customers the ability to access fuel from the majors' terminals at a wholesale spot price.
- 6 This intervention has already supported expansion into new areas by low priced retailers such as Gull, NPD, and Waitomo. Gull has said that without the Act it would not be able to competitively source fuel to operate its South Island outlets and provide competitive tension. Despite this, the tight relationships

between the majors and wholesale customers do not yet appear to have been significantly disrupted.

- 7 [Redacted] Commercial Information [Redacted] However, the interventions which aim to reduce restrictive wholesale supply relationships, have only applied in full to existing contracts since 11 August 2022. [Redacted] Commercial Information [Redacted]
- 8 Since the commencement of the Act there has been no clear trend in importer margins, although there have been occasional large spikes (and dips). The impact of the Act has been difficult to measure because external shocks have had much greater impact, such as lower fuel volumes due to COVID-19 restrictions and supply-chain impacts, along with increased fuel costs caused by the Russia-Ukraine conflict.
- 9 The information gathering regime has been designed to monitor the impact the Act. This has only recently come into force with reporting and analysis of data yet to commence. There is limited data to assess the impact of the Act as a result and any such analysis will also be complicated by the afore-mentioned shocks.
- 10 The Ministry of Business, Innovation and Employment (MBIE) and the Commission will continue their monitoring functions. However, there is a gap in the regime, identified by the Commission at the time of its market study, that could compromise the effectiveness of the regime.

*A regulatory backstop will promote wholesale competition in engine fuel markets*

- 11 At the time of the market study, the Commission also recommended the development of a regulatory backstop to incentivise the wholesale suppliers to offer competitive TGPs.
- 12 The market study outlined risks that could prevent the implementation of a successful TGP regime, that existing competition law and the fixed wholesale contract and TGP interventions do not address. These risks include:
- 12.1 The TGP regime is used as a vehicle for coordination; and
- 12.2 Wholesale suppliers set TGPs that incorporate a return on market power.
- 13 These two risks are likely to manifest in the form of excessive TGPs which deter market entry and expansion. The Commission found that even with the introduction of a regulatory regime, there are risks that wholesale suppliers do not offer competitive TGPs (because of coordination or market power at a particular terminal).
- 14 A regulatory backstop complements existing measures by providing a threat of price regulation to incentivise wholesale suppliers to offer competitive TGPs. This would help to promote competition in wholesale fuel markets, which flows through to a more competitive retail fuel market.

**IN CONFIDENCE**

- 15 However, due to significant design requirements, the Government agreed in February 2020 that officials continue to develop the regime to be implemented at a future point [DEV-20-MIN-0008 refers].

*Cabinet has agreed to amend the Fuel Industry Act 2020 to better promote competition for the long-term benefit of consumers*

- 16 On 8 August 2022, Cabinet agreed, subject to a supporting regulatory impact statement, to progress a regulatory backstop to the wholesale fuel market, with the objective of promoting wholesale competition in engine fuel markets for the long-term benefit of consumers [CAB-22-MIN-0300 refers].

- 17 Cabinet agreed for the following process to be implemented in the Bill to give effect to the backstop:

- 17.1 The Commission can, on its own initiative, or at the request of the Minister, consider whether TGPs have been persistently higher than would be expected in a workably competitive market, after taking into account views from interested persons.
- 17.2 The Commission provides a recommendation to the Minister responsible for the administration of the Act on whether to price regulate the TGP of a wholesale supplier at a terminal or terminals.
- 17.3 If the Minister considers that regulation is in the public interest, the Minister may make a recommendation to the Governor-General to make an Order in Council which would provide that one or more wholesale suppliers are subject to regulated TGPs for the specified fuel type or types, at a particular terminal or terminals, for a specified time.
- 17.4 After it has consulted with interested persons, the Commission must then set a pricing principle or methodology in a determination that one or more wholesale supplier(s) would be required to follow when setting their TGPs.
- 17.5 The Commission may, of its own accord or in response to a complaint referred or made to it, investigate whether a pricing principle or methodology has been correctly applied by one or more wholesale supplier. If the Commission finds that a pricing principle or methodology has been incorrectly applied, it may apply to the Court to impose a pecuniary penalty.

- 18 Cabinet also authorised me to make additional policy decisions, consistent with Cabinet's policy decisions, on any issues that arise during the drafting process.

*I have made additional policy decisions to better give effect to Cabinet's decision to introduce a regulatory backstop to the Fuel Industry Act 2020*

- 19 I now consider the separate public interest test is not necessary given when the Minister makes their decision on whether to price regulate, given the nature of the inquiry carried out by the Commission in making its recommendations.

**IN CONFIDENCE**

- 20 I have instead decided that the Minister must decide whether, in their opinion, all or any of the TGPs recommended by the Commission should be regulated. This will still enable the Minister to consider the costs and benefits of imposing regulation.
- 21 I have also agreed to make refinements to the test referred to in paragraph 17.1 above. Instead of having the Commission consider whether TGPs have been persistently higher than would be expected in a competitive market, instead price regulation may only be imposed if the relevant wholesale supplier has posted TGPs, for the relevant specified engine fuel and bulk storage facility, that were not consistent with what would be expected in a competitive market.
- 22 I have also decided to incorporate section 53N of the Commerce Act 1986 with appropriate modifications to allow the Commission further powers to monitor compliance with a determination by allowing the Commission to require; written statements, reports signed by an auditor, sufficient information, and a certificate signed by a director to confirm the truth and accuracy of the information.
- 23 Cabinet has also agreed that new ongoing funding is required to implement these proposals which will be sought as part of Budget 2023. Confidential advice to Government
- [REDACTED]

### Impact analysis

- 24 Cabinet agreed to progress a regulatory backstop to the wholesale fuel market, subject to a supporting regulatory impact statement [CAB-22-MIN-0300 refers]
- 25 MBIE's Regulatory Impact Analysis Review Panel reviewed the **attached** Supplementary Analysis Report: Regulatory backstop under the Fuel Industry Act 2020 ('Supplementary Analysis'). The panel considered that the information and analysis summarised in the Supplementary Analysis met the criteria necessary for Ministers to make informed decisions on the proposals in this paper. This Supplementary Analysis was provided to me on 31 August 2022.

## Compliance

- 26 The Bill complies with:
- 26.1 the principles of the Treaty of Waitangi;
  - 26.2 the disclosure statement requirements;
  - 26.3 the principles and guidelines set out in the Privacy Act 2020;
  - 26.4 relevant international standards and obligations;
  - 26.5 the [Legislation Guidelines](#) (2021 edition), which are maintained by the Legislation Design and Advisory Committee.
- 27 A New Zealand Bill of Rights Act 1990 vet is currently being undertaken by the Ministry of Justice.

## Consultation

- 28 In March 2020 MBIE released the Consultation paper: *Regulations under a Fuel Industry Bill and other matters* which sought views on the possible design of a regulatory backstop, to be added to the Act at a later date.
- 29 Industry stakeholders were generally not supportive of the development of a regulatory backstop regime, raising concerns about the challenges of designing such a regime, questioning the need for the backstop, and cautioning the potential impact on incentives to invest. Despite these concerns, I consider it is important to progress this proposal to give full effect to the recommendations made by the Commission in its market study.
- 30 Individual consumers did not widely engage with the Consultation paper. However, the New Zealand Automobile Association was supportive of the development of a regulatory backstop.
- 31 The Commerce Commission, Ministry of Justice, the Treasury, Ministry of Transport, Ministry of Primary Industries, Ministry for the Environment, Ministry of Foreign Affairs and Trade, Waka Kotahi, and the Office of the Privacy Commissioner have been consulted. The Department of the Prime Minister and Cabinet was informed.

## Binding on the Crown

- 32 The Act already binds the Crown, and I did not propose to change this during policy development [CAB-22-MIN-0300 refers].

## Creating new agencies or amending law relating to existing agencies.

- 33 The Bill does not propose to create new agencies.

### **Allocation of decision-making powers**

- 34 The Bill proposes to allocate decision making powers between the Commission and the Minister responsible for administration of the Act.
- 35 The Commission would have responsibilities for recommending price regulating one or more wholesale suppliers' TGPs and determining the form of that price regulation, if the Minister agrees to the recommendation.
- 36 If the Commission applies to a court, the court would have responsibilities to impose pecuniary penalties and other enforcement measures such as injunctions.
- 37 These are consistent with decision making powers and responsibilities under existing regimes for economic regulation under the Commerce Act 1986, Telecommunications Act 2001, and the Retail Payment System Act 2022.

### **Associated regulations**

- 38 Regulations are not needed to bring the Bill into operation.

### **Other instruments**

- 39 The proposed Bill would allow the Governor-General, on the recommendation of the Minister, make an Order in Council imposing regulation on particular wholesale suppliers and TGPs. I consider that the Governor General and the Minister are the appropriate decision makers, as these decisions set the scope of the price regulation (i.e. which specified engine fuel, wholesale suppliers, and terminal is or are covered).
- 40 There are only five wholesale fuel suppliers that own and operate terminals in New Zealand and that could be subject to an Order in Council (Z Energy, BP, Mobil, Gull, and TOSL). Therefore, this decision would not directly impact the public at large.
- 41 The proposed Bill would also enable the Commission, following an Order in Council mentioned above, to make a determination specifying how the price regulation applies to wholesale suppliers and regulated TGPs. A determination is secondary legislation under the Legislation Act 2019, and a summary of it must be published in the *Gazette* and made publicly available.
- 42 The Commission is an expert competition agency that has existing responsibilities for monitoring and regulating engine fuel markets. The Commission is also responsible for other backstop regulatory regimes contained in the Commerce Act 1986, Telecommunications Act 2001 and Retail Payment System Act 2022, which enable the Commission to determine delegated legislation following similar processes.
- 43 It is important that these decisions sit within delegated legislation to enable a timely response if it is found that TGPs are being offered not consistent with what would be expected in a workably competitive market.

### Commencement of legislation

44 I propose that the Bill will come into force the day after receiving Royal Assent.

### Parliamentary stages

45 I propose that the Bill be introduced the week beginning 14 November 2022 and to be passed by mid 2023.

46 The Bill should be referred to the Economic Development, Science and Innovation Select Committee.

### Proactive Release

47 Consistent with the Government's proactive release policy, I intend to release this paper within 30 business days from the date that Cabinet considers the paper.

### Recommendations

48 The Minister of Energy and Resources recommends that the Committee:

1 Confidential advice to Government

2 **note** that the Bill proposes a regulatory backstop to the Fuel Industry Act 2020 with the objective of promoting wholesale competition in engine fuel markets for the long-term benefit of consumers;

3 **Note** that Cabinet authorised the Minister of Energy and Resources to make additional policy decisions, consistent with the decisions made under CAB-22-MIN-0300, on any issues that arise during the drafting process;

4 **note** that Cabinet previously agreed [CAB-22-MIN-0300] that if the Minister receives recommendation from the Commerce Commission (the Commission) to regulate one or more wholesale supplier with price regulation, and the Minister considers that regulation is in the public interest, the Minister may make a recommendation to the Governor-General to make an Order in Council, which would provide that one or more wholesale supplier is subject to regulated terminal gate prices (TGPs) for the specified fuel type or types, at a particular terminal or terminals, for a specified time;

5 **note** that the Minister of Energy and Resources has agreed that if the Minister receives recommendation from the Commission to regulate one or more wholesale supplier with price regulation, and if, in the opinion of the Minister, all or any of the TGPs recommended by the Commission should be regulated, the Minister may make a recommendation to the Governor-General to make an Order in Council, which would provide that one or more wholesale supplier is subject to regulated TGPs for the



**IN CONFIDENCE**

specified fuel type or types, at a particular terminal or terminals, for a specified time;

- 6 **note** that Cabinet previously agreed [CAB-22-MIN-0300] the decision to impose price regulation can only be made after the Commission considers whether TGPs at the terminal or terminals owned or operated by wholesale suppliers have been persistently higher than would be expected in a workably competitive market;
- 7 **note** that the Minister of Energy and Resources has agreed that price regulation may only be imposed the relevant wholesale supplier has posted TGPs, for the relevant specified engine fuel and bulk storage facility, that were not consistent with what would be expected in a competitive market;
- 8 **note** the Minister of Energy and Resources has decided that the Bill will incorporate section 53N of the Commerce Act 1986 to the Fuel Industry Act 2020 with appropriate modifications;
- 9 **approve** the Fuel Industry Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 10 **agree** that the Bill be introduced in the week beginning 14 November 2022;
- 11 **agree** that the Government propose that the Bill be:
  - 11.1 referred to the Economic Development, Science and Innovation Select Committee for consideration; and
  - 11.2 enacted by mid 2023.

Authorised for lodgement

Hon Dr Megan Woods  
Minister of Energy and Resources

**IN CONFIDENCE**