

Fuel Industry Amendment Bill

Government Bill

Explanatory note

General policy statement

On 5 December 2019, the Commerce Commission (the **Commission**) published its final report on its retail engine fuel market study, which concluded that engine fuel companies have been making higher profits than would be expected in a workably competitive market. To give effect to the Commission's recommendations, the Fuel Industry Act 2020 (the **Act**) introduced interventions to improve competition in the wholesale and retail markets for engine fuel (**fuel**). A key intervention is the terminal gate pricing (**TGP**) regime, which requires wholesale suppliers that draw fuel from wholesale terminal storage to post a daily spot price at which they must supply fuel. This creation of a wholesale spot market encourages new entry and expansion in new areas by existing players.

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

- that the TGP regime is used as a vehicle for co-ordination; and
- that wholesale suppliers set terminal gate prices (**TGPs**) that incorporate a return on market power.

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

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement pro-

vides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2022&no=188>

Regulatory impact statement

The Ministry of Business, Innovation, and Employment produced a Supplementary Analysis Report on 29 August 2022 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this Report can be found at—

- Supplementary Analysis Report: Regulatory backstop under the Fuel Industry Act 2020 (mbie.govt.nz)
- <https://treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 relates to the commencement of the Bill.

Clause 3 provides that the Fuel Industry Act 2020 (the **Act**) is the Act being amended.

Part 1

Amendment to principal Act to enable price regulation of terminal gate prices

Part 1 inserts *new Part 2A*, which would provide a regime for regulating terminal gate prices.

The *new Part 2A* regime is based on the generic provisions in Part 4 of the Commerce Act 1986 that provide for regulation of the price of goods or services in markets where there is little or no competition and little or no likelihood of a substantial increase in competition.

The *new Part 2A* regime will apply only to terminal gate prices that the Act requires wholesale suppliers to publicly post. So it will not apply to prices for fuel supplied under fixed wholesale contracts and contracts other than TGP contracts or to fuel that is excluded from the TGP regime. For example, currently premium grade petrol with a research octane number of 98.0 or higher is excluded from the TGP regime (although it could later be brought into the regime by Order in Council).

Subpart 1 of new Part 2A sets out matters relating to interpretation, the effect of terminal gate prices being subject to price regulation, and the test for when price regulation can be imposed on terminal gate prices.

Subpart 2 of new Part 2A is based on the generic provisions in subpart 2 of Part 4 of the Commerce Act 1986 that provide for the regulation of the price of certain goods or services. There are many similarities with that subpart 2, for example,—

- the Commission holds an inquiry into whether to regulate, and then makes a recommendation to the Minister:
- the Minister considers the Commission’s recommendation and decides whether to recommend to the Governor-General that regulation be imposed:
- if the Minister decides to recommend regulation, an Order in Council may be made that makes the TGPs subject to regulation:
- the Commission makes a determination specifying how regulation applies to a wholesale supplier and to the TGPs.

However, there are some differences, including—

- in respect of the process at the inquiry stage:
- neither the Commission’s inquiry nor recommendation, nor the Minister’s recommendation nor the Order in Council, deal with how to regulate TGPs. The pricing method (whether via a pricing principle or methodology) is left to the Commission’s determination:
- the Minister cannot decide that more TGPs should be regulated than those that the Commission recommends.

Subpart 3 of new Part 2A—

- ensures that the generic powers in the Commerce Act 1986 are not limited by *new Part 2A*:
- provides that certain provisions of the Commerce Act 1986 will apply to *new Part 2A*, namely,—
 - section 26, which provides that, in the exercise of its powers, the Commission must have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister:
 - sections 53N and 53ZD, which are some of the Commission’s information-gathering powers.

Part 2

Other amendments to principal Act

Part 2 makes changes to the Act to enable *new Part 2A* to operate.

Clause 5 inserts a new definition of competition into the main interpretation section of the Act, namely that competition means workable or effective competition. This mirrors section 3(1) of the Commerce Act 1986. The new definition will apply both for *new Part 2A* and for the existing section 3 of the Act, which states that 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.

Clause 6 amends section 9 of the Act. That currently provides that the wholesale supplier may change the terminal gate price for a specified engine fuel at any time. This will now become subject to *new Part 2A*.

Clause 7 amends section 30 of the Act, which sets out the pecuniary penalties that apply for certain contraventions of the Act. The amendment ensures that the same pecuniary penalty regime will apply to contraventions of price regulation under *new Part 2A*.

Clause 8 amends section 33 of the Act, to add sections 99B to 99P, which relate to assistance to overseas regulators, to the provisions of the Commerce Act 1986 that apply for the purpose of subpart 1 of Part 3 of the Fuel Industry Act 2020 (which relates to proceedings).

Clause 9 amends section 42 of the Act, which currently sets out offences in relation to the information-gathering powers in sections 98 and 98A of the Commerce Act 1986. The amendment extends this to also set out offences in relation to the new information-gathering powers being carried forward from sections 53N and 53ZD of the Commerce Act 1986.

Clause 10 amends section 45 of the Act, to add section 17 of the Commerce Act 1986 to the provisions that apply generally under the Fuel Industry Act 2020. Section 17 is a boilerplate provision about how Commission determinations can be made. It ensures that a determination in writing signed by all the members of the Commission or of a Division of the Commission necessary to constitute a quorum is as valid and effectual as if it had been made at a meeting of the Commission or Division duly called and constituted by those members. Section 45 currently ensures that the Chairperson may direct the Commission to sit in Divisions (by applying section 16 of the Commerce Act 1986).

Clause 11 and the Schedule insert *new Part 2* into the transitional and savings provisions of the Act, to ensure that terminal gate prices posted before the Bill commences will not count for certain purposes when the Commission is deciding whether to recommend the imposition of price regulation under *new Part 2A*.

Hon Dr Megan Woods

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Part 2A

Price regulation of terminal gate prices

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Schedule

New Part 2 inserted into Schedule 1

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Fuel Industry Amendment Act **2022**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 5

3 Principal Act

This Act amends the Fuel Industry Act 2020.

Part 1

Amendment to principal Act to enable price regulation of terminal gate prices 10

4 New Part 2A inserted

After Part 2, insert:

Part 2A

Price regulation of terminal gate prices

Subpart 1—Preliminary provisions

29A Interpretation and overview

- (1) In this Part, unless the context otherwise requires,— 5
price regulation or regulation means regulation under this Part
regulated terminal gate price means a terminal gate price that is declared to be regulated by an Order in Council under **section 29J**.
- (2) The process for imposing price regulation on particular terminal gate prices involves the following steps: 10
- (a) the Commission holds an inquiry into whether to regulate the terminal gate prices, and then makes a recommendation to the Minister under **section 29G**;
 - (b) the Minister considers the Commission’s recommendation and decides whether to recommend to the Governor-General that price regulation be imposed: 15
 - (c) if the Minister decides to recommend price regulation, an Order in Council may be made under **section 29J** that makes the terminal gate prices subject to that regulation:
 - (d) for each regulated terminal gate price (or group of regulated terminal gate prices), the Commission makes a determination under **section 29L** specifying the pricing principles or pricing methodologies that apply. 20
- (3) This section is intended only as a guide to the general scheme and effect of this Part. 25
 Compare: 1986 No 5 s 52E

29B Effect of terminal gate prices being subject to price regulation

- (1) If terminal gate prices are subject to price regulation, every wholesale supplier must comply with every determination made under **section 29L** applying to those prices and the supplier.
- (2) Sections 30 to 38 (which relate to civil proceedings relating to contraventions of this Part) apply to a wholesale supplier on and from the date on which the wholesale supplier is obliged to comply with a relevant determination made under **section 29L**. 30
- (3) The Commission is entitled to exercise any of its powers under this Act and under the Commerce Act 1986 (as applied by this Act) for the purpose of monitoring compliance with price regulation. 35

Compare: 1986 No 5 s 52F

29C When terminal gate prices may be regulated

The Commission may make a recommendation that price regulation should be imposed on terminal gate prices only if it is satisfied that the relevant wholesale supplier has posted terminal gate prices, for the relevant specified engine fuel and bulk storage facility, that were not consistent with what would be expected in a competitive market.

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Example

The Commission holds an inquiry into all terminal gate prices in New Zealand for diesel (in respect of all wholesale suppliers and all bulk storage facilities).

However, if only 1 supplier at 1 bulk storage facility has posted terminal gate prices for diesel that are higher than expected in a competitive market, the Commission may recommend regulation only in respect of the diesel terminal gate prices of that supplier at that facility (and not other prices).

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Compare: 1986 No 5 s 52G

Subpart 2—How price regulation may be imposed

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*Commission inquiry***29D How inquiry triggered**

- (1) The Commission—
 - (a) must hold an inquiry if required to do so by the Minister; and
 - (b) may hold an inquiry on its own initiative.
- (2) Any requirement by the Minister must—
 - (a) be in writing; and
 - (b) specify the date by which the Commission must make a recommendation under **section 29G** to the Minister.

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Compare: 1986 No 5 s 52H

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29E Commission inquiry into particular terminal gate prices

- (1) In conducting an inquiry into particular terminal gate prices, the Commission must consider—
 - (a) whether the test in **section 29C** is met in relation to the terminal gate prices; and
 - (b) if so, whether price regulation should be imposed on the terminal gate prices and for how long; and
 - (c) if so, how the terminal gate prices should be defined (that is, by reference to all or any of specified engine fuel, wholesale supplier, or bulk storage facility).

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- (2) During an inquiry, the Commission may have regard to any other matters it considers necessary or desirable for the purpose of the inquiry.

Compare: 1986 No 5 s 52I

29F Process of inquiry

- (1) At the start of an inquiry, the Commission must publish in the *Gazette* a notice setting out,—
- (a) in the case of an inquiry required by the Minister, the Minister’s requirements; and
 - (b) in the case of an inquiry on the initiative of the Commission, the terms of reference for the inquiry.
- (2) The notice must set out indicative time frames and key steps.
- (3) Before making a recommendation under **section 29G**, the Commission must consult interested persons about the proposed recommendation (including the Commission’s reasons for proposing to make a recommendation).

Compare: 1986 No 5 s 52J; 2022 No 21 s 13

29G Commission’s recommendation following inquiry

- (1) At the end of an inquiry, having considered the matters in **section 29E**, the Commission must make a recommendation to the Minister on whether, in its opinion, price regulation should be imposed on all or any of the terminal gate prices that were the subject of the inquiry.
- (2) If the Commission recommends that price regulation should be imposed on particular terminal gate prices, the recommendation must state—
- (a) which terminal gate prices should be regulated, by reference to all or any of the following:
 - (i) the specified engine fuel or fuels;
 - (ii) the wholesale supplier or suppliers;
 - (iii) the bulk storage facility or facilities; and
 - (b) how long the regulation should be in place.
- (3) The Commission must make the recommendation publicly available as soon as practicable after making it, including a statement of its reasons for making the recommendation.
- (4) To avoid doubt, a recommendation by the Commission is not a determination of the Commission.

Compare: 1986 No 5 s 52K

*Order in Council imposing regulation***29H Minister's consideration**

- (1) The Minister must consider any recommendation of the Commission made under **section 29G**.
- (2) As part of that consideration, the Minister— 5
- (a) must consult the Minister of Commerce and Consumer Affairs and the Minister of Transport; and
 - (b) may request further information or advice from the Commission; and
 - (c) may request that the Commission reconsider any matter (for example, an error, an oversight, or a competing policy interest). 10
- (3) The Minister must make publicly available any request made under **subsection (2)(c)**, and the Commission must make publicly available its advice given following that request.
- (4) If the Commission receives a request under **subsection (2)(c)**, it may, at its discretion,— 15
- (a) consult interested parties; or
 - (b) reopen its inquiry, in which case **section 29F** applies with all necessary modifications.

Compare: 1986 No 5 s 52L

29I Minister's decision and recommendation 20

- (1) Having considered the Commission's recommendation in accordance with **section 29H**, the Minister must—
- (a) decide whether, in the opinion of the Minister, price regulation should be imposed on all or any of the terminal gate prices recommended by the Commission; and 25
 - (b) make a recommendation to that effect, if so.
- (2) The Minister's decision may be—
- (a) the same as the Commission's recommendation under **section 29G**; or
 - (b) different from the Commission's recommendation under **section 29G** only to the extent that all or any of the terminal gate prices recommended by the Commission should be not regulated. 30

Example

After an inquiry, the Commission recommends that all diesel terminal gate prices that are posted by suppliers A and B should be regulated.

The Minister may recommend the same or the Minister may recommend that regulation should apply only to all or some of supplier A's diesel terminal gate prices and not supplier B's (or vice versa). The Minister cannot recommend that regula- 35

tion should apply to supplier C unless the Commission makes a separate recommendation to that effect.

- (3) If the Minister’s decision is different from the Commission’s recommendation, the Minister must set out the reasons for the decision and make the decision, with the reasons, publicly available. 5

Compare: 1986 No 5 s 52M

29J Order in Council imposing regulation

- (1) The Governor-General may, on the recommendation of the Minister made under **section 29I**, make an Order in Council imposing regulation on particular terminal gate prices. 10

- (2) The order must declare that the terminal gate prices are regulated under this Part.

- (3) The order may identify the terminal gate prices it relates to by reference to all or any of—

- (a) the specified engine fuel or fuels: 15
- (b) the wholesale supplier or suppliers:
- (c) the bulk storage facility or facilities.

- (4) The order must include an expiry date (which must be a date not later than 10 years after its commencement date) at the close of which the order is revoked. 20

- (5) Despite **subsection (5)**, the order may be earlier revoked in the manner in which it was made.

- (6) An order under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 25

Compare: 1986 No 5 s 52N

29K Revocation or amendment of Order in Council

- (1) An Order in Council made under **section 29J** in respect of particular terminal gate prices may not be revoked or significantly amended unless the Commission has held an inquiry into the terminal gate prices. 30

- (2) In **subsection (1)**, **significantly amended** means amended in a way that materially alters the terminal gate prices to which the price regulation applies, so that—

- (a) the terminal gate prices, or any of them, are no longer regulated; or
- (b) terminal gate prices that were not identified in the original order are now subject to regulation. 35

- (3) An Order in Council made under **section 29J** may be amended in any other material way only after the Commission has consulted with interested parties, but may be amended in a non-material way without prior consultation.

Compare: 1986 No 5 s 52O

Commission determination about how regulation applies

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29L Commission determination about how regulation applies

- (1) The Commission must make determinations under this section specifying how price regulation applies to wholesale suppliers and regulated terminal gate prices.

- (2) Determinations must be made—

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- (a) only after consultation with interested parties; and
(b) as soon as practicable after the Order in Council under **section 29J** is made.

- (3) Determinations must—

- (a) set out, for each regulated terminal gate price, the pricing principles or pricing methodologies that apply and the requirements that apply to each wholesale supplier; and
(b) set out any time frames that must be met or that apply.

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- (4) It is not necessary for a single determination to address all matters relating to particular regulated terminal gate prices, or to a wholesale supplier of regulated terminal gate prices, and different parts of any determination may come into effect at different times.

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- (5) A determination under this section may require a wholesale supplier to comply with the requirements set out in any other determination that has been made under this section in respect of regulated terminal gate prices of the same type.

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- (6) The Commission must, as soon as practicable after making a determination under this section, give to each wholesale supplier to which the determination relates notice of the determination and where it is available.

- (7) Each wholesale supplier to which the determination relates must comply with the requirements imposed by the determination.

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- (8) A determination under this section and an amendment to a determination are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

Compare: 1986 No 5 s 52P

29M Amendment of determination made under section 29L

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- (1) A determination made under **section 29L** may be amended in a material way only after the Commission has consulted with interested parties, but may be amended in a non-material way without prior consultation.

- (2) However, the Commission is not required to conduct an inquiry before amending a determination.
 - (3) As soon as practicable after making an amendment, the Commission must give to each wholesale supplier to which the determination relates notice of the amendment and where it is available. 5
- Compare: 1986 No 5 s 52Q

Subpart 3—Miscellaneous provisions

29N Commerce Act 1986 not limited

This Part does not limit subpart 2 of Part 4 of the Commerce Act 1986, which allows for regulation to be imposed on particular goods or services. 10

Compare: 1986 No 5 s 56N

29O Application of Commerce Act 1986 to this Part

- (1) The following provisions of the Commerce Act 1986 apply to this Part with any necessary modifications (including the following modifications):
 - (a) section 26 (Commission to have regard to economic policies of Government): 15
 - (b) section 53N (monitoring compliance with price-quality paths) as if each reference to a price-quality path were a reference to regulation under this Part:
 - (c) section 53ZD (powers of Commission under Part 4) as if section 53ZD(1)(b) referred to investigation as to the terminal gate prices that would be expected in a competitive market and how any pricing principles or pricing methodologies being considered by the Commission may be applied or have been applied. 20
- (2) This section does not limit the application of other provisions of the Commerce Act 1986. 25

Part 2

Other amendments to principal Act

5 Section 4 amended (Interpretation)

In section 4, insert in its appropriate alphabetical order: 30

competition means workable or effective competition

6 Section 9 amended (Obligation to post terminal gate price)

After section 9(3), insert:

- (4) Subsection (3) is subject to **Part 2A**, if that Part applies.

- 7 Section 30 amended (Pecuniary penalties)**
- After section 30(1)(a)(iii), insert:
- (iv) requirements imposed by a determination made under **section 29L** (which relates to **Part 2A** price regulation of terminal gate prices); or 5
- 8 Section 33 amended (Application of Commerce Act 1986)**
- After section 33(h), insert:
- (ha) sections 99B to 99P (assistance to overseas regulators), as if— 10
- (i) references to an overseas regulator were references to an overseas body that has functions relating to the regulation of the fuel industry:
- (ii) references in those sections to the Minister were references to the Minister responsible for the administration of this Act:
- 9 Section 42 amended (Offences in respect of sections 98 and 98A of Commerce Act 1986)** 15
- (1) Replace the heading to section 42 with “**Offences in respect of provisions of Commerce Act 1986**”.
- (2) In section 42(1)(a), replace “notice under section 98” with “notice under sections 53N, 53ZD, and 98”.
- 10 Section 45 amended (Application of Commerce Act 1986)** 20
- After section 45(c), insert:
- (ca) section 17 (assent to determination):
- 11 Schedule 1 amended**
- In Schedule 1,—
- (a) insert the Part set out in the Schedule of this Act as the last Part; and 25
- (b) make all necessary consequential amendments.

Schedule
New Part 2 inserted into Schedule 1

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Part 2	
Provisions relating to Fuel Industry Amendment Act 2022	
4	Interpretation in this Part
	In this Part, pre-commencement price means a terminal gate price that was posted before the commencement of the Fuel Industry Amendment Act 2022 .
5	Application of new Part 2A to existing prices
(1)	The Commission must not consider whether a pre-commencement price has met the test in section 29C .
(2)	However, the Commission may take into account a pre-commencement price when considering whether a post-commencement price has met that test.
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	Example
	A supplier posts an equal number of terminal gate prices before and after commencement. The prices that the Commission assesses against the test in section 29C will be only the prices from after commencement (that is, half of them). However, in assessing those prices against the test, the Commission can base its assessment, at least in part, on data that pre-dates commencement.