



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HIKINA WHAKATUTUKI



Consultation paper

Regulations under a Fuel Industry Bill and other matters

March 2020

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Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document (other than the issues discussed in Section 2.5) by 5pm on **Friday 25 April**. We seek written submissions on the regulatory backstop (discussed in Section 2.5) by 5pm on **Friday 15 May**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at: <https://www.mbie.govt.nz/have-your-say/regulations-under-a-fuel-industry-bill-and-other-matters>. This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to energymarkets@mbie.govt.nz.
- mailing your submission to:

Energy Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473

Wellington 6140
New Zealand

Please direct any questions that you have in relation to the submissions process to energymarkets@mbie.govt.nz.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on regulating the New Zealand fuel market in response to the Commerce Commission's Retail Fuel Market Study. We may contact submitters directly if we require clarification of any matters in submissions.

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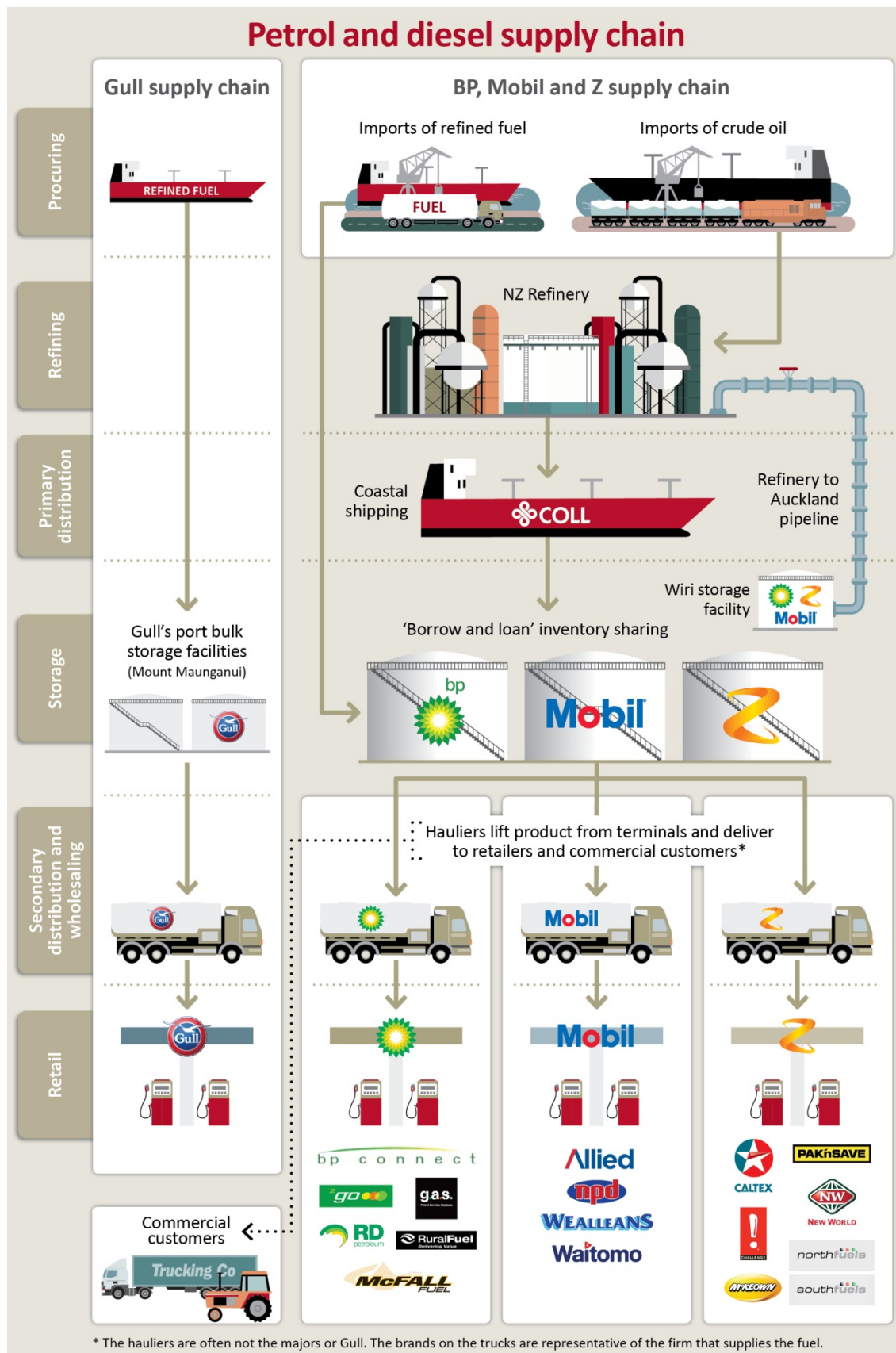
1 Introduction

1.1 Commerce Commission market study into retail fuel

1. On 5 December 2019, the Commerce Commission (Commission) published its final report for its market study into the retail fuel sector¹.
2. The Commission found that fuel companies have been making persistently higher profits over the past decade than would be expected in a competitive market. The Commission also found that wholesale prices are higher than it would expect in a competitive market and that this flows through to consumers paying higher pump prices than they otherwise would.
3. The Commission's study argued that these features of the fuel market arise from the lack of competition in wholesale fuel markets. Figure One on the next page shows the structure of the New Zealand fuel market. Wholesale suppliers supply fuel from storage facilities to their own retail businesses, other retail fuel sellers (dealers), distributors and commercial customers.
4. The consequences of a lack of wholesale market competition are that:
 - a. independent importers face barriers to entry or expansion as there are few customers at the wholesale level who are actively looking for new wholesale suppliers
 - b. competition between existing wholesale suppliers is reduced because many dealers and distributors face barriers to switching suppliers
 - c. it is difficult for distributors and dealers to obtain competitive wholesale supply as they may lack bargaining power and transparent pricing information.

¹ <https://comcom.govt.nz/about-us/our-role/competition-studies/fuel-market-study>

Figure One: The New Zealand fuel supply chain



Source: Commerce Commission Final Report

5. The Commission recommended a range of changes to address its findings, which are outlined in its final report. These changes include:
 - a. requiring wholesale suppliers to provide more transparent pricing at fuel storage terminals (with regulatory backstop powers if more transparent pricing does not deliver competitive outcomes)
 - b. providing for terms in contracts between wholesale suppliers and their customers that are fair and facilitate retail competition by allowing wholesale customers to switch suppliers more easily
 - c. enabling consumers to make more informed purchasing decisions through regulating display of premium prices on price boards, monitoring use of price boards and investigating the introduction of fuel cap stickers specifying the recommended fuel grade for vehicles
 - d. supporting these changes by regulating for the collection and disclosure of information to assist in market analysis.

1.2 Initial Government response

6. To promote competitive outcomes in the fuel market for the long-term benefit of consumers, the Government has accepted a number of the Commission's recommendations.
7. There is more detailed information on the Government's response to the Commission's study and the rationale for the proposed approach in the material prepared for Cabinet on these decisions. This material has been proactively released on the MBIE website². These papers, together with the Regulatory Impact Statement³ outline why and how the Government considers these changes should improve competition in fuel markets.
8. Taken together these changes should facilitate a more active wholesale market for petrol and diesel, allowing for increased price competition. The changes should provide incentives for wholesale fuel suppliers to compete more vigorously. The benefits of competition should be felt in more competitive prices for consumers. Additionally, more transparent information for consumers, in particular for premium fuel products, should facilitate more informed purchasing decisions.
9. The following subsections summarise these key changes.

Improving wholesale market competition

² <https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/market-studies/>

³ <https://www.mbie.govt.nz/dmsdocument/11217-regulatory-impact-statement-fuel-industry-bill>

10. The Government has agreed to establish an enforceable terminal gate pricing (TGP) regime in New Zealand. This regime will require wholesale suppliers to set and publish a TGP price at which they will sell fuel to wholesale customers at storage terminals. In addition to a requirement to publish a price, there will be an obligation on suppliers to supply particular fuel products at the terminal gate price on request to fuel retailers and wholesalers, unless there are reasonable grounds to refuse supply. For more information on a TGP and how it might be affected by proposed regulations see Section 2.2 of this document.
11. The Government has agreed to require fair and competitive terms in wholesale contracts between wholesale suppliers and their distributors and dealers. For more information on wholesale contract arrangements and how they might be affected by proposed regulations, see Section 2.3 of this document.
12. This document also consults on key features of a dispute resolution scheme for wholesale market transactions to resolve disputes relating to wholesale market contracts and terminal gate supply. For more information on potential dispute resolution provisions and how they might be affected by proposed regulations, see Section 2.4 of this document.
13. The Government supports the introduction of a regulatory backstop and has directed officials to work on the design of such a regime to be added to the regulatory regime at a future date. A backstop will provide a credible threat of further regulatory action should a TGP regime not facilitate competitive wholesale prices. Work to develop a regulatory backstop will be carried out over a longer time frame as there are significant design requirements for a backstop, particularly if price regulation is part of a backstop. In the meantime, the Government welcomes stakeholder views on a regulatory backstop. For more information on regulatory backstop proposals, and to provide feedback on potential arrangements for a regulatory backstop, see Section 2.5 of this document.

Improving information transparency for consumers

14. To improve transparency of information for consumers, Government has agreed that there be the ability to regulate information provided on the price of fuel at retail fuel outlets. In the short term, to respond to the Commission's concerns on premium pricing, Government is considering regulation of the display of premium prices on forecourt price boards. Additionally, regulation-making powers would provide the ability to regulate other information related to fuel pricing in the future if needed. For example, if monitoring of discounting practices (highlighted by the Commission as a potential issue) revealed that there were competition concerns, additional regulation might be necessary. For more detail on proposals relating to information for consumers see Section 3.

Information disclosure and monitoring

15. To ensure these proposed changes are having an effect on competition in the wholesale and retail fuel markets, Government has agreed to introduce an information disclosure and monitoring regime for fuel markets. Such a monitoring regime is a critical component of the

proposals, as it will enable monitoring of whether the market is becoming more competitive over time, and ongoing assessment of the effectiveness of regulatory changes. For some aspects of the fuel market, including the TGP regime, monitoring will be needed to check compliance and prompt enforcement of the regime. For more detail on proposed information disclosure and monitoring, see Section 4.

1.3 Fuel Industry Bill and associated regulations

16. The Government is currently preparing legislation to give effect to the decisions outlined above, with a Bill to be introduced to Parliament shortly (Fuel Industry Bill). The Bill will put in place the framework for industry regulation, with some detail to be set out in regulations.
17. As fuel is a significant item of personal expenditure for many consumers, the Government seeks to address the findings of the fuel market study as a high priority. In order to facilitate a prompt response, consultation on the proposed content of the regulations is being undertaken now alongside development of the Bill itself.
18. This discussion document outlines the proposed content of the regulations and seeks feedback. There are a number of questions in each of the chapters and information about how you can provide feedback is provided at the front of this document.
19. Development of the regulations is subject to the passage of the Bill and we acknowledge that the ultimate shape of the legislation may therefore differ from the Government's current approach. This may result in the final regulations being different to the proposals outlined in this discussion document.

1.4 Criteria for analysis

20. This paper looks at the pros and cons of the different options for the regulations to be developed as part of the Government response to the Commission's report, pending passage of a Fuel Industry Bill. Where relevant, to assist in our assessment of pros and cons of options, we have drawn on the criteria that were used for assessment of the regulatory impact of legislation, as outlined in the Regulatory Impact Statement for a Fuel Industry Bill:
 - a. enable the competitive process to work well
 - b. encourages efficient storage and distribution of fuel to meet consumers' needs
 - c. enables consumers to make informed purchasing decisions
 - d. regulatory options are proportionate to the harms identified
 - e. regulatory options are certain and predictable.
21. If there are other significant pros or cons that you consider have not been outlined in relevant sections of this document then your feedback is welcome.

2 Wholesale fuel markets

2.1 Introduction

22. The key problem identified by the Commission in its Market Study is the lack of a competitive wholesale fuel market. Remedying this problem would create scope for more competition and lead to lower prices at the retail level.

2.2 Terminal gate pricing

23. Government has decided to develop a more active wholesale fuel market by legislating for an enforceable terminal gate pricing regime to be put in place in New Zealand. The objectives of a terminal gate pricing regime are to:

- a. increase the ability of distributors and dealers to purchase fuel on competitive terms by improving transparency of wholesale fuel prices to inform bargaining, and enabling them to purchase some or all of their fuel on the spot market
- b. reduce barriers to entry and expansion for importers and distributors by providing a transparent and readily available way to obtain spot fuel supply on a nationwide basis from the existing network of terminals
- c. provide competitive benchmark information for industry and government and curb the incentive on wholesale suppliers to use their market power in regions where competition is weak.

24. Government has agreed that the new Fuel Industry Bill will establish a terminal gate pricing regime applying to all wholesale suppliers who have a right to draw specified products (diesel, 91 and 95 octane, plus any other fuel as specified in regulations) from terminals or equivalent facilities.

25. Government has agreed that the terminal gate pricing regime will:

- a. require wholesale suppliers of specified fuel in relation to a storage terminal to publicly post a price at which they will sell that fuel to fuel retailers or wholesalers at storage terminals on a spot basis, and provide for a regulation-making power to prescribe those requirements
- b. require wholesale suppliers of specified fuel to supply a prescribed minimum of fuel product per week or per month to retailers or wholesalers of fuel products upon request unless there are reasonable grounds for refusal, and provide for a regulation making power to prescribe those requirements

- c. provide for regulation-making powers to prescribe standard terms and conditions for sales, what constitutes reasonable grounds for refusal, which taxes or costs can be included in the terminal gate price, the prescribed minimum of fuel to be supplied, and requirements for publication of the terminal gate price.

26. Government has agreed:

- a. that the terminal gate pricing regime should come into effect on a date appointed by order in council, and no later than 12 months after the date of Royal Assent
- b. to provide for civil pecuniary penalties for breaches of the requirements of the terminal gate pricing regime, with maximum penalties of \$500,000 for an individual or \$5,000,000 in any other case.

27. Some of the detail of how the TGP regime will operate is to be specified in regulations. This consultation document discusses the following issues:

- a. 2.2.1 – Which additional fuel products should be subject to the terminal gate pricing regime?
- b. 2.2.2 – What obligations should apply for setting and posting prices?
- c. 2.2.3 – What constitutes reasonable grounds for refusal, and what standard terms and conditions should apply for TGP sales?

2.2.1 - Which fuel products should be subject to the terminal gate pricing regime?

What is the issue?

28. We need to identify which fuel products should be subject to the terminal gate pricing regime in order to meet the regime's objectives. The objective of greater price transparency to promote informed contracting for wholesale supply could apply to all fuel products supplied. However, the terminal gate pricing regime also includes a 'must supply' obligation. This obligation is designed to ensure that posted prices are genuine and to facilitate importers' and distributors' access to fuel on a nationwide basis. An obligation to supply some proprietary or non-standard fuel products under this regime could discourage innovation and may not be necessary to achieve the competition benefits.

29. The Commission's market study focused on the retail supply of petrol and diesel for use in land transport and its recommendations reflect this. The study did not cover other fuels, such as aviation and marine fuels. The Fuel Industry Bill will provide that the terminal gate pricing regime applies to regular 91 petrol, premium 95 petrol, and regular diesel. Other products can be added in the future by regulations as required.

What are the options and impacts?

30. We are seeking feedback on whether the terminal gate pricing regime should extend to fuel products other than regular 91 petrol, premium 95 petrol and regular diesel in order to achieve the regime's objectives.
31. We are also interested in feedback on the standards used by industry for defining fuel products, which could be used for the purposes of defining any additional products in the regulations.
32. The Engine Fuel Specifications Regulations 2011 provides examples of how to define specifications for certain types of engine fuels provided for supply at retail and non-retail sites in New Zealand. For example, it defines:
 - a. **Diesel** – means a refined petroleum distillate, or other liquid hydrocarbon fuel, having a viscosity and distillation range that is intermediate between those of kerosene and light lubricating oil, whether or not it contains additives, and that is intended for use as fuel in compression-ignition internal combustion engines, and includes diesel containing up to 7% biodiesel by volume.
 - b. **Petrol** – means a refined petroleum distillate, or other liquid hydrocarbon fuel, normally boiling within the limits of 15°C to 220°C, whether or not it contains additives, that is intended for use as a fuel in spark-ignition internal combustion engines; and includes petrol containing up to 10% ethanol by volume.
 - c. **Biofuel** – means any gaseous or liquid fuel produced from biomass that can be used as a fuel for engines.
33. Within these specifications, there are a number of products. For example:
 - a. **Regular 91 grade petrol** – being petrol supplied as having a research octane number (RON) of at least 91.0
 - b. **Premium 95 grade petrol** – being petrol supplied as having a RON of at least 95.0
 - c. **Automotive gas oil (regular diesel)** – is the main diesel used for road vehicles (cars, buses, trucks, etc.).
34. Other new efficient or environmentally friendly products are likely to emerge over time. The obligation to supply should be capable of being extended to these products if the same market dynamics apply.

1

Should fuel products other than regular 91 grade petrol, premium 95 grade petrol and regular diesel be subject to the TGP regime, for example, aviation and marine fuels, or premium 98 grade petrol? Please give reasons.

2

If the regime should apply to other fuel products, what are the standards used by industry for defining these fuel products?

2.2.2 – What obligations should apply to wholesale suppliers for setting and posting prices?

What is the issue?

35. A key objective of the terminal gate pricing regime is to provide transparency of wholesale prices of fuel to facilitate informed contracting. The Fuel Industry Bill will provide that each wholesale supplier will have an obligation to publicly post a terminal gate price. For the purposes of the regulations, this raises the following issues:

- a. What is included in the terminal gate price that is posted?
- b. How is it set?
- c. What does it mean to publicly disclose the price?

What are the options and impacts?

What should the requirements be for publically posting the terminal gate price?

36. The Australian Oil Code is a set of regulations made under the Australian Competition and Consumer Act 2010 that has similar objectives to the Fuel Industry Bill and associated regulations. It provides that a terminal gate price is the price that the wholesale supplier charges on that day for the wholesale sale of each specified fuel product that the wholesale supplier sells from that storage facility.

37. In order to facilitate price comparisons, the Australian Code provides that the terminal gate price must be calculated on a standardised basis. That is:

- a. it must be worked out for the fuel product on a temperature corrected basis
- b. expressed in cents per litre
- c. must not include an amount imposed for or in relation to an additional service provided with that fuel.

38. Our initial view is that the regulations should provide for similar matters in relation to the terminal gate price in New Zealand that is publicly posted. One difference is that we have been advised that it is industry practice in New Zealand for fuel products to be priced based on ambient temperature, rather than a corrected temperature of 15°C. Therefore, our initial view is that the ambient temperature should be used when calculating the price in cents per litre of fuel.

39. We also consider that additional charges, fees, duties or taxes should be identified separately, whether charged on a per litre basis or a per purchase basis. For example, the storage facility owner may impose a charge to access the storage facility (such as a throughput fee). Our initial view is that the regulations should provide that such additional charges, if relevant, should be separately itemised, as part of the standard terms and conditions for sales.

- 40. The Australian Oil Code provides that, each day, a wholesale supplier must identify the terminal gate price for spot wholesale supply of the specified fuel product at each storage facility for that day. The wholesale supplier may change that price throughout the day, but only one price is in effect at any one time. The price takes effect when it is disclosed in the specified manner. We consider that a similar obligation should apply to this regime.
- 41. The Australian Oil Code provides that the wholesale supplier must disclose the terminal gate price on a publicly accessible website. Alternatively, if the publicly accessible website is not available, the wholesale supplier must make the price available by phone or fax on request.
- 42. There is also an additional requirement for the wholesale supplier to provide documentation to the terminal gate customer for each spot sale at the terminal gate and what that documentation should include.
- 43. We consider that the regulations for publicly posting terminal gate pricing in New Zealand should provide for similar matters. In particular, the wholesale supplier must display the current TGP on a publicly accessible website.
- 44. In addition, the standard terms and conditions should provide that the wholesale supplier should make the current TGP available to a potential terminal gate customer on request, and provide the terminal gate customer with documentation at the time of loading which includes the TGP, any other charges, fees or taxes, and the quantity of fuel provided.

3	Should there be a notice period for changes in the TGP price during a day?
4	Do you have any comments on how terminal gate prices should be set and publicly posted?

2.2.3 – “Must supply” obligation - reasonable grounds for refusal, and standard terms and conditions for TGP sales

What is the issue?

- 45. As with the Australian Oil Code, the Fuel Industry Bill will provide for a “must supply” obligation on wholesale suppliers. Wholesale suppliers must supply the amount requested by resellers unless there are reasonable grounds to refuse.
- 46. Wholesale suppliers should not be exposed to unreasonable risks as a result of this regime and should be able to refuse supply in some circumstances where it would unreasonably jeopardise their business or public safety. However, if the grounds for refusal are too wide, then resellers (retailers or wholesalers) of fuel products may never be able to access fuel on a spot basis.
- 47. The Commission noted that the New Zealand supply chain is frequently characterised by periods of tight supply, where forecast demand for the next three months exceeds supply. This can trigger port coordination events where fuel product may be apportioned on an agreed basis.

- 48. The Fuel Industry Bill will provide that wholesale suppliers of specified fuel must not refuse to supply a prescribed minimum of fuel product upon request on the grounds that the available fuel is required to meet the wholesale supplier’s own supply and/or term contracted supply. Other reasonable grounds for refusal (health and safety, creditworthiness) will still apply.
- 49. The purpose of this prescribed minimum is to enable competitive entry and expansion by ensuring that new resellers or those that are expanding their business have some certainty in situations of tight supply. However, the minimum amount should not be set so high as to impose unreasonable fuel holding or shipping costs on the wholesale supplier at each storage facility.
- 50. If a prescribed minimum is set too high and not accessed by TGP customers, there is a risk that the prescribed minimum could increase the ‘heel’ of fuel in tanks at terminals. ‘Heel’ means any material remaining in a tank following unloading, delivery, or discharge of fuel shipments sales from the tank. A larger ‘heel’ of unused fuel in tanks means that less fuel can be delivered in each shipment and more frequent shipments are required to each terminal to sustain the same amount of fuel supply.

What are the options and impacts?

Prescribed minimum amount

- 51. In its market study the Commission noted that:

suppliers could be required to make available a minimum volume of fuel for spot sales at each terminal - for example, 30,000 to 35,000 litres (i.e. a tanker load) per week or month. A wholesale supplier would not be able to refuse spot supply of this amount of fuel.
- 52. We propose that the prescribed minimum of fuel product which wholesale suppliers of specified fuel must not refuse to supply to a terminal gate customer upon request regardless of tight supply (unless there are other reasonable grounds for refusal) is 30,000 litres per terminal per week of that fuel product to one retailer or wholesaler. We seek your feedback on the appropriateness of this amount as a prescribed minimum, and whether and under what circumstances the prescribed minimum could or should be adjusted.

5	Is the prescribed minimum of 30,000 litres per week to one retailer or wholesaler appropriate?
6	Should the prescribed minimum be able to be changed, or varied? For example, could the prescribed minimum be different for different storage facilities, given some terminals supply larger fuel volumes than others?

Reasonable grounds for refusal

- 53. We propose that the Bill would specify the following reasonable grounds to refuse to supply the prescribed minimum, being:

- a. **occupational, health and safety requirements** applicable to the customer and the specified fuel product
- b. **creditworthiness** of the customer
- c. where the wholesale supplier has **already supplied** the prescribed minimum in the relevant period from a particular storage facility

54. In addition to the grounds for refusal in 53 (a) and (b) above, the Bill would also specify a further reasonable ground to refuse to supply the amount by which a request for fuel **exceeds the prescribed minimum**:

- a. the amount sought beyond the prescribed minimum is required to meet the supplier's own or term-contracted fuel supply obligations.

55. The Bill will provide for other grounds to be prescribed in regulations, but any such grounds would have to be necessary to satisfy the purpose of the Bill.

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

Standard terms and conditions of supply

56. The regulations could prescribe other standard terms and conditions a wholesale supplier may set for supply for the TGP at the storage facility. These may include matters such as conditions of access to the storage facility and terms of supply that are reasonable and consistent with industry best practice.

57. Standard terms and conditions of supply could also provide that:

- a. pre-certification may be required to allow a wholesale supplier to determine if the TGP customer meets health and safety requirements and creditworthiness, to avoid delays at the storage facility on the day of supply.
- b. such pre-certification shall not be unreasonably withheld, with a response in a fixed timeframe.
- c. this pre-certification could be on a national basis for a wholesale supplier, rather in relation to each storage facility.
- d. the standard terms and conditions be publicly available from the wholesale supplier.

8	<p>We seek your feedback on whether occupational, health and safety requirements and creditworthiness could be determined on the day TGP supply is sought with minimal impact on the customer or the wholesale supplier?</p> <p>If not, is it necessary to specify a pre-certification process with potential terminal gate customers in advance to allow an efficient assessment of whether these grounds for refusal have been met.</p>
9	<p>What other standard terms and conditions should be prescribed for sales by a wholesale supplier for the TGP at the storage facility?</p>
10	<p>Please provide comments on any other matters related to the terminal gate pricing regime.</p>

2.3 Regulating terms in wholesale contracts

58. The Commission’s study reported that many contracts contain restrictive provisions that create and reflect an imbalance of rights and obligations between wholesale suppliers and distributors and dealers, favouring suppliers. The Commission noted that such terms must be considered in the context of a whole contract, but ultimately concluded that less restrictive contractual arrangements are necessary to stimulate increased competition in both the wholesale and retail markets and made a range of recommendations in relation to making wholesale contracts less restrictive.
59. The Commission’s report examined contracts in relation to two types of market participants who purchase fuel under wholesale supply agreements:
- a. **distributors** are market participants who purchase fuel at wholesale, then either supply it to others, or sell that fuel under their own retail brand, such as Allied, NPD and Waitomo
 - b. **dealers** are market participants who operate retail fuel sites and sell fuel under someone else’s brand.
60. The Government will address the Commission’s recommendations to provide for terms in contracts between wholesale suppliers and dealers and distributors that are fair and facilitate retail competition, and that allow wholesale customers to switch suppliers more easily.
61. The Fuel Industry Bill will contain many of these changes with some further details to be specified by regulations. The Government has agreed that the Bill will include a regime governing contractual terms in fuel supply contracts between wholesale suppliers and their distributors and dealers, as relevant, that:
- a. requires contract terms to be written in clear and concise language
 - b. requires contracts with dealers and distributors to contain transparent pricing methodologies, and provides for a regulation-making power to deem certain methodologies to be transparent pricing methodologies

- c. prohibits the unilateral ability of one party to change the transparent pricing methodology, and provides for a regulation-making power to permit reasonable exceptions, such as when the other party has sufficient notice, and the right to terminate the contract if the change is unacceptable to it.
- d. allows distributors to terminate their wholesale supply contract on reasonable notice if they are longer than a prescribed length, and provides for:
 - i. a regulation-making power to set the prescribed length
 - ii. reasonable exceptions, such as when the contract duration, or any renewal, beyond the prescribed period is reasonably necessary to enable specific investment for the benefit of the distributor, or the contract is nonexclusive and contains no minimum purchase requirements.
- e. prohibits any exclusivity provision in a distributor's wholesale supply contract applying to more than a prescribed share of the distributor's annual requirement, and provides for:
 - i. a regulation-making power to set the prescribed share
 - ii. distributors to give sufficient notice of their intention to take supply from another supplier, or to require them to provide reasonable forecasting.
- f. prohibits terms that limit the ability of the dealer or distributor to compete with the supplier or other parties from being included in contracts, and provides for:
 - i. a regulation-making power to prescribe a list of terms that are likely to have such an effect
 - ii. reasonable exceptions, such as when they are reasonably necessary in order to protect the commercial interests of the supplier or any other person.

62. The Government has agreed that:

- a. commercial end user customers not be included in the regime
- b. the wholesale contractual terms regime come into effect:
 - i. for new contracts, on a date appointed by order in council, and no later than 12 months after the date of Royal Assent
 - ii. for existing contracts, on a date appointed by order in council, and no later than 24 months after the date of Royal Assent.
- c. to provide for civil pecuniary penalties for breaches of the requirements or prohibitions of the regime governing contractual terms between wholesale suppliers and their customers, with maximum penalties of \$500,000 for an individual or \$5,000,000 in any other case.

63. This section discusses the options for the regulations.

2.3.1 Wholesale contract price transparency

What is the issue?

64. The Commission’s retail fuel report notes there is a lack of price transparency in some wholesale supply agreements between suppliers, distributors and dealers, which can make it difficult for distributors and dealers to compare and negotiate wholesale prices. In addition, current pricing terms may provide suppliers with the ability to exert upwards pressure on retail prices.
65. Greater transparency around wholesale price setting and the use of cost-based pricing methodologies should improve the ability of distributors and dealers to obtain better prices at the wholesale level, and to compete with the majors at the retail level.

What are the options and impacts?

66. We are seeking feedback on two pricing methodologies that could be deemed to be transparent pricing methodologies:
 - a. Prices set with reference to a TGP. In Australia it is not uncommon for term contract prices to reference a TGP.
 - b. Prices set with reference to an industry-recognised price reporting agency’s price, such as the Mean of Platts Singapore (MOPS – an accepted international benchmark price for fuels). We understand existing contracts between the fuel suppliers and commercial customers or fuel suppliers and distributors are often based on MOPS plus costs and a margin. MOPS-based methodologies are also used in a regulatory setting in a number of Pacific Island jurisdictions.
67. Including either or both of these options should make it easier for distributors and dealers to compare and negotiate wholesale prices.
68. The Bill will prohibit the unilateral ability of one party to change the transparent pricing methodology. We propose to permit a reasonable exception when the other party has sufficient notice, and the right to terminate the contract if the change is unacceptable to it.

11	Should either or both of the TGP or an industry-recognised price reporting agency’s price based (MOPS or equivalent) pricing methodologies be deemed to be transparent pricing methodologies?
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12	Should any other pricing methodology be deemed a transparent pricing methodology?
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13	Should there be any other reasonable exceptions?
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69. Wholesale fuel suppliers will likely either offer a discount to a TGP or include a margin above MOPS (including cover for costs from getting fuel to New Zealand etc). We are seeking feedback on the level to which different costs and margin should be itemised as part of a transparent

pricing methodology. The more the cost and margin is itemised, the more transparency distributors and dealers have, which may assist with their understandings of price fluctuations.

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

2.3.2 Length of wholesale distributor contracts

What is the issue?

70. With the exception of large commercial customers, wholesale fuel transactions in the fuel industry are characterised by long-term exclusive contracts, which the Commission's fuel report notes reduce contestability and limit the scope for entry into the wholesale market.
71. Competition would be enhanced by the removal of unjustifiably long wholesale supply agreements between fuel suppliers and distributors (wholesale distributor contracts). The Fuel Industry Bill will allow distributors to terminate their wholesale distributor contract on reasonable notice if it is longer than a prescribed period. The Bill will provide for a regulation-making power to set the prescribed period, and provide for reasonable exceptions.

What are the options and impacts?

72. If the prescribed period is too long this limits the frequency of opportunities for distributors to 'shop around' for competitive supply. However, a prescribed period that is too short is likely to increase the cost for distributors, as suppliers have less volume certainty and ability to organise their supply chains. To balance these factors, the Commission suggested a maximum wholesale distributor contract length of 3 to 5 years may be appropriate⁴. We propose that a prescribed period of 5 years should provide enough supply certainty for wholesale suppliers and supply security for distributors. We seek feedback on the appropriate length for the prescribed maximum period.

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

2.3.3 Exclusivity of wholesale distributor contracts

What is the issue?

73. Competition would be enhanced if distributors had the option to obtain a significant part of their annual requirements from other sources beyond their traditional exclusive supplier. Relaxing exclusivity requirements would:

⁴ Commerce Commission Retail Fuel Market Study paragraph 6.95.

- a. enable distributors to test the market, including by confirming security of supply from a new supplier, improving their position in any negotiations
- b. enable distributors to take advantage of favourable terminal gate prices or offers from new entrants
- c. promote competition between the major wholesale fuel suppliers, who would be incentivised to offer competitive prices to retain existing customers, and to attract new volumes from distributors they do not currently supply
- d. improve the conditions for entry by any new importer, who would no longer have to deal with complete foreclosure of their potential customers.

74. The Fuel Industry Bill will prohibit any exclusivity provision in a distributor's wholesale supply contract applying to more than a prescribed share of the distributor's annual requirement.

What are the options and impacts?

75. We propose that the prescribed share be 80 per cent. For example, if the distributor's annual requirement was forecast to be 100 units, the wholesale supply contract could only require that 80 units are sourced exclusively from the main wholesale supplier.

76. A prescribed share greater 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. A lower prescribed share 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 that they would be purchasing from other suppliers.

77. The remaining share could be sourced from either the main wholesale supplier or another supplier. If the distributor chooses to seek supply from another supplier, but then subsequently decides to seek all supply from a single supplier, the main wholesale supplier would then only be obliged to supply the remainder amount if the distributor provided adequate notice. This would allow distributors to choose to access more than the prescribed share of their requirement from one supplier (their main supplier), but would not impose unreasonable costs on the supplier.

78. There may be some challenges in managing a provision of this kind if actual volumes differ from the forecasts over the life of the contract. We propose that if the annual requirement changed because of increased demand for the distributor's product, the main supplier would only be required to supply the 80 per cent of the volume that was originally forecast, unless distributors had given adequate notice of the changed volumes.

An illustrative example of how an exclusivity requirement could work for distributor

A distributor signs a contract with a wholesale supplier (their main supplier) based on a total forecast requirement of 100 units per annum for the prescribed period. This contract allows the distributor to get 20 per cent of their requirement from other parties (i.e. 20 units based

on the forecast of 100 units). As part of this contract the distributor is required to send through a running three month forecast of their requirement from their main supplier. After the first year of the contract the distributor has grown their business and now requires 110 units for the second year. The supply shares for the second year could occur as follows:

- b. If the distributor stuck to the 80 per cent share with the main supplier then it would increase its requirement and pick up 88 units from the main supplier and 22 units from third parties. The third party agreements that the distributor signs to obtain the 22 units could be exclusive share of supply (but for 20 per cent) or fixed term contracts, or a combination.
- c. If the distributor ended up wanting to take more of its supply from its main supplier it would do so by changing its forecasts and it could turn out that the distributor took 90 units from its main supplier and 20 units from third parties.
- d. In either case the distributor would have to give adequate notice to the supplier

As part of this contract the distributor would have to demonstrate to the main supplier that it took at least 80 per cent of its supply from them.

79. The exclusivity requirement is meant to give distributors more flexibility, so constraining the requirement to each fuel type and having the exclusivity apply across a time period shorter than a year may reduce the competitive benefits for distributors.

16

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

17

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

18

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

2.3.4 Other wholesale contract terms that may limit the ability of a dealer or distributor to compete

What is the issue?

80. There are a range of wholesale contract terms which provide disincentives to switch suppliers, including restraints of trade, requirements to pay liquidated damages upon switching suppliers, rights of first refusal and renewal clauses at the supplier's option.
81. The Fuel Industry Bill will prohibit terms in wholesale fuel contracts which limit the ability of the dealer or distributor to compete with the supplier or other parties, and provide for a regulation-making power to prescribe a list of terms that are likely to have such an effect. The Bill will provide for reasonable exceptions, for example when terms are reasonably necessary in order to protect the commercial interests of the supplier or any other person.

82. The Commerce Commission found the following contractual terms potentially hinder competition:

- a. Long notice periods for termination and rights of renewal. Some contracts include either automatic or unilateral rights of renewal that allow major wholesale suppliers to renew existing wholesale supply agreements for one or more pre-determined periods, for example five or ten years. Some agreements also give the major supplier the sole discretion to terminate.⁵ The more onerous these terms are the more difficult it is for dealers and distributors to switch suppliers and a new importer to establish a wholesale business.
- b. Transfer of ownership/rights of first refusal clauses. Many wholesale supply contracts contain clauses that effectively allow major suppliers to veto any transfer of ownership by dealers and distributors, or provide them with a first right of refusal regarding any potential transfer of ownership. Some contracts may also provide a major supplier with the option to unilaterally acquire the resellers' businesses.

In relation to distributors that own and operate their own brands, it is not clear that there is a pro-competitive justification for restrictions on the transfer of ownership. There may however be general requirements to assess the suitability of a purchaser to acquire the distributor's contractual rights and obligations.

- c. Restraint of trade and liquidated damages clauses. Some wholesale supply contracts contain clauses that limit distributors' ability to compete in retail markets at the expiry of their existing contract or may limit the ability of distributors to test the market and negotiate new wholesale supply arrangements. Some provisions also require the payment of liquidated damages, for example if volume quotas are not met. These clauses are likely to be hindering competition in wholesale and retail fuel markets by either deterring or explicitly prohibiting distributors or dealers from competing with their wholesale suppliers at the expiration of their current supply agreements or from switching wholesalers.
- d. Exclusive territories. In some cases, distributors are not permitted to operate outside of an assigned territory without prior approval of their wholesale supplier. Existing territorial restrictions weaken wholesale competition and may no longer be justified on pro-competitive grounds.

What are the options and impacts?

83. We propose to include the above terms in a list of terms which are likely to limit the ability of the dealer or distributor to compete with the supplier or other parties. We are seeking feedback on whether these terms limit the ability of dealers or distributors to compete and whether there are any other contractual terms that could hinder the ability of dealers or distributors to compete.

⁵ Commerce Commission Retail Fuel Market Study paragraph 6.101

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

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

84. As part of the Commission’s “must supply” recommendation, they recommended that term contract supply be prioritised ahead of wholesale suppliers’ own retail sites. We do not propose to do this. However, if wholesale fuel suppliers were to discriminate on access in their supply under term contracts, this could limit the ability of the dealer or distributor to compete with the supplier and other parties. This could occur in instances of tight supply such as port coordination events⁶.

85. Where wholesale contracts provide for non-discriminatory access treatment of the supplier and the distributor in these circumstances – for example, if the wholesale supplier and the distributor both reduced their fuel take to the same proportion of their requirement for their retail sites in instances of tight supply– then no further regulatory intervention would be necessary, as this would not limit the ability of the dealers or distributors to compete.

86. However, where contractual terms specifically prioritise supply to the wholesale supplier’s own retail sites over contracted supply, this could have the effect of limiting the ability of dealers or distributors to compete. We are considering whether terms of this kind should be included in the list of terms that are likely to limit the ability of the dealers or distributors to compete.

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

2.4 Dispute resolution processes for wholesale markets

87. The Government has agreed that the Fuel Industry Bill will provide wholesale fuel suppliers and customers with the option to access mediation, and if they agree, arbitration services. The details of the mediation and arbitration options under the scheme will be set out in the regulations, such as when the dispute resolution scheme must be used, who must use it, the process the parties must follow, and who will provide the dispute resolution.

88. The new wholesale markets regime may lead to disputes and, as such, out-of-court dispute resolutions should be offered by the regime. A dispute resolution scheme would provide parties with a low cost way to resolve disputes under the regime when compared with taking an action in the courts or seeking enforcement by the Commission.

⁶ Port coordination events are used by the majors to ration out available supply between the majors and their downstream partners, when terminals are forecast to run out of supply before the next shipment arrives. The Commission’s Final Report found some ports are under coordination up to 40% of the time for certain fuels.

What is the issue?

89. The purpose of establishing a dispute resolution scheme is to provide a quicker and more affordable method for resolving disputes. A dispute resolution scheme would be an alternative to taking action in the courts or seeking enforcement by the Commission, not a replacement.
90. We seek feedback on the details of the proposed dispute resolution scheme which will be set out in the regulations.
91. The Australian Codes of Conduct under the Competition and Consumer Act 2010, which cover similar areas as the Fuel Industry Bill, provide access to a dispute resolution scheme as an alternative to litigation. For example:
- a. Under the Australian Oil Code the scheme appoints a dispute resolution advisor to facilitate the process. The dispute resolution advisor may make non-binding determinations for industry disputes under the Australian Oil Code.
 - b. The Australian Dairy Code⁷ requires that all milk supply agreements must provide for both an internal complaint handling procedure and a mediation process. It provides both processors and farmers with the ability to seek to resolve a dispute via the mediation process set out in the Australian Dairy Code. Under the Australian Dairy Code, a milk supply agreement may also provide for an arbitration process, including by adopting the arbitration process set out in the code.
92. The Government Centre for Dispute Resolution defines mediation and arbitration as:
- a. **Mediation** is a process where the parties, with the assistance of external help, create a safe environment where they can address their issues and resolve them if they wish. Mediation is based on the principles of voluntariness, confidentiality, impartiality, and self-empowerment.
 - b. **Arbitration** is a process in which the parties to a dispute agree to present arguments and evidence to one or more dispute resolution practitioners (the arbitral tribunal) who then issue an award; deciding the matter in dispute. Arbitrations are governed by the Arbitration Act 1996.

What are the options and impacts?

Will a dispute resolution process under the regulations be used?

93. It is our initial view that the dispute resolution scheme could be similar to the one set out in the Australian Dairy Code whereby wholesale fuel suppliers and their customers have the ability to seek to resolve a dispute via the mediation process set out in the regulations, and if both parties agree, the arbitration process set out in the regulations.

⁷ <https://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct>

94. It is our understanding that clauses setting out the processes for dispute resolution are already widely used in contracts between wholesale fuel suppliers and their customers. We are seeking feedback on whether a mediation or arbitration process set out in the regulations would be used as an alternative, or whether existing arrangements are sufficient. However, we note that either way a process could still be made available for dealing with disputes about TGP supply, which would not be covered by existing contracts.

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

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

Circumstances in which the dispute resolution scheme must be used

95. We suggest that participation in the mediation process should be mandatory if one party to a dispute wants to initiate it. The procedure set out in the regulations should apply if either party wishes to have a dispute resolved by mediation, though there would be no obligation on the parties to reach an agreement.

96. We note that under the Australian Oil Code the dispute resolution scheme applies to disputes arising:

- a. where a wholesale supplier fails to supply a *declared petroleum product* to a customer
- b. between the parties to a *fuel re-selling agreement*
- c. in relation to other provisions under the Australian Oil Code in relation to terminal gate price arrangements or a fuel re-selling business.

97. It is our view that the dispute resolution scheme could apply to similar circumstances in New Zealand. We think it is possible that the terminal gate pricing regime and the new wholesale contract terms may create disputes between parties e.g. disputes about refusal to supply at TGP, and about whether existing contracts meet the requirements of the Fuel Industry Bill and regulations.

98. It is therefore our initial view that the dispute resolution scheme should apply in the following circumstances:

- a. when a wholesale supplier refuses to supply at TGP to another party
- b. any other provision of the new regime that relates to the terminal gate pricing regime; including non-price terms.
- c. disputes arising between a wholesale supplier and its contracted wholesale customers that relate to requirements of the new regime in relation to contractual terms.

99. We are seeking feedback on whether you agree that the dispute resolution scheme should apply in these circumstances and whether there are any other aspects of the new regime to which the dispute resolution scheme should apply.

24	Should participating in mediation be mandatory for the other party if one party wishes to attempt to resolve the dispute using this dispute resolution process?
25	Should the dispute resolution scheme apply if a wholesale supplier refuses to supply fuel at TGP?
26	Should the dispute resolution scheme apply to disputes that result from the new wholesale contract terms?
27	Should the dispute resolution scheme apply to disputes that result from any provision that relates to the terminal gate pricing regime?
28	Are there any other aspects of the new regime you think the dispute resolution scheme should apply to?

Affordability and accessibility

100. Any dispute resolution scheme that the regulations provide for must be both affordable and accessible. We seek your feedback on how we can ensure this for all participants, from the major suppliers, through to smaller dealers.

101. Resolving disputes through the courts is beyond the means of many small businesses, putting them at a disadvantage. If agreement is not reached at mediation, there is still the option of going through the court system to resolve disputes in relation to fuel supply contracts.

102. The out-of-court dispute resolution processes offered by the scheme should be cheaper and faster than the courts. For private commercial disputes, it is common that the cost of these dispute resolution services is divided equally between the parties involved in the dispute. We propose that each party to a dispute is required to pay half the costs of any mediation or arbitration process (unless both parties agree to another arrangement). We seek feedback on this proposal.

103. We also seek feedback on how we can ensure the dispute resolution scheme is effective. Generally, mediated agreements and arbitral awards can be enforced through the courts which will go some way to ensure the effectiveness of the process.

29	In your view, how can we ensure the dispute resolution scheme is affordable, easily accessible, and timely for all parties involved?
30	Should each party to a dispute be required to pay half the cost of the mediation or arbitration process?
31	In your view how can we ensure the dispute resolution scheme is effective?

Who should provide the dispute resolution service?

104. The Commission noted in their report that it was important that any dispute resolution scheme was independent from industry.

105. We note that in the Australian Dairy Code the Agriculture Minister must appoint a mediation advisor who must compile a list of persons who can be mediators.

106. In order to ensure that the dispute resolution scheme is independent of industry we are seeking feedback on who should provide the dispute resolution service. We consider that there are four options:

- a. parties reaching an agreement between themselves on a suitable person to act as a mediator / arbitrator
- b. parties ask an independent and impartial nominating authority for professional dispute resolvers (which would be set out in the regulations) such as the Arbitrators and Mediators Institute of New Zealand, the Resolution Institute, or the President of the Law Society to appoint a mediator / arbitrator
- c. a combination of the above e.g. parties have a choice between reaching an agreement between themselves on the person who should act as a mediator / arbitrator and if they can't decide then ask the independent nominating authority to appoint someone for them
- d. the customer to a wholesale supply agreement nominates three authorised mediators / arbitrators and the other party must agree to one. This is similar to the process under the Farm Debt Mediation scheme.

32	Who should provide the dispute resolution services set up under the new regulations?
33	Should the dispute resolution scheme appoint an independent nominating authority to appoint dispute resolvers under the scheme?
34	Is there a specific skillset / background the mediator / arbitrator should have?
35	Please feel free to provide comments on any other matters related to the dispute resolution process.

2.5 Regulatory backstop

107. In its final report, the Commission recommended a backstop regulatory regime that could be brought into force should the proposed TGP regime not deliver competitive terminal gate prices within a reasonable period of time. The credible threat of further regulatory intervention would provide incentives for competitive conduct at the terminal gate.

108. The Commission outlined two possible options for the design of a regulatory backstop:

- a. A binding arbitration system that could provide for price or terms of supply to be set for a supplier who has unreasonably failed to comply with the terminal gate pricing regime. For example, this could apply if there were repeated instances of non-supply at a terminal gate price or if prices were consistently set well above cost at a terminal.
- b. A default regulatory regime could be made available to regulate prices at a specific terminal or terminals where a major has market power, or competitive outcomes are not being observed. Options may include determining prices based on:
 - i. a New Zealand landed cost based on industry approved benchmarks (such as MOPS) plus a regulated margin, or
 - ii. A benchmark terminal gate price, based on a demonstrably competitive price observed at another port (e.g. Mount Maunganui), adjusted to reflect any difference in cost associated with transporting fuel by the least cost means (e.g. shipping) to the regulated terminal.

109. The Government supports the introduction of a regulatory backstop, and has directed officials to work on the design of such a regime to be added to the new Fuel Industry Bill at a future date. These details will be worked out over a longer timeframe, however, at a high level we are interested in your initial thoughts on how a regulatory backstop could be implemented. A longer period has been provided for consultation on this issue, given the longer timeframe.

110. This consultation document discusses the following issues:

- a. 2.5.1 – What is the problem that a regulatory backstop should address?
- b. 2.5.2 – What should be the threshold and process for triggering the regulatory backstop?
- c. 2.5.3 – How should price control regulation apply under the regulatory backstop?

2.5.1 – What is the problem that a regulatory backstop should address?

111. The objectives of the terminal gate pricing regime are discussed earlier in this document. These are:

- a. increase the ability of distributors and dealers to purchase fuel on competitive terms by providing greater transparency of wholesale fuel prices to inform bargaining and providing an ability to purchase some or all of their fuel through TGPs at terminal gates
- b. reduce barriers to entry and expansion for importers and distributors by providing a transparent and readily available way to obtain fuel supply through TGPs on a nationwide basis from the existing network of terminals or equivalent facilities
- c. provide competitive benchmark information for industry and the government and curb the incentive on wholesale suppliers to use their market power in regions where competition is weak.

112. When the Commission recommended the option of binding arbitration as a backstop to address non-compliance by a wholesale supplier, it did not know if the Government would support introducing an enforcement regime or an alternative dispute resolution scheme for the terminal gate pricing regime. The Government has agreed that the Fuel Industry Bill will include civil pecuniary penalties for non-compliance, and these prohibitions will be enforceable by the Commission. As part of this discussion document we are also consulting on the design of an alternative dispute resolution scheme. We consider these arrangements to be sufficient to promote compliance by an individual wholesale supplier and a further regulatory backstop for this purpose is not necessary.

113. However, the Commission identified a risk to the success of the terminal gate regime if wholesale suppliers do not offer competitive TGPs. For example, the wholesale supplier may be at a storage facility in a relatively remote location which gives them a degree of market power, or the wholesale suppliers with rights to sell specified fuel products at that storage facility may coordinate in the setting of terminal gate prices. Setting high TGPs will not be prohibited under the terminal gate regime, and therefore a regulatory backstop is likely to be required.

114. In particular, the Commission considered that existing statutory provisions under the Commerce Act were insufficient to provide disciplines on the conduct of wholesale suppliers in this situation. These other provisions include:

- a. Sections 27 and 36 of the Commerce Act, which currently prohibit anticompetitive agreements between parties or persons with substantial market power from taking advantage of that power for anticompetitive purposes. Section 36 is also subject to review and is likely to be strengthened through upcoming amendments to the Commerce Act.
- b. Part 4 of the Commerce Act, which provides for economic regulation to be imposed in markets where there is little or no competition, and little or no likelihood of a substantial increase in competition.

2.5.2 – What should be the threshold and process for triggering the regulatory backstop?

What is the issue?

115. The remainder of this section considers how to design a backstop regime that may be triggered to regulate TGPs at the terminal gate. As part of good regulatory processes, it is important that a clear and transparent process is followed to determine whether regulation should be imposed.

What are the options and impacts?

What should be threshold for regulatory intervention?

116. The threshold for regulation intervention would ordinarily require:

- a. evidence of a significant and sustained competition problem that is not addressed by other means; and/or
 - b. assessment that the public benefits of regulation materially exceed the detriments, where such an assessment need not be quantitative.
117. The competition problem in this case may manifest as TGPs at the terminal gate that exceed the cost of supply, and are not justified for other reasons. Supply costs in this case could be assessed by reference to:
- a. a cost-based pricing methodology, such as MOPS plus various itemised components that make up the price at each terminal gate; or
 - b. a benchmark such as the TGP observed at another terminal where competition exists such as Mount Maunganui, adjusted to reflect any difference in cost associated with transporting fuel by the least cost means such as shipping to that terminal.
118. There may also be other forms of uncompetitive conduct at the terminal gate, such as uncompetitive terms of supply.
119. We consider two options for a regulatory threshold, being:
- a. **Option 1** – A discretion for regulation to be imposed at a terminal or equivalent facility if TGPs repeatedly exceed a measure of supply costs, and the decision-maker is satisfied that regulation would be in the public interest; or
 - b. **Option 2** – A requirement for a more detailed assessment, such as:
 - i. whether the wholesale supplier or suppliers at the terminal or equivalent facility have ‘substantial market power’, and
 - ii. taking into account the benefits and detriments of imposing regulation.
120. Under either option the proposed monitoring regime would be designed to ensure that information relevant to an assessment of whether the threshold had been met would be collected.
121. Under both Option 1 and 2, we consider that a Government Minister should be the decision-maker as to whether regulation should be imposed through recommending an Order in Council to that effect.
- a. Option 1 would be a clearer test, and the Minister may be able to make an assessment based on advice received through the monitoring regime.
 - b. Option 2 would require a more detailed assessment of the market, and we anticipate that the Minister’s decision would need to be informed by expert competition analysis, such as following a recommendation by the Commission. A comparable provision applies in section 56M of the Commerce Act 1986 to provide for whether an airport service provided by the regulated airport companies should become subject to regulation.

What process should be followed?

122. In deciding whether to impose regulation, interested parties should have an opportunity to be consulted and have their views taken into account. Under Option 1, this consultation would be carried out by the Minister. Under Option 2, the Commission would be required to consult on its assessment before making a recommendation to the Minister.
123. The normal accountability arrangements would apply, including judicial review and the Order in Council being a disallowable instrument.

36

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

2.5.3 – How should price control regulation apply under the regulatory backstop?

What is the issue?

124. The regulatory backstop could provide for price and quality control to be imposed for the TGP supply of a specified fuel product or products at one or more terminal or equivalent facility. There are a variety of options for how a price and quality control regime could be designed. Without limiting the feedback you may provide on this issue, we discuss some options below.

What are the options and impacts?

125. The main examples of different regulatory regimes for price and quality control are individual price and quality control under Part 4 of the Commerce Act 1986, determinations for designated telecommunications services under Schedule 1 of the Telecommunications Act 2001, and regulations for raw milk under the Dairy Industry Restructuring (Raw Milk) Regulations 2012.
126. A few features of a possible price and quality control regime for specified fuel products are:
- a. it would likely apply to all wholesale TGP supply of that specified fuel product at that terminal or equivalent facility
 - b. the regulatory methodology would need to allow for significant fluctuations in some components of the fuel price, particularly the cost of imported fuel on the world market
 - c. as much as possible, it should reflect industry practices for determining prices and quality
 - d. it should supplement the terminal gate pricing regime, so that a regulated supplier would have an obligation to post a daily regulated TGP and supply a terminal gate customer at that regulated price, unless there are reasonable grounds to refuse. Such reasonable grounds to refuse could be further specified as part of the regulatory backstop.

127. We consider the following options:

- a. **Option 1 (the Part 4 Individual Price Path Model)** – the regulatory regime could link to generic regulatory control provisions in Part 4 of the Commerce Act. Once an Order in Council has been made making the TGP supply of specified fuel at the terminal or equivalent facility subject to control, the Commission would be directed to carry out an inquiry to determine the rules for how that price and quality control would apply. This may include determining input methodologies for components of the price. Once the form of price and quality is finalised, the Commission would make a determination of how those price and quality control rules would apply to a regulated wholesale supplier. This process provides the most flexibility for the form of price and quality control, as it does not require pre-determined pricing principles or methodologies.
- b. **Option 2 (the designated telecommunications service model)** – the regulatory regime could set out an initial and final pricing principle for regulated fuel products, and a process for the Commission to make determinations as to how those pricing principles would apply. Once an Order in Council has been made, the TGP supply of specified fuel at the terminal or equivalent facility would be subject to control. Then the Commission may make a determination for that terminal or equivalent facility to which all regulated wholesale suppliers must comply. A short form determination process could apply the initial pricing principle in relation to each regulated wholesale supplier or suppliers at the specified terminal or equivalent facility, based on a benchmark price or MOPS plus pricing methodology. A final pricing principle could apply a more detailed assessment.
- c. **Option 3 (the raw milk model)** – the regulatory regime could set out a regulated pricing methodology for how the TGP must be determined. Once an Order in Council has been made declaring a terminal subject to regulation, regulated wholesale suppliers at that terminal would be required to apply that methodology when calculating the daily terminal gate TGPs. If terminal gate customers dispute the manner in which the methodology is applied, they could apply to the Commission for a determination.

128. There are also two variations to the above options:

- a. **Decision-maker** – We generally favour the Commission as being the body charged with making a determination on regulated prices. However, in some cases, an arbitrator may be able to carry out this function. The Commission is preferred if there is an imbalance in power between the parties to the determination, or if investigatory powers are desirable to address significant information asymmetries between the parties. An arbitrator will normally hold proceedings based on an adversarial rather than inquisitorial approach.
- b. **Enforceable undertakings** – A further variation of the above regulatory options is, following the making of an Order in Council imposing control over a specified terminal, whether a regulated supplier should be able to offer an enforceable undertaking to the Commission as an alternative to a regulated price.

129. Under any of the above options, we consider that a determination by the Commission would be subject to appeal.

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

3 Consumer Information

3.1 Overview

130. While a significant number of the Commission's recommendations primarily focused on wholesale competition, as outlined in Section 2, the Commission also recommended several changes to more directly improve competition in retail fuel markets. In particular, the recommendations focus on improving the ability of consumers to make more informed purchasing decisions for fuel.

131. We agree with the Commission that features of the retail market may reduce price competition, including in relation to transparency of consumer information in the following areas:

- a. Discount and loyalty offers may make it difficult for consumers to compare pricing, with consumers focusing on the level of discounting rather than the price. Additionally, discounting practices may soften competition if only more price sensitive consumers sign up to discounting programmes, and others pay higher board prices.
- b. Fuel firms earn higher margins on premium compared to regular fuel and the gap has been rising. The price of premium fuel is not listed on price boards, which may be contributing to this trend.

132. There is some evidence that new technology is providing consumers with more information on fuel offers. This includes real time pricing through apps such as Gaspy, and retailers employing different strategies for displaying fuel prices and discount or loyalty scheme offers.

133. To address issues relating to availability of transparent pricing information for consumers, Government agreed to include in the Fuel Industry Bill a requirement for display of certain prescribed information relating to the price of fuel at retail fuel outlets, in the form and manner prescribed in regulations.

134. Government has also agreed that the Fuel Industry Bill provide for regulation-making powers to:

- a. set out the specific requirements for the display of information relating to the price of fuel (including setting out any requirements to prohibit the display of certain pricing information) and to prescribe the form and manner in which that information is to be provided
- b. allow exceptions to be made to prescribed requirements for display of information relating to the price of fuel, for example, for small sites below a defined annual sales volume

135. Government has also agreed:

- a. that these requirements come into effect on a date appointed by order in council, and no later than 18 months after the date of Royal Assent
- b. to provide for civil pecuniary penalties for breaches of the requirement for the display of certain prescribed information relating to the price of fuel at retail fuel outlets in the form and manner prescribed in regulations, with maximum penalties of \$500,000 for an individual or \$5,000,000 in any other case.

3.2 Regulations for display of premium prices on price boards

What is the issue?

136. Premium petrol accounts for around one quarter of total retail fuel consumption. The Commission observed that premium fuels were more expensive than regular fuel, with fuels being sold at higher margins and margins increasing over time.
137. Currently there is no specific requirement for fuel retailers to display prices. Existing industry practice is to display prices for regular 91 octane petrol and diesel at retail fuel outlets. The Commission suggested that a lack of display of premium prices on boards is contributing to trends in the price margins of premium fuel. Not displaying premium prices on boards means that consumers are not able to compare available prices of premium fuels without specifically driving into retail sites to check the pump price.
138. Crowd sourced information and apps such as Gaspy may help with price comparison for premium fuels, and may become more widely used over time. However, it is unclear how often consumers use apps like Gaspy before purchasing fuel and what proportion of sales can be linked to their use.
139. Given these issues, the Commission recommended regulating the display of the price of premium petrol on price boards at retail outlets.
140. In late 2019, the Minister of Commerce and Consumer Affairs wrote to retail fuel sellers to encourage them to put premium prices on price boards at their sites. Some retail fuel sellers have begun a process to display premium prices on price boards, particularly at newly opened sites, which should assist consumers to compare prices.
141. However, it is still the case that at the majority of retail sites, premium petrol prices are not displayed, which makes it difficult for consumers of premium fuels to compare prices and identify the most competitive supplier. This may have contributed to premium petrol margins increasing faster than regular petrol.

What are the options and impacts?

142. Under the status quo, there is no requirement to display any prices on a price board. The majority of retail fuel sellers have a board that drivers can see from the road, which displays prices for regular 91 octane petrol and diesel. There are some retailers who do not currently have price boards. More recently, some retailers have begun to display discounted prices for regular 91 petrol on price boards. A requirement to display premium prices would in effect require retail outlets to have a price board if they do not already.
143. Any requirement to display premium prices has an associated cost. The Commission noted an estimate from fuel companies that it would cost in the order of \$7,500 per site to put the prices of premium fuels on price boards. It also noted that resource consents might be needed for some older sites, which may add additional costs, but that it is not expected that this would affect many sites. Cost may vary by site, and the Commission noted that 'if the cost is significant it could affect business decisions pertaining to entry and exit, especially for smaller sites'⁸. We seek your feedback to a number of questions on the costs of requiring premium prices on price boards.
144. Fuel companies earn higher margins on premium fuels and the differences in price between regular 91 octane petrol and premium petrol grades can be significant. Roughly one quarter of fuel consumption is premium fuels. An initial high level estimate suggests that consumers of premium fuels could make significant cost savings if prices were more transparent, for example \$14 million if prices decreased by two cents per litre (2cpl) or \$36 million if prices decreased by as much as 5cpl. These are indicative estimates only.
145. If government chooses to regulate for display of premium prices on boards, there are a number of questions and options that will need to be considered in determining how this is done, and what the impacts of such a requirement would be.

What should be disclosed?

146. There are two key questions that we seek feedback on in terms of information that could be required to be disclosed:
- a. As noted above, there are currently no requirements for information to be disclosed on a price board. Requiring price boards to display premium prices without addressing requirements for display of other fuel grades may lead to issues such as removal of other prices e.g. for diesel from price boards. This may create issues for comparison of prices for other fuel grades. There is a need to consider whether there should be requirements for display of other prices, in particular for regular 91 octane petrol and diesel.
 - b. We are interested in your feedback on whether regulation should require display of prices for all grades of premium fuel, or only the main grades supplied. There are a number of grades of premium fuel, and we are interested in feedback on how many grades are sold at

⁸ Commerce Commission Retail Fuel Market Study paragraph 7.143.

each retail outlet. Displaying all grades would provide all petrol consumers with information on their fuel costs. However, displaying all grades may require some service stations to include four or five prices on their price boards, which creates a busy price board environment that may be confusing for consumers.

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

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

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

Requirements for display

147. We seek feedback on the appropriateness of setting specific requirements for the form and manner of display of prices on a price board. For example, there could be requirements:

- a. That prices on a board are displayed in a particular order from top to bottom. Requiring prices to be displayed in a specific order would reduce the possibility of confusion for motorists, e.g. between prices for 91 and 95 octane products. This may particularly be helpful if sellers are required to display all grades of fuel, with the possibility that four or five prices may be included on a board.
- b. For a board to have certain visibility requirements e.g. to be a particular minimum or maximum size, for a particular font size, for particular colour coding for grades of fuel or particular visibility requirements in the road environment. We note that there are already a number of signage requirements that businesses have to comply with in the road corridor, including the NZTA Bylaw relating to signs on state highways and with controls administered by territorial local authorities, which include either district plan rules under the Resource Management Act 1991 (RMA) or local authority bylaws.

148. Having a specific form and manner for display may improve information for consumers, for example, reducing confusion for consumers distinguishing between grades of petrol. However, prescriptive requirements for price boards will impose greater compliance costs, with more price boards needing to be upgraded. Additionally, some price boards have already started to be upgraded following a request from the Minister of Commerce and Consumer Affairs in late 2019, following the release of the Commission's final report, and setting specific requirements could require those boards to be changed again. Setting specific requirements for price boards may also mean that there is less space to display other information that may be of use to consumers such as availability of coffee and other food services.

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

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

Exceptions

149. As noted above, feedback is sought on whether prices for all grades of premium fuel should be displayed, or only the most frequently sold. If regulations specify that prices for all grades of premium fuel should be specified, there is still a question of whether there are some circumstances in which it may be appropriate to exempt some retailers from this requirement. We seek your feedback on whether there is a case for exceptions from requirements:

- a. Where a site is only selling a small volume of a particular fuel, is there a case for an exception to be made from the requirement for display for that fuel? If so, what amount of fuel for a particular grade would be a reasonable minimum to exempt from a requirement to display price?
- b. Where a site sells below a minimum volume for all grades of fuel, is there a case for an exception to be made from a requirement to display a price board? This would reduce costs for small sites and avoid the issue noted by the Commission as at paragraph 143. However, an exception for small volumes is likely to mean that smaller service stations in remote areas may not display prices. In relation to display of prices in remote areas, the Commission noted that other sources of information on price, such as apps like Gaspys were less likely to be available⁹, meaning that price boards may be more critical in such locations as a source of information.

150. Also as noted above, retailers must comply with requirements in the NZTA Bylaw relating to signs on state highways and with controls administered by territorial local authorities, which include either district plan rules under the RMA or local authority bylaws. We seek your feedback on whether exceptions are required to enable compliance with these other instruments:

- a. At this stage, we have not seen evidence to suggest that placing requirements for display of prices will conflict with requirements set in district plans under the RMA. However, we would be interested in your feedback on whether you see any conflicts between these requirements and RMA requirements.
- b. We seek your feedback on whether an exception to requirements is needed for situations where the seller must comply with the NZTA Bylaw relating to signs on state highways, or local authority bylaws.

⁹ Commission report paragraph 7.139.2

42	Should there be an exception from the requirement to display a price of a particular grade of fuel if the volume of that type of fuel being sold at a particular retail site is below a certain minimum volume? If so, why, and what would be a reasonable threshold for such an exception?
43	Should there be an exception from the requirement to have a price board displaying fuel prices if the total volume of fuel sold at a particular retail site is below a certain minimum volume? If so, why, and what would be a reasonable threshold for such an exception?
44	<p>Is an exception needed for the situation where sellers must comply with NZTA requirements for signage on state highways?</p> <p>Are there any other situations where an exception might be needed? For example:</p> <ul style="list-style-type: none"> • is an exception required in relation to local authority bylaws? • are you aware of any issues that would mean that requirements on the display of price boards would conflict with local council requirements for signs under bylaws or the Resource Management Act? If so, describe these issues?
45	Are there any other issues that you think should be considered in development of regulations relating to the display of prices on price boards?

3.3 Other issues

151. Other issues noted by the Commission relating to transparency of consumer information included issues relating to discounts and loyalty programmes, and display of discounted pricing; and a lack of information for consumers on whether their vehicles need to use premium fuel. Government is not proposing to make regulations relating to these matters at this time.

Monitoring display of discounts and discounted pricing

152. The Commission noted that retail price competition is increasingly focused on discount and loyalty programmes, which has the effect of avoiding direct competition on board prices, and can also make it harder for consumers to compare prices. A focus on discounting can be misleading for consumers, and may distort consumers' purchasing decisions, by increasing their focus on the size of the discount, rather than overall prices.

153. However, the display of discounts and discounted prices is evolving over time. Government proposes to monitor the display of price boards, rather than making regulations on this issue at this time. However, the regulations will be able to be made to prohibit the display of discounts and discounted prices if necessary.

46	Do you have any comments that you wish to make on other matters relating to transparency of information for consumers?
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4 Information disclosure and monitoring

4.1 Introduction

154. One of the reasons that multiple studies have been required to reach a view on key industry performance metrics is that the necessary information has not been available or easily obtainable. In the market study, the Commission identified that it had encountered some constraints in obtaining information, even with the power to compel the production of such information.
155. The information sought is sometimes not available because it has never been collected, or has been destroyed/not retained, because it is held offshore and its production cannot legally be compelled in New Zealand, or because it is held in systems that make it difficult to access at a reasonable cost. Additionally, information available has in some cases been unable to be used because it has been prepared in accordance with different standards, making it difficult to compare with other information.
156. There would be long term benefits from improving the information available on the fuel sector. There is a high level of interest in the effectiveness of competition in the sector, and if higher quality information is held by industry or by government, this could significantly improve the timeliness, cost and accuracy of obtaining information and analysis on the fuel industry.
157. The Government has agreed to include in the Fuel Industry Bill a requirement for certain fuel industry participants to collect and disclose certain information periodically and/or on request to:
- a. the Minister of Energy and Resources and/or the Commission, to enable monitoring of the market and assessment of the regulatory regime
 - b. the Commission to enable enforcement of the regime.
158. The Government has agreed to provide for regulation-making powers setting out the specifics of these obligations, including (but not limited to):
- a. to whom the obligation to collect/disclose information applies
 - b. the specific information to be collected/disclosed
 - c. how long information must be held for/when disclosure must take place
 - d. the form in which information must be held in/disclosed.

159. Government has agreed to provide for civil pecuniary penalties for breaches of the obligations to collect and disclose information, with maximum penalties of \$500,000 for an individual or \$5,000,000 in any other case.
160. Government has agreed to include in the Bill the ability for the Minister of Energy and Resources and the Commission to share information for the purposes outlined in paragraph 163 above, and to publish information disclosed, and analysis of this information, subject to appropriate protections.
161. Government has agreed that these requirements come into effect on a date appointed by order in council, and no later than 18 months after the date of Royal Assent.

4.2 Record keeping and disclosure of information

What is the issue?

162. The key issue to consider is how to put in place requirements for record keeping and information disclosure, while ensuring that administrative and compliance costs are minimised. There are a range of approaches that can be taken to ensure that the regime is achieving the purposes. We are seeking feedback on the impacts of a number of different approaches to a record keeping and information disclosure regime.

What information will be used for

163. The Fuel Industry Bill will outline three key purposes for the record keeping and information disclosure regime:
- a. To enable regular monitoring of the performance of the market: Regular monitoring of market trends and issues, and competition indicators will ensure that any competitive problems in the industry can be identified and addressed. Key components of regular monitoring include:
 - i. Further development of [MBIE's weekly price monitoring](#) function to observe trends in industry margins.
 - ii. Monitoring of wholesale and retail markets to understand the impacts of the regulatory changes made by the Fuel Industry Bill.
 - iii. Publication of regular analysis and reporting on indicators such as the fuel price and gross margins on a national and regional level. Such reporting would be similar to the products that are released by the Australian Competition and Consumer

Commission¹⁰, and would help to assess regional competition and the impacts of Terminal Gate Pricing on competition indicators.

- b. To investigate compliance and enforcement of the regulation: Monitoring of the Terminal Gate Pricing regime, including monitoring whether companies are meeting requirements to set and post prices, and whether obligations to supply are being met.
- c. To enable assessment of the regulatory regime: In addition to regular monitoring, there is a role for gathering more comprehensive information (such as that gathered by the Commission in its market study) for longer term, less frequent, reporting, which could:
 - i. Allow for in depth assessment of the market to determine whether competition outcomes in the market are changing over time. For example, through revisiting the findings of the Commission’s market study.
 - ii. Enable assessment of the effectiveness of regulatory changes, for example to test whether the TGP regime is supporting competitive markets and to address the risk that price transparency may encourage collusive behaviour.

164. Additionally, as noted in Section 2.5 above, Government proposes to add a regulatory backstop to the regime at a later date. Information will be needed to determine whether TGPs are in line with what would be expected in a competitive market and to determine whether further regulation would be required.

165. The monitoring roles outlined above will be shared across MBIE and the Commission.

What are the options and impacts?

What information will be required to be collected and/or disclosed

166. To meet the purposes outlined in the section above, there are a range of different types of information that we propose are collected by companies and disclosed to MBIE and the Commission. We seek feedback on the information that would be collected and/or disclosed. In particular, it will be important to ensure that the information is fit for the purposes outlined above. The cost of collecting information should be proportionate to need. We seek your feedback on the need for, and costs of, collecting particular information.

167. Information that we propose could be collected is outlined in Table One as follows:

TABLE ONE: PROPOSALS FOR INFORMATION COLLECTION		
TYPE OF INFORMATION	INFORMATION TO BE COLLECTED AND SUGGESTED FREQUENCY OF COLLECTION AND DISCLOSURE	WHO SUPPLIES INFORMATION

¹⁰ The Directive: <https://www.legislation.gov.au/Details/F2019L01657>

Recent reports: <https://www.accc.gov.au/regulated-infrastructure/fuel/acccs-fuel-monitoring-role>

Wholesale market	<ul style="list-style-type: none"> Wholesale market revenues by customer, by terminal, by supply type (i.e. TGP or term) for each grade of fuel. <ul style="list-style-type: none"> Collected monthly, disclosed quarterly Wholesale market volumes by customer, by terminal, by supply type (i.e. TGP or term) for each grade of fuel <ul style="list-style-type: none"> Collected daily, disclosed monthly 	Wholesale suppliers
Terminal gate pricing	<ul style="list-style-type: none"> Daily Prices posted for each terminal for each grade of fuel <ul style="list-style-type: none"> Collected daily, disclosed monthly Instances of failure to supply and reasons for non-supply <ul style="list-style-type: none"> Collected weekly, disclosed monthly 	All wholesale suppliers who are required to post a TGP
Wholesale contract information	<ul style="list-style-type: none"> High-level information such as start and end dates, and customer names of wholesale fuel supply contracts <ul style="list-style-type: none"> Collected monthly, disclosed annually 	Wholesale suppliers
Importers' costs	<ul style="list-style-type: none"> Information on costs of an importer for supplying fuel to relevant terminals for each grade of fuel, including, for example: <ul style="list-style-type: none"> Landed costs of fuel imports/ final cost of NZ refined fuel Pipeline fees such as for RAP or other pipelines and/or shipping costs, such as for COLL Throughput fees Costs such as excise, NZETS costs, foreign exchange hedging costs Terminal holding costs Collected monthly, disclosed quarterly 	Wholesale suppliers who import fuel
Retail market	<ul style="list-style-type: none"> Retail fuel prices (including discounted prices and sizes of discount) net of taxes, levies and ETS costs and volumes and revenues by region for each grade of fuel <ul style="list-style-type: none"> Collected daily, disclosed monthly Retail revenues by region, for each grade of fuel <ul style="list-style-type: none"> Collected daily, disclosed monthly Retail volumes by region for each grade of fuel <ul style="list-style-type: none"> Collected daily, disclosed monthly 	Retailers (distributors and dealers) ¹¹
Financial information	<ul style="list-style-type: none"> A standalone set of financial statements for the New Zealand business, prepared in accordance with generally accepted accounting practice, on an annual basis <ul style="list-style-type: none"> Prepared annually, disclosed on request 	Wholesale suppliers, distributors and dealers.

168. We are interested in your feedback on a number of questions, including the costs of collecting and disclosing such information and whether the correct party has been identified to supply the information.

169. We are also interested in feedback on whether you consider that there is any other information not mentioned on this list that should be collected and/or disclosed. For example, one indicator of market performance and efficient competition for the long term benefit of consumers could be investment for security of supply or to address capacity constraints. We would be interested in your feedback on whether it would be useful to collect information on investment indicators. Information relating to reliability and resilience could include, for example, minimum bulk storage level (days of cover) recorded at a terminal during a month.

¹¹ It would be expected that data on dealers who sell fuel with the branding of a wholesaler and do not have the ability to set their own price would be captured in a return made by their major supplier/franchisor. We seek feedback on whether collection is able to be done in this way, or whether there would be issues with this collection of information on the retail level.

Form and manner of disclosure

170. We also seek your feedback on the proposed form and manner for collecting and disclosing information. This will be key to ensuring that the costs and benefits of the regime are proportionate, that compliance costs are minimised and that the regime achieves the right balance between certainty and adaptability. We understand that there will be costs for businesses to record data, (if it is not being already recorded, or it is required to be recorded in a way that is not already standard within industry), to store data, and to provide data to agencies on a regular basis. In particular, we seek your feedback on the following considerations:

- a. **Frequency of supplying the information:** the table above outlines suggested frequencies for collection and disclosure of each type of information. We seek your feedback on these suggested timeframes.
- b. **Form for supplying information:** To ensure that information is supplied in a consistent format, we propose that templates are developed for collection and disclosure of information, specifying what information needs to be collected, and the form it is to take. Templates would be specified by the agency the information is being supplied to, in the form of an excel spreadsheet or similar. Templates would be sent out either monthly, quarterly or annually. Templates for collection of information would be aligned with other information gathering processes where possible to minimise compliance costs, but would require information to be provided in a consistent format from industry, to address issues noted by the Commission in relation to availability and comparability of information. We seek your comments on how templates could best be provided to ensure disclosure occurs in a consistent format, including specification in templates of detail on how information should be collected.
- c. **When disclosures must be provided:** In the case of financial information that is required for less frequent in-depth studies of the industry, there is a question as to whether such data should be supplied to agencies on a regular basis, or whether it is held by companies until such time as it is requested. The benefit of regular disclosure is that it would enable the designated agency to ensure that returns are being completed accurately. There are compliance costs to companies for disclosing information regularly rather than on an ad hoc basis.

47

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

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

48

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

49	<p>For Fuel Industry participants, is the information outlined above currently collected by your business?</p> <ul style="list-style-type: none"> • If so, is it collected in a form or manner that would be consistent with what's outlined above, or would changes to your information collection processes be required? • If not, what costs would be incurred in collecting this information?
50	<p>Are there any other factors not discussed above that could have an impact on the compliance cost of collecting and disclosing information? What are these factors?</p>
51	<p>Are there any importing costs not captured in Table One that are relevant to understanding the cost of supplying fuel from a terminal in New Zealand?</p>
52	<p>Have the proposed parties outlined as the owners and suppliers of information in Table One been correctly identified?</p> <ul style="list-style-type: none"> • Could data returns for dealers who sell fuel under the brand of a wholesaler, and do not set their own price, be completed by suppliers? If not, do you have any comments on options for minimising compliance costs in this situation?
53	<p>Do you have any comments on the proposed frequencies for collection and disclosure of information outlined in Table One?</p>
54	<p>Do you consider that the proposals outlined above strike the right balance between certainty and adaptability? Would you prefer that requirements such as frequency of information collection are set by agencies or set out in regulations?</p>
55	<p>Do you have any comments on proposals for agencies to develop templates to ensure that information is disclosed in a consistent format?</p>
56	<p>For information that is proposed to be used for periodic analysis:</p> <ul style="list-style-type: none"> • Should such information still be required to be disclosed on a regular basis, or should that information be held by the companies until needed?
57	<p>Do you have any other comments that you wish to make on matters relating to information disclosure and monitoring?</p>

5 Glossary of terms

Table Two: Glossary of terms and acronyms used in this paper

Term	Definition
Australian Oil Code	A set of regulations made under the Australian Competition and Consumer Act 2010 that has similar objectives to the proposed Fuel Industry Bill and regulations.
Australian Dairy Code	A set of regulations made under the Australian Competition and Consumer Act 2010 that has similar objectives to the proposed Fuel Industry Bill and regulations, but applies to the dairy industry.
Bill	Fuel Industry Bill proposed to be introduced to Parliament to regulate the fuel industry for the long term benefit of consumers
The Commission	The Commerce Commission
cpl	Cents per litre
Dealer	A person who purchases fuel from a wholesale supplier and sells fuel through a retail fuel outlet.
Distributor	A person who buys fuel from a wholesale supplier and sells to either supply it to a dealer or dealers, and/or sells fuel through a retail fuel outlet.
Engine fuel	Definition Include some text below definition on the types of product this is likely to include. For example, this could include Regular 91 Octane petrol, 95 octane petrol, 98 octane petrol, diesel, biofuels, hydrogen.
Exclusivity provision	A provision in a contract that requires a buyer to buy all of its fuel from a single seller
MBIE	Ministry of Business, Innovation and Employment
Price board	A board displaying prices of different grades of fuel sold at a retail outlet for fuel
Terminal gate price (TGP)	A daily price for fuel set by wholesale suppliers at a storage facility, under the Terminal Gate Pricing regime.
Terminal gate pricing (TGP) regime	A regime under which wholesale suppliers set and publish a spot price at which they will sell fuel to resellers at a storage facility
Transparent pricing methodology	A method that shows clearly the main components of prices in a contract and how these are built up to reach a final price.
Wholesale contract	Contracts between wholesale suppliers and distributors and dealers for the supply of fuel.
Wholesale supplier	A person or firm that imports and then sells engine fuel to distributors and dealers.

6 Summary of questions

Wholesale markets

1	Should fuel products other than regular 91 grade petrol, premium 95 grade petrol and regular diesel be subject to the TGP regime, for example, aviation and marine fuels, or premium 98 grade petrol? Please give reasons.
2	If the regime should apply to other fuel products, what are the standards used by industry for defining these fuel products?
3	Should there be a notice period for changes in the TGP price during a day?
4	Do you have any comments on how terminal gate prices should be set and publicly posted?
5	Is the prescribed minimum of 30,000 litres per week to one retailer or wholesaler appropriate?
6	Should the prescribed minimum be able to be changed, or varied? For example, could the prescribed minimum be different for different storage facilities, given some terminals supply larger fuel volumes than others?
7	Should there be any additional grounds for refusal, such as the quantity demanded being below a de minimis amount, or reasons of force majeure ? If you consider there should be, please suggest a de minimis amount or identify which force majeure reasons should apply.
8	We seek your feedback on whether occupational, health and safety requirements and creditworthiness could be determined on the day TGP supply is sought with minimal impact on the customer or the wholesale supplier? If not, is it necessary to specify a pre-certification process with potential terminal gate customers in advance to allow an efficient assessment of whether these grounds for refusal have been met.
9	What other standard terms and conditions should be prescribed for sales by a wholesale supplier for the TGP at the storage facility?
10	Please provide comments on any other matters related to the terminal gate pricing regime.
11	Should either or both of the TGP or an industry-recognised price reporting agency's price based (MOPS or equivalent) pricing methodologies be deemed to be transparent pricing methodologies?
12	Should any other pricing methodology be deemed a transparent pricing methodology?
13	Should there be any other reasonable exceptions?

14	What cost elements of a deemed pricing methodology should be itemised?
15	What would be an appropriate prescribed period after which distributors can terminate their wholesale fuel supply contracts?
16	What proportion of a distributor's annual requirements should be permitted to be subject to exclusive supply provisions?
17	Should the maximum exclusivity requirement apply as an average across the whole length of the contract? If not, how should it be applied?
18	Should the exclusivity requirement apply to the total fuel requirement of distributors, or to each fuel type?
19	Do these terms hinder the ability of dealers or distributors to compete?
20	Are there any other terms that are likely to hinder the ability of dealers or distributors to compete?
21	Should a term in wholesale contracts which prioritises supply to a supplier's own retail sites over that of a term customer be considered as likely to limit the ability of the dealers or distributors to compete?
22	Do your wholesale supply contracts currently provide for a means of dispute resolution? If so, what does this look like?
23	Do you consider the existing arrangements for dispute resolution to be sufficient? If not, how much use do you think would be made of a new dispute resolution scheme?
24	Should participating in mediation be mandatory for the other party if one party wishes to attempt to resolve the dispute using this dispute resolution process?
25	Should the dispute resolution scheme apply if a wholesale supplier refuses to supply fuel at TGP?
26	Should the dispute resolution scheme apply to disputes that result from the new wholesale contract terms?
27	Should the dispute resolution scheme apply to disputes that result from any provision that relates to the terminal gate pricing regime?
28	Are there any other aspects of the new regime you think the dispute resolution scheme should apply to?
29	In your view, how can we ensure the dispute resolution scheme is affordable, easily accessible, and timely for all parties involved?
30	Should each party to a dispute be required to pay half the cost of the mediation or arbitration process?
31	In your view how can we ensure the dispute resolution scheme is effective?

32	Who should provide the dispute resolution services set up under the new regulations?
33	Should the dispute resolution scheme appoint an independent nominating authority to appoint dispute resolvers under the scheme?
34	Is there a specific skillset / background the mediator / arbitrator should have?
35	Please feel free to provide comments on any other matters related to the dispute resolution process.
36	What should be the threshold and process for whether backstop regulation should be imposed on the TGP supply of specified fuel products at a terminal or terminals? Please give reasons.
37	How should the backstop price control regime be designed to apply to specified fuel products at a terminal or terminals? Please give reasons.

Consumer information

38	Do you have any comments on the costs of or time required to modify or install price boards?
39	Which grades of fuel should the requirement to display apply to? Should it apply to all grades of fuel including premium, or to premium fuels only?
40	Do you consider that an obligation to display price should apply to all grades of premium fuel, or only to the main grades of premium fuel sold?
41	Do you consider that there should be specifications in regulations on the layout, size or other requirements of a price board? <ul style="list-style-type: none"> • For example, should there be a requirement for a particular ordering or colour coding of prices that are displayed on a price board? • Are there any other requirements you consider should be applied consistently across price boards?
42	Should there be an exception from the requirement to display a price of a particular grade of fuel if the volume of that type of fuel being sold at a particular retail site is below a certain minimum volume? If so, why, and what would be a reasonable threshold for such an exception?
43	Should there be an exception from the requirement to have a price board displaying fuel prices if the total volume of fuel sold at a particular retail site is below a certain minimum volume? If so, why, and what would be a reasonable threshold for such an exception?

44	<p>Is an exception needed for the situation where sellers must comply with NZTA requirements for signage on state highways?</p> <p>Are there any other situations where an exception might be needed? For example:</p> <ul style="list-style-type: none"> • is an exception required in relation to local authority bylaws? <p>are you aware of any issues that would mean that requirements on the display of price boards would conflict with local council requirements for signs under bylaws or the Resource Management Act? If so, describe these issues?</p>
45	<p>Are there any other issues that you think should be considered in development of regulations relating to the display of prices on price boards?</p>
46	<p>Do you have any comments that you wish to make on other matters relating to transparency of information for consumers?</p>

Information disclosure and monitoring

47	<p>Do you have any specific feedback or comments on the information identified in the above table that industry participants would be required to collect and disclose?</p> <p>Is there is any other information not identified above that should be collected and disclosed to enable monitoring?</p>
48	<p>For Fuel Industry participants, what costs would there be for your business to collect and disclose this information?</p>
49	<p>For Fuel Industry participants, is the information outlined above currently collected by your business?</p> <ul style="list-style-type: none"> • If so, is it collected in a form or manner that would be consistent with what's outlined above, or would changes to your information collection processes be required? • If not, what costs would be incurred in collecting this information?
50	<p>Are there any other factors not discussed above that could have an impact on the compliance cost of collecting and disclosing information? What are these factors?</p>
51	<p>Are there any importing costs not captured in Table One that are relevant to understanding the cost of supplying fuel from a terminal in New Zealand?</p>
52	<p>Have the proposed parties outlined as the owners and suppliers of information in Table One been correctly identified?</p> <ul style="list-style-type: none"> • Could data returns for dealers who sell fuel under the brand of a wholesaler, and do not set their own price, be completed by suppliers? If not, do you have any comments on options for minimising compliance costs in this situation?
53	<p>Do you have any comments on the proposed frequencies for collection and disclosure of information outlined in Table One?</p>

54	Do you consider that the proposals outlined above strike the right balance between certainty and adaptability? Would you prefer that requirements such as frequency of information collection are set by agencies or set out in regulations?
55	Do you have any comments on proposals for agencies to develop templates to ensure that information is disclosed in a consistent format?
56	For information that is proposed to be used for periodic analysis: <ul style="list-style-type: none">• Should such information still be required to be disclosed on a regular basis, or should that information be held by the companies until needed?
57	Do you have any other comments that you wish to make on matters relating to information disclosure and monitoring?