Regulations under a Fuel Industry Bill and other matters - Have your say

Introduction

* 1. **Name (first and last name)**

Hamish Clareburt

* 2. **Email**

[redacted]

* 3. **Is this an individual submission, or is it on behalf of a group or organisation?**

☐Individual
☒On behalf of a group or organisation

* 4. **Which group do you most identify with, or are representing?**

☐ Iwi or hapū
☐ General public
☐ Environmental
☐ Local government
☐ Research institute / academia
☒ Industry or industry advocates
☐ Central government agency
☐ Fuel importer or wholesaler
☐ Fuel retailer
☐ Large fuel user
☐ Other fuel sector stakeholder
☐ Oil and gas sector
☐ Consultant, financial services etc
☒ Other (please specify)

Dispute Resolution specialists

*5. **Business name or organisation (if applicable)**

Utilities Disputes Limited

*6. **Position title (if applicable)**

[redacted]

* 7. **Important information about your submission (important to read)**

The information provided in submissions will be used to inform the Ministry of Business, Innovation and Employment's (MBIE's) work on *Regulations under a Fuel Industry Bill and other matters*.

We will upload the submissions we receive and publish them on our website. If your submission contains any sensitive information that you do not want published, please indicate this in your submission.

The Privacy Act 1993 applies to submissions. Any personal information you supply to MBIE in the course of making a submission will only be known by the team working on the *Accelerating renewable energy and energy efficiency*.

Submissions may be requested under the Official Information Act 1982. Submissions provided in confidence can usually be withheld. MBIE will consult with submitters when responding to requests under the Official Information Act 1982.

We intend to upload submissions to our website at www.mbie.govt.nz. Can we include your submission on the website?

☒ Yes
☐ No

* 8. **Can we include your name?**

☒Yes
☐No

* 9. **Can we include your organisation (if submitting on behalf of an organisation)?**

☒Yes
☐ No

10. All other personal information will not be proactively released, although it may need to be released if required under the Official Information Act.

Please indicate if there is any other information you would like withheld.

Regulations under a Fuel Industry Bill and other matters - Have your say

Areas you wish to provide feedback on

The *Regulations under a Fuel Industry Bill and other matters* discussion document seeks feedback on proposed content of regulations under a Fuel Industry Bill and on options for a regulatory backstop to be included in a Fuel Industry Bill at a later date. The document is divided into four sections:

- **Introduction**
- **Wholesale fuel markets**
- **Consumer information**
- **Information disclosure and monitoring**

You are invited to provide feedback and respond to questions in as many, or as few of the sections as you would like, depending on your interests.

Section 2 on wholesale fuel markets seeks feedback on a number of proposed aspects of wholesale market regulation. The section seeks feedback on the content of regulations in the following areas:

- Terminal gate pricing
- Regulating terms in wholesale contracts
- Dispute resolution processes for wholesale markets

Submissions on these proposed regulations together with feedback on consumer information and information disclosure and monitoring are sought by **5pm, Friday 25 April**.

Section 2 also includes a section for feedback on a regulatory backstop regime to be included in legislation at a later date. Submissions on the issues specifically relating to a regulatory backstop are sought by **5pm, Friday 15 May**.

Wholesale markets

Terminal Gate Pricing

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. No comment
2	If the regime should apply to other fuel products, what are the standards used by industry for defining these fuel products? No comment
3	Should there be a notice period for changes in the TGP price during a day? No comment
4	Do you have any comments on how terminal gate prices should be set and publicly posted? No comment
5	Is the prescribed minimum of 30,000 litres per week to one retailer or wholesaler appropriate? No comment
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? No comment

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 No comment.
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. No comment
9	What other standard terms and conditions should be prescribed for sales by a wholesale supplier for the TGP at the storage facility? No comment
10	Please provide comments on any other matters related to the terminal gate pricing regime. No comment

Regulating terms in wholesale contracts

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? No comment
12	Should any other pricing methodology be deemed a transparent pricing methodology? No comment

13	Should there be any other reasonable exceptions? No comment
14	What cost elements of a deemed pricing methodology should be itemised? No comment
15	What would be an appropriate prescribed period after which distributors can terminate their wholesale fuel supply contracts? No comment
16	What proportion of a distributor's annual requirements should be permitted to be subject to exclusive supply provisions? No comment
17	Should the maximum exclusivity requirement apply as an average across the whole length of the contract? If not, how should it be applied? No comment
18	Should the exclusivity requirement apply to the total fuel requirement of distributors, or to each fuel type? No comment
19	Do these terms hinder the ability of dealers or distributors to compete? No comment
20	Are there any other terms that are likely to hinder the ability of dealers or distributors to compete? No comment

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? No comment

Dispute resolution processes for wholesale markets

22	Do your wholesale supply contracts currently provide for a means of dispute resolution? If so, what does this look like? No comment
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? No comment

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? Utilities Disputes is in favour of mandatory mediation or a form of mandatory alternative dispute resolution. Utilities Disputes is the provider of the government-approved mandatory Energy Complaint Scheme and the Broadband Shared Property Access Dispute Resolution Scheme. As a part of these scheme's dispute resolution process, we use mediation as one method to resolve disputes. The participants are typically customers who have never engaged in mediation before, and either electricity or gas retailers or network operators, who are not always aware of the benefits of mediation. In our experience, unwilling participants often participate in the process in good faith, and reach resolution. For some companies and individuals, mediation is still an unknown, despite its widespread adoption. Individuals may have ill-conceived biases against the process due to lack of familiarity. Similarly, companies may not have processes for engaging in mediation and decline to participate for that reason. Mandatory mediation gives such entities an opportunity to engage in mediation and experience its benefits, where they may otherwise reject it out of hand. Mediation allows for disputes to be settled without burdening the courts or imposing an arbitration. Additionally, mandatory mediation only requires parties to attend and participate in good faith, not settle. If the mediation does not reach a resolution, the parties are free to pursue resolution through other methods such as via the courts. If mediation is not successful the parties may be subject to minimal mediation costs only and a slight delay in processing to the next stage. At its best, mediation resolves the dispute while maintaining the relationship between the parties.

25	Should the dispute resolution scheme apply if a wholesale supplier refuses to supply fuel at TGP? Utilities Disputes is in favour of the scheme being applied in this situation. A centralised dispute resolution scheme can help resolve all manner of disputes through mediation or other forms such as conciliation or facilitation. The benefit of using an appointed dispute resolution scheme with a centralised decision maker if matters do not resolve, rather than ad-hoc external mediators, is that the scheme provider builds up experience dealing with specific types of complaints, which it can share for the purposes of education and be used as a guideline to facilitate resolutions in future cases. As disputes around supply at the TGP are likely to be the more common types of disputes, they are well-suited to a dispute resolution scheme with a central decision maker such as that offered by Utilities Disputes.
26	Should the dispute resolution scheme apply to disputes that result from the new wholesale contract terms? As mentioned in question 25, dispute resolution schemes are proven best practice when dealing with disputes of a similar nature within a specific industry. If new wholesale contract terms are being implemented, it is likely that disputes will arise from them.
27	Should the dispute resolution scheme apply to disputes that result from any provision that relates to the terminal gate pricing regime? As mentioned in question 25, dispute resolution schemes are proven best practices when dealing with disputes of a similar nature and within a specific industry. It is likely that disputes will arise from the terminal gate pricing regime and there is no reason these should not be included.

28	Are there any other aspects of the new regime you think the dispute resolution scheme should apply to? Utilities Disputes believes a dispute resolution scheme could be expanded to include the end-consumer-facing mechanisms, such as clarity of pricing. This would allow for quick resolutions of any breaches or other issues arising for the end consumer allowing vulnerable consumers to have access to a free, effective and independent resolution service.

29

In your view, how can we ensure the dispute resolution scheme is affordable, easily accessible, and timely for all parties involved?

Utilities Disputes believes the dispute resolution scheme should adhere to established benchmarks for dispute resolution. Utilities Disputes adheres to the six Australian Benchmarks for Consumer Dispute Resolution, which includes:

- Accessibility
- Independence
- Fairness
- Accountability
- Efficiency
- Effectiveness

Utilities Disputes is actively engaged in consultation with The Government Centre for Dispute Resolution (GCDR) which is currently developing benchmarks specific for dispute resolution in New Zealand. Benchmarks address matters of accessibility, affordability and timeliness. Work is underway by GCDR to introduce new standards consistent with Treaty of Waitangi principles. Utilities Disputes is taking active steps to ensure its processes will be consistent with these new standards when they are introduced.

In relation to affordability we suggest that the funding of the scheme can be refined more than the 50/50 cost split usual in contractual mediation and arbitration. As an example, in the Energy Complaints Scheme run by Utilities Disputes, scheme members pay a fixed amount each year based on their market share, and a smaller variable amount depending on how many cases they receive. This allows for the Scheme to be 'pre-funded', reducing the cost of using it in a single instance, which in turn increases the likelihood of people choosing to access it.

In relation to accessibility, Utilities Disputes has various approaches that may be applicable in the development of any new scheme. Access to justice is an important component of our work. Enquiries and disputes can be lodged by phone, post, email, online form and fax. Disputes can be worded in any form, and do not require a legalistic formula. Information can be submitted any time a dispute is active. Utilities Disputes is looking to extend its operating hours outside of normal business hours to ensure more accessibility and prides itself on having highly trained staff available by phone to discuss issues with little formality. Discussions and mediations are typically carried out over the phone also for expediency and security. In person hearings have the downside of being less accessible to people with impairments, requiring travel, and in our current world, increasing risk of exposure to Covid-19. Utilities Disputes is offering video conferencing as a platform for mediation and has been able to embrace this technology as the preferred option for dispute resolution

Regarding timeliness, having target times to resolve disputes in place is crucial, so parties have certainty about how long the process will take. It also enables the effectiveness of the scheme operator to be assessed. Utilities Disputes has also found success with aiming for early resolution. When we receive a complaint, we summarise the complainant's dispute and send it to the scheme member, with an expectation that it works with the complainant to try to find resolution. Where appropriate we may immediately organise a three-way phone-call to discuss the complaint with a view to encouraging the parties to come to a quick resolution.

30	Should each party to a dispute be required to pay half the cost of the mediation or arbitration process? As we mentioned above in question 29, the funding of a dispute resolution scheme can be more refined than the 50/50 cost split usual in contractual mediation and arbitration. As an example, in the Energy Complaints Scheme run by Utilities Disputes, scheme members pay a fixed amount each year based on their market share, and a smaller variable amount depending on how many cases they received. This allows for the Scheme to be 'pre-funded', reducing the cost of using it in a single instance, which in turn increases the likelihood of people choosing to access it. This sort of approach, where costs of funding the scheme are split according to market share, would be more equitable for smaller resellers. It would, in effect, be a progressive funding mechanism, contrasted with the regressive funding of a 50/50 split. This approach would also allow for the funding of an end consumer expansion to the proposed scheme, as we mention in our response to question 28. It is particularly important for consumer dispute resolution schemes that no (or very little) costs are placed on consumers to increase accessibility to the Scheme and facilitate access to justice.

31

In your view how can we ensure the dispute resolution scheme is effective?

Effectiveness can be measured in a number of ways including accessibility, usage and feedback from participants.

Utilities Disputes believes the proposed dispute resolution scheme should adhere to established benchmarks for dispute resolution. As mentioned above in paragraph 28 Utilities Disputes makes use of the Australian Benchmarks for Consumer Dispute Resolution, as referenced in the statutes empowering the Energy Complaints Scheme and Broadband Shared Property Access Disputes Scheme. The Government Centre for Dispute Resolution is currently developing benchmarks specific for dispute resolution in New Zealand. Ideally, the provider of the dispute resolution scheme will have a history of supplying dispute resolution schemes in accordance with a set of similar benchmarks.

To ensure uptake, the dispute resolution scheme should have a low marginal cost of use. In other words, the bulk of the funding should be fixed based on a variable like market share, with only a small portion of the funding from each individual use. This means using the scheme in a given instance is effectively pre-funded.

Utilities Disputes outlined in our response to question 24, participation in mediation should be mandatory if at least one party wants it and provided the amount in contention is below a prescribed value threshold. This approach used in Utilities Disputes' Energy Complaints Scheme, allows binding resolutions to be issued for disputes up to $50,000 in value. This allows for relatively minor disputes to be resolved quickly. We believe having a threshold prevents inequity and provides a fair and accessible process to all participants.

We consider the dispute resolution scheme should be structured with a central decision maker for unresolved disputes, with multiple conciliators below the central decision maker (such as a Commissioner) to handle disputes as they arise. This centralisation allows for consistency between decisions, without going through the cost of litigation to set precedents in court. This also avoids one of the social externalities of widespread arbitration, which is that decisions can end up confidential, leading to unnecessary resources being spent over multiple disputes re-litigating similar issues. However, we do not recommend the final decision maker set formal precedents. We instead recommend a standard of what is 'fair and reasonable', while having regard to a variety of factors, including the law. This allows for the central decision maker to value consistency, without being bound by it where impractical.

One of the benefits of having a dispute resolution scheme, rather than ad-hoc external mediations and arbitrations, is that it creates infrastructure that can fulfil a variety of functions. This might include promoting the scheme, providing dispute resolution training to industry, and educating a variety of stakeholders with data and systemic issues gathered from running the scheme.

For instance, Utilities Disputes fills this role with the Energy Complaints Scheme by providing dispute management workshops to its members, issuing practice notes, and providing industry-wide data. This also aids government agencies and regulatory bodies, as they can draw on the data held by the scheme (taking into account privacy obligations).

32

Who should provide the dispute resolution services set up under the new regulations?

As we responded in question 31, we believe an independent dispute resolution provider with a centralised decision maker should run the dispute resolution scheme. We advise against a model of hiring individual mediators and arbitrators on an ad-hoc basis.

We believe the new scheme provider should demonstrate a strong pedigree in dispute resolution, and one that has been awarded government approved schemes in the past based on merit and experience. Ideally the scheme provider would have existing relationships with either wholesalers or retailers. An example of this is Utilities Disputes' relationship with LPG providers through the Energy Complaints Scheme. LPG providers are typically also retailers of petrol.

The scheme provider should provide an end to end service to its members

- **Prevention** through it external training and methodology
- **Education** through systemic issue reporting
- **Resolve** through alternative dispute resolution framework

The scheme provider should have the necessary infrastructure to provide an end-to-end service to members, as discussed in our response to question 31. This means going beyond merely resolving complaints, and seeking to educate through data gathered, and prevent complaints arising in the future through external training.

The provider should also be a market leader and demonstrate thought leadership in the industry, considerations of accessibility for the future and ease of use through innovative technologies like online dispute resolution.

It is also important to note that the new scheme provider should be culturally aware and sensitive for Maori and Pasifika businesses to be able to easily access the scheme, adhering to Treaty of Waitangi principles for dispute resolution as set by the Government Centre for Dispute Resolution

33

Should the dispute resolution scheme appoint an independent nominating authority to appoint dispute resolvers under the scheme?

As discussed by Utilities Disputes in question 31, we believe an independent dispute resolution provider should run the dispute resolution scheme. We advise against a model of hiring individual mediators and arbitrators on an ad-hoc basis.

The key benefit of a self-contained dispute resolution scheme provider, rather than isolated mediations and arbitrations run by a nominating authority, is that it creates infrastructure that can fulfil a variety of functions, including promoting the scheme, providing dispute resolution training to industry, and educating a variety of stakeholders with the data gathered from running the scheme. For instance, Utilities Disputes fills this role with the Energy Complaints Scheme by providing dispute management workshops to members, issuing practice notes, and providing industry-wide data. This also aids government agencies and regulatory bodies, as they can draw on the data held by the scheme (taking into account privacy obligations).

Using a scheme provider allows for consistency between different cases as any mediated decisions can be issued by the ultimate decision maker of the scheme. In our response to question 31, we said we believe that the dispute resolution scheme should be structured with a central decision maker for unresolved disputes, with multiple conciliators below that to handle disputes as they arise. This centralisation allows for consistency between decisions, without going through the cost of litigation to set precedents in court. This also avoids one of the social externalities of widespread arbitration, which is that decisions can end up confidential, leading to unnecessary resources being spent over multiple disputes re-litigating similar issues. Note, however, that we do not recommend the ultimate decision maker of the dispute resolution provider provides formal precedents. We instead recommend a standard of what is 'fair and reasonable', while having regard to a variety of factors, including the law. This allows for the decision maker to value consistency, without being bound by it where impractical.

If a national self-contained scheme structure is used, organisational knowledge of the industry will accumulate. While knowledge might accumulate in the hands of individual mediators in a nominating-authority model, that approach limits the transfer of knowledge and is not scalable. If a full dispute resolution scheme is used, the knowledge accumulates within the organisation, allowing for new mediators/conciliators to naturally absorb the required industry knowledge.

We agree that an independent service is a fundamental requirement of a scheme. The provider should be independent of both parties, and not have conflicting interests, or perceived conflicting interests. This applies in particular to financial interests of the scheme. Our view is that the ideal structure for independence of a dispute resolution scheme is a statutorily mandated funding model, with services provided on a not-for-profit basis.

Failure to appoint a sufficiently independent provider can be a reputational risk for both the Government and the industry in question. We are aware that using a nominated authority model can be time consuming when selecting and appointing a dispute resolver with parties required to agree to the nomination and conflicts often being identified causing impasse and delays before a matter is even assigned.

34	Is there a specific skillset / background the mediator / arbitrator should have? While mediators in theory do not need industry knowledge, in practice it can be beneficial. In relation to the fuel industry, knowledge or familiarity with regulated markets, as an example the electricity and gas market would be useful. Similarly, existing organisational relationships with industry participants helps set mediator expectations, and better manage the participants in the new scheme. Utilities Disputes also suggests that as a minimum, mediators should be required to be accredited to ensure a consistent framework to resolving complaints
35	Please feel free to provide comments on any other matters related to the dispute resolution process. No further comments

Regulatory backstop

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. No comment
37	How should the backstop price control regime be designed to apply to specified fuel products at a terminal or terminals? Please give reasons. No comment

Consumer information

38	Do you have any comments on the costs of or time required to modify or install price boards? No comment

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? No comment
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? No comment
41	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? No comment
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? No comment
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? No comment

44	Is an exception needed for the situation where sellers must comply with NZTA requirements for signage on state highways? Are there any other situations where an exception might be needed? For example: • 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? No comment
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? No comment
46	Do you have any comments that you wish to make on other matters relating to transparency of information for consumers? Utilities Disputes believes a dispute resolution scheme could be expanded to include the end-consumer-facing mechanisms, such as clarity of pricing. This would allow for quick resolutions of any breaches or other issues arising for the end consumer allowing vulnerable consumers to have access to a free, effective and independent resolution service.

Information disclosure and monitoring

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? No comment

48	For Fuel Industry participants, what costs would there be for your business to collect and disclose this information? No comment
49	For Fuel Industry participants, is the information outlined above currently collected by your business? • 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? No comment
50	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? No comment
51	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? No comment
52	Have the proposed parties outlined as the owners and suppliers of information in Table One been correctly identified? • 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? No comment
53	Do you have any comments on the proposed frequencies for collection and disclosure of information outlined in Table One? No comment

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? No comment
55	Do you have any comments on proposals for agencies to develop templates to ensure that information is disclosed in a consistent format? No comment
56	For information that is proposed to be used for periodic analysis: • Should such information still be required to be disclosed on a regular basis, or should that information be held by the companies until needed? No comment
57	Do you have any other comments that you wish to make on matters relating to information disclosure and monitoring? No comment