

Fuel Industry Bill

Government Bill

As reported from the Finance and Expenditure Committee

Commentary

Recommendation

The Finance and Expenditure Committee has examined the Fuel Industry Bill and recommends that it be passed with the amendments shown.

Introduction

The bill is the Government's response to a market study into retail fuel conducted by the Commerce Commission. This study concluded that fuel companies have been making higher profits, and that wholesale prices are higher, than would be expected in a competitive market. These higher prices for wholesale fuel have flowed through to consumers paying higher prices at the pump.

How the bill aims to increase competition

The bill would introduce changes to wholesale market arrangements in the fuel sector. The Government intends that the changes would improve transparency of pricing and provide for rules to ensure that wholesale contracts are transparent and fair.

The changes include:

- introducing a wholesale pricing regime, known as “terminal gate pricing” (TGP), which would require wholesale fuel suppliers at a storage terminal to publicly post a price at which they sell a specified engine fuel to wholesale customers on a spot basis
- providing for a regime that governs contract terms between wholesale suppliers and their wholesale customers, to ensure that contracts are fair and promote competition
- providing for a dispute resolution scheme to address disputes relating to the wholesale market changes

- creating regulation-making powers in relation to a range of matters, such as terms and conditions for supply under TGP, details of contractual requirements, and mediation and arbitration processes.

The bill would also:

- require retail outlets to display certain information relating to the price of fuel, to help consumers compare prices, thereby promoting competition
- require some fuel industry participants to record and disclose certain information, to improve transparency and enable monitoring of fuel markets
- give new enforcement powers to the Commerce Commission.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Definition of a “retail fuel site”

Clause 4 of the bill defines “retail fuel site”, and gives a petrol station as the sole example. We believe a reader could think that the definition was limited to petrol stations. For the avoidance for doubt, we recommend amending this provision to make it clear that a retail fuel site includes a truck stop fuel site.

Safeguards for regulation-making powers related to engine fuel

The bill is intended to apply to fuels that are used for motor vehicles for land transport purposes.

The bill calls these fuels specified engine fuels. Specified engine fuels can include any “engine fuel” (within the meaning of the Energy (Fuels, Levies, and References) Act 1989) that is included in the definition of specified engine fuel by regulations made under clause 12(1)(a) of the bill.

The definition of engine fuel in the 1989 Act is quite broad, and is designed to cover a wide range of fuels:

any gaseous or liquid fuel that can be used as a fuel for engines, and includes biofuel, diesel, petrol (which is called motor spirit in the Excise and Excise-equivalent Duties Table (as defined in section 76A of the Customs and Excise Act 1996)), synthetic fuel, and blends of these.

Relying on this broad definition provides some flexibility. In the future, demand for alternative fuels for motor vehicles is likely to grow. A new type of fuel may be developed, which would potentially not meet a narrow definition of specified engine fuel.

However, we are concerned that the ability to make regulations that include any engine fuel in the definition of specified engine fuel might lead to fuels that were never intended to be regulated by this bill being regulated.

We recommend inserting clause 12(2)(b)(ia). This provision would stipulate that the Minister, when exercising the regulation-making power to add a new engine fuel to the list, must be satisfied that a significant proportion of the engine fuel would be used by motor vehicles. This would prevent the use of regulations expanding the scope of the legislation beyond what Parliament would have intended.

Amendments to provisions relating to the terminal gate pricing regime

The bill does not enable price setting through regulations

Clause 12(1)(b) of the bill as introduced enables the making of regulations to prescribe “requirements relating to setting and posting terminal gate prices”. This provision could be read as extending to setting the actual prices.

The policy intent of clause 12(1)(b) is to set requirements for posting prices. These requirements would be prescribed in regulations. They would include aspects such as the form, timing, and process for posting the price.

It is not the intention of the bill for regulations to “set” the terminal gate (TG) price. We recommend that clause 12(1)(b) be amended to make it clear that the regulations made under clause 12 may not fix or control the TG price.

Reasonable grounds to refuse supply

Clause 11(1) lists reasonable grounds for a wholesale supplier to refuse to supply fuel. Clause 11(1)(e) states that a reasonable ground would be if the wholesale supplier required the requested amount itself to meet forecast demand at its own retail fuel sites.

As introduced, the list would exclude situations where fuel is sold by a supplier at retail fuel sites that the supplier does not own, for example, when fuel is supplied by the wholesale supplier under an agency arrangement.

We recommend amending this provision. Our change would include, as a reasonable ground for refusal to supply, situations where the fuel was required to meet forecast demand at other retail fuel sites where the wholesale supplier sells fuels to end users.

Regulations relating to the frequency with which terminal gate prices may be changed

Clause 12(1)(b)(i) would enable regulations to prescribe requirements relating to how frequently the TG price may be changed. Some submitters were concerned that these regulations would require a wholesale supplier to stand in the market at the posted TG price, which would be set daily. These submitters were concerned that it would undermine the ability of wholesale suppliers to compete in a dynamic market.

The policy intent of the bill is not to determine the frequency with which TG prices may be changed. Instead, the intent is more limited, in that it merely seeks to determine the minimum frequency at which prices should be posted (that is, daily) and to provide a reseller with certainty that they can purchase fuel at the posted price. The

intention is to prevent the price from being arbitrarily changed, including, for example, at the point of sale.

We recommend deleting clause 12(1)(b)(i). We also recommend inserting clause 8(3). Our change would clarify that the TG price could be changed throughout the day. However, the new clause 10(1A) would prohibit a wholesale supplier from raising the price for a particular reseller, after the request for supply has been made for same day delivery. The TGP regime relates solely to the supply of fuel on the same day as a request for supply, not for longer term arrangements. Requests should be made at the TG price, and only one posted TG price should apply at any one time. This provision would essentially enable a reseller and a wholesale supplier to agree the purchase at the price posted, before the tanker queues up at the terminal.

Terms and conditions prescribed by regulations

Clause 12(1)(d) would allow regulations to be made for the purpose of prescribing terms and conditions on a wholesale supplier who supplies a reseller at its TG price.

We are concerned that there is a lack of clarity about what the terms and conditions would be. This would result in a regulation-making power that is broader than necessary, and could be used for purposes that were not intended by Parliament.

We recommend amending clause 12(1)(d) to provide clear limits on the types of terms and conditions that could be prescribed under this clause. Specifically, we recommend amending clause 12(1)(d) stating that the terms and conditions listed in clause 12(1)(d)(i) and (ii) are the only relevant terms and conditions for the purposes of this provision.

The intent of this clause is to enable the stipulation of terms and conditions to establish that the wholesale supplier would be required to offer pre-certification to resellers. This pre-certification would assure resellers that they would be able to participate in TGP.

In addition, this clause would enable terms and conditions relating to the documentation that must be provided by wholesale suppliers to resellers for each sale at the TG price. These terms and conditions would be the only other type of terms and conditions that could be set under this provision.

Wholesale contractual terms

Pricing methodology for wholesale contracts

Clause 15 would establish rules around pricing methodology. The policy intention behind this clause is that a wholesale contract would provide clear information about how the price in that contract was arrived at by the wholesaler.

We heard from some submitters who were concerned that clause 15 goes further than intended, and would effectively amount to price regulation. This is not the intent of the provision. The provision itself contains no requirement to limit prices within a certain band.

We recommend amending clause 15 by requiring wholesale suppliers to specify the “pricing method” by which the price is calculated. This would make it clear that clause 15 would not prescribe the pricing method itself.

We also recommend consequential amendments to clause 19, which would stipulate that the regulation-making power would be in relation to specifying the pricing method.

The burden of proof for proceedings relating to clauses 16, 17, and 18

Clauses 16 and 17 each provide an exemption to wholesale contracts in circumstances where a contractual provision is reasonably necessary to enable, or to enable recovery of, a specific investment. Clause 18 also provides a similar exemption in circumstances where a contractual provision is necessary or to protect the reasonable interests of the supplier.

Under the bill as introduced, the burden of proof would lie with the reseller, or the Commerce Commission, in proceedings related to one of clauses 16, 17, or 18. They would need to show that it is not reasonably necessary to enable, or to enable the recovery of, a specific investment, or to protect the reasonable commercial interests of the supplier.

We are concerned that the claimant in such proceedings would have difficulty in proving that a specific investment has not occurred. Even if they were able to prove this, the claimant would likely incur a significant financial expense to do so. For these proceedings, it would likely be the reseller who would act as the claimant.

However, the defendant (who would most likely be the wholesale supplier) would hold this information. We are confident they would be in a better position to satisfy this burden of proof than the Commerce Commission or a reseller, who would not have access to the wholesale supplier’s information.

Accordingly, we recommend inserting clause 41A, which would place the onus on the wholesale supplier.

For parties in a wholesale contract, restrictions on supply would be applied consistently

Clause 18(1)(a) would prohibit wholesale contracts that limit the ability of a reseller to compete with a wholesale supplier (or any other person).

Clause 18(4) sets out examples of provisions that might limit the ability of a reseller to compete. Clause 18(4)(b)(ii) includes the example of “a provision that disproportionately prioritises the allocation of engine fuel to the wholesale supplier’s retail fuel sites over allocation to the reseller, in the event of a supply constraint”.

Some submitters were concerned that the word “disproportionately” makes it uncertain how the provision would operate. It could enable a wholesale supplier to prioritise supply to its own retail sites, so long as the prioritisation was not “disproportionate”. This would be contrary to the policy intent of this provision by limiting competition within a wholesale contract.

We recommend amending clause 18(4)(b)(ii) by removing the word “disproportionately”. Our change would make it clear that, when supply is tight, any restrictions on supply must be applied in a non-discriminatory way across the wholesale supplier’s contracted customers, as well as their own outlets.

Obligation on the Minister to consult affected parties on regulations made under clauses 19, 21, and 25

Clauses 19, 21, and 25 would empower the Minister to make regulations regarding various functions of the bill. We are concerned that this regulation-making power would lack sufficient safeguards to ensure that the regulations would be necessary or desirable to promote competition for the benefit of consumers, which is the bill’s purpose.

Parliament’s intention is for these regulations to be used solely for the purpose of the Act (and, where relevant, the purpose of the subpart under which the regulations are made). We propose amending clauses 12(2)(ii), 21(3) and 25(3), and inserting clause 19A. Our changes would create a requirement on the Minister to consult fuel industry participants before making regulations. This would help ensure that the Minister, when making regulations, was not acting contrary to Parliament’s intention for the bill. This would help ensure that the Minister, after having regard to the purposes of the Act, would only make regulations under these provisions that would be necessary or desirable for these purposes.

Amendments to provisions governing the disclosure of information

Form and manner of disclosed information

Clause 26 of the bill as introduced states that the Commerce Commission, or the chief executive of the Ministry of Business, Innovation and Employment (MBIE), “may specify the form and manner” in which information is disclosed to them. The policy intention behind this provision is that requirements regarding form and manner of information be able to be enforced.

We recommend amending clause 24 by inserting clause 24(2) and (3). This would add an obligation for parties to comply with the information disclosure requirements. The effect of this change would be that a party who fails to submit information in the form and manner required could be subject to a pecuniary penalty for that alone.

Enforcement of information disclosure provisions

The chief executive of MBIE would be tasked with monitoring the performance of the engine fuels market, and undertaking analysis to assess whether the purpose of the bill is being met. However, under the bill as introduced MBIE would not have the ability to enforce requirements relating to information disclosed to it.

We recommend amending clause 29 so that the chief executive of MBIE could apply to the High Court for a pecuniary penalty in relation to clause 24 (which contains the obligation to comply with information disclosure requirements).

Amendments to enforcement provisions

- We recommend amending clause 29 so that a contravention of clause 11(3) or (4) would be subject to a pecuniary penalty, and proceedings for this action would be heard in the District Court.
- We recommend amending clause 29(5) to allow the Court, when setting a pecuniary penalty, to take into account previous contraventions by the defendant of a similar nature. Recidivism is a relevant factor to setting a pecuniary penalty.
- We recommend that clause 29(6) be amended to provide that no civil proceedings may be commenced 10 years or more after the contravention, rather than 3 years, as in the bill as introduced. This would apply to all civil proceedings taken under clause 29 (the bill's pecuniary penalties provision).
- It is unclear whether a private litigant could bring proceedings for any purpose other than an injunction. A private party that suffers loss or damage should be able to apply for orders from the Court. This would not diminish the role of the Commerce Commission, which would act in the primary enforcement role.

We recommend inserting clause 38(5). Our change would make it clear that a party that suffers loss or damage may also apply for court orders under clause 38. This would need to be in relation to an alleged contravention of the wholesale contract obligations in Part 2, subpart 2 of the bill.

Dispute resolution

Stipulating a maximum timeframe for mediation

The bill as introduced would have no defined timeframe within which mediation is to be concluded. Provisions in similar legislation are standard practice, and they help ensure that one party to a dispute does not prolong mediation to the detriment of the other party.

We recommend amending clause 43 to clarify that if a dispute cannot be resolved by mediation in a specified timeframe prescribed in regulations, either party may refer the dispute to arbitration.

Prescribing the dispute resolution scheme

The regulation-making powers in the bill as introduced do not stipulate who will provide the dispute resolution service.

We recommend inserting clause 44(1)(ba), so that the Minister is empowered to make regulations that prescribe 1 or more dispute resolution schemes. Our change would ensure that the Minister is able to select the most appropriate service, in order to best fit the needs of the particular dispute, and the parties involved.

National Party minority view

On 5 December 2019, the Commerce Commission published its final report on its retail fuel market study, saying that wholesale prices are higher than it would expect

in a competitive market and that this flows through to consumers paying higher pump prices.

It is noted that in the Fuel Markets Conference the Commission facilitated on 24-25 September 2019, there were differing views expressed by the participant companies on the level of competition New Zealand has. One being: “If the wholesale market was broken, or if the majors enjoyed a structural advantage which impacted workable competition, we would not have expected to have seen a total of 76 sites from just the independent retail brands—being Gull, Waitomo, NPD and Allied—being built in the last five years alone.”

National does question the view that the market is not workable and that competition is limited; however, we do support any improvements that can be made to that market.

We support the proposal in the bill to establish a terminal gate price as a mechanism to create a stronger platform for smaller independent resellers in their relationships with suppliers. The TGP mechanism was adopted in Australia in 2007.

We note that certain elements of the bill need further refinement, such as the dispute resolution provisions, and that this bill has proceeded through the select committee at a pace where officials reported that improvements to this provision will need to be part of a further bill in the future. We express our concern at such a rushed process and that good law ought to have the time needed to ensure unintended consequences do not occur.

Appendix

Committee process

The Fuel Industry Bill was referred to the committee on 30 June 2020. The closing date for submissions was 7 July 2020. We received and considered 13 submissions from interested groups and individuals. We heard oral evidence from 10 submitters.

We received advice from the Ministry of Business, Innovation and Employment. The Regulations Review Committee reported to the committee on the powers contained in clauses 12(1), 12(2)(b), 21(2), 21(3), 25(2)(a), and 25(3).

Committee membership

Dr Deborah Russell (Chairperson)

Kiritapu Allan

Andrew Bayly

Rt Hon David Carter

Tamati Coffey

Hon Judith Collins

Hon Paul Goldsmith

Ian McKelvie

Greg O'Connor

David Seymour

Jamie Strange

Fletcher Tabuteau

Dr Duncan Webb

Jonathan Young participated in our consideration of this bill.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Dr Megan Woods

Fuel Industry Bill

Government Bill

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The Parliament of New Zealand enacts as follows:**1 Title**

This Act is the Fuel Industry Act **2020**.

2 Commencement

- (1) **Sections 1 and 2, Part 1** (preliminary provisions), and **Part 3** (~~enforcement proceedings~~ and miscellaneous provisions) other than **section 43** come into force on the day after the date on which this Act receives the Royal assent. 5
- (2) The rest of this Act comes into force on a date appointed by the Governor-General by Order in Council, and 1 or more orders may be made appointing different dates for different provisions and for different purposes. 10
- (3) To the extent that they are not previously brought into force under **subsection (2)**,—
 - (a) **subparts 1** (terminal gate pricing) and **2** (~~fixed~~ wholesale contractual terms) of **Part 2** and **section 43** (dispute arising from **subpart 1 or 2 of Part 2** must be referred to mediation) come into force 1 year after the date on which this Act receives the Royal assent; and 15
 - (b) **subparts 3** (consumer information standards) and **4** (disclosure of information) of **Part 2** come into force 18 months after the date on which this Act receives the Royal assent.
- (4) In this section, **provision** includes any item, or any part of an item, in **Schedule 1**. 20

Part 1

Preliminary provisions

3 Purpose

The purpose of this Act is to promote competition in engine fuel markets for the long-term benefit of end users of engine fuel products. 5

4 Interpretation

In this Act, unless the context otherwise requires,—

bulk storage facility means a facility for the storage of 5 million litres or more of engine fuel

chief executive means the chief executive of the department of State that, with the authority of the Prime Minister, is for the time being responsible for the administration of this Act 10

Commission means the Commerce Commission

dealer means a reseller that sells and supplies engine fuel through its own retail fuel sites using a brand owned by another person that is not an interconnected body corporate of the reseller 15

distributor means a reseller that is not a dealer

end user, in relation to engine fuel, means a person who is the ultimate consumer of that engine fuel

engine fuel has the same meaning as in the Energy (Fuels, Levies, and References) Act 1989 20

fixed wholesale contract—

(a) means a wholesale contract that governs,—
 (i) for a fixed period, the wholesale price and other conditions of sale and supply of engine fuel during the period; or 25

(ii) for a fixed amount of engine fuel, the wholesale price and other conditions of sale and supply for that engine fuel; but

(b) does not include a wholesale contract for the sale and supply of engine fuel under the terminal gate pricing regime in **subpart 1 of Part 2**

fuel industry participant means a person that purchases, or sells and supplies, engine fuel other than as— 30

(a) an end user; or

(b) an incidental part of the hiring, leasing, or selling of motor vehicles

interconnected, in relation to bodies corporate, has the same meaning as in section 2(7) of the Commerce Act 1986 35

Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

reseller—

- (a) means a person that purchases, or intends to purchase, engine fuel from a wholesale supplier to sell and supply to another person; but 5
- (b) does not include a person that does so, or intends to do so, only as an incidental part of their business

retail fuel site—

- (a) means a place at which engine fuel is sold and supplied to an end user (for example, a petrol station or a truck stop); but 10
- (b) does not include a place at which the primary business is the hiring, leasing, or selling of motor vehicles; and
- (c) does not include a bulk storage facility

retailer—

- (a) means a person that carries on a business of selling and supplying engine fuel to end users; but 15
- (b) does not include a person who sells and supplies engine fuel only as an incidental part of their primary business of hiring, leasing, or selling motor vehicles 20

specified engine fuel has the meaning given in **section 7(2)**

terminal gate price has the meaning given in **section 8**

wholesale contract means a contract between a wholesale supplier and a distributor or dealer reseller for the sale and supply of engine fuel

wholesale supplier means a person that sells and supplies engine fuel, as the whole or part of its business, to persons other than end users. 25

5 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

6 Act binds the Crown

This Act binds the Crown. 30

6A Status of examples

- (1) An example used in this Act or in an enactment made under this Act is only illustrative of the provisions to which it relates. It does not limit those provisions. 35
- (2) If an example and a provision to which it relates are inconsistent, the provision prevails.

Part 2 Requirements applying to fuel industry participants

Subpart 1—Terminal gate pricing

7 Application and definition

- (1) This subpart applies to— 5
- (a) a wholesale supplier that has a right to draw specified engine fuel at a bulk storage facility as the owner or co-owner of the fuel; and
 - (b) a reseller.
- (2) In this subpart, **specified engine fuel**—
- (a) means regular grade petrol, premium grade petrol, or diesel (each within the meaning of regulations made under section 35 of the Energy (Fuels, Levies, and References) Act 1989); and 10
 - (b) includes any other engine fuel that is included in this definition by any regulations made under this subpart; but
 - (c) does not include any engine fuel referred to in **paragraph (a)** that is excluded from this definition by any regulations made under this subpart. 15

8 Obligation to set ~~and~~ post terminal gate price

- (1) A wholesale supplier must ~~set and~~ publicly post a price (a **terminal gate price**) for each specified engine fuel that it has the right to draw at a bulk storage facility ~~of~~ for the specified engine fuel. 20
- (2) ~~The wholesale supplier must comply with any requirements of regulations made under this subpart relating to setting and publicly posting a terminal gate price.~~
- (2) The wholesale supplier must comply with any requirements of regulations made under this subpart relating to publicly posting a terminal gate price. 25
- (3) The wholesale supplier may change the terminal gate price for a specified engine fuel at any time.

9 Right to request ~~same-day~~ supply

- (1) A reseller may, in accordance with any regulations made under this subpart, request a wholesale supplier to supply, at a bulk storage facility and on the day of the request, an amount of a specified engine fuel at its terminal gate price. 30
- (2) The reseller may withdraw the request at any time before the request is accepted by the wholesale supplier.

10 Wholesale supplier must supply at terminal gate price

(1) The wholesale supplier must supply the reseller with the requested amount at its terminal gate price, unless the wholesale supplier has reasonable grounds to refuse to supply.

(1A) The price payable by the reseller for the specified engine fuel must not exceed the terminal gate price posted at the time the request is made. 5

(2) The wholesale supplier must comply with any terms and conditions prescribed by regulations made under this subpart that apply to the wholesale supplier.

11 Reasonable grounds to refuse to supply

(1) The wholesale supplier has **reasonable grounds to refuse to supply only** if— 10

(a) the amount of specified engine fuel requested by the reseller is less than any minimum purchase amount prescribed by regulations made under this subpart; or

(b) the wholesale supplier reasonably believes that the reseller is unable or unlikely to comply with any terms and conditions prescribed by regulations made under this subpart that apply to the reseller; or 15

(c) the wholesale supplier reasonably believes that the reseller is unable or unlikely to receive or transport the requested amount in accordance with any health and safety requirements that apply in relation to the reseller, the specified engine fuel, or the bulk storage facility concerned; or 20

(d) the wholesale supplier reasonably believes that the reseller is unable to pay for the requested amount; or

(e) the wholesale supplier requires the requested amount—

(i) to meet its obligations under its contracts with end users or its fixed wholesale contracts~~or under its contracts with end users~~; or 25

(ii) to meet forecast demand, over the period prescribed by regulations made under this subpart, at its own retail fuel sites for specified engine fuel sold by the wholesale supplier at retail fuel sites to end users; or

(f) any other grounds prescribed by regulations made under this subpart apply. 30

(2) A wholesale supplier is not entitled to rely on **subsection (1)(e)** in respect of supply of specified engine fuel to an independent reseller during a prescribed time period except to the extent that supply of the specified engine fuel would require the wholesale supplier to supply more than the prescribed minimum supply amount to independent resellers during that period. 35

Example

The prescribed time period is a month. The prescribed minimum supply amount is 30,000 litres.

- A wholesale supplier has, to date during the month, supplied 20,000 litres of the specified engine fuel to independent resellers.
- An independent reseller requests the wholesale supplier to supply 15,000 litres of the specified engine fuel to the independent reseller during the month.
- The wholesale supplier— 5
- is not entitled to rely on **subsection (1)(e)** in respect of 10,000 litres (when it will have supplied the prescribed minimum supply amount of 30,000 litres to independent resellers in the month):
 - is entitled to rely on **subsection (1)(e)** in respect of 5,000 litres (being the amount exceeding the prescribed minimum supply amount). 10
-
- (3) A wholesale supplier to which **subsection (1)(e)(i) and (ii)** applies (that is, ~~it the wholesale supplier~~ requires the specified engine fuel that it has available to supply to meet obligations under its contracts with end users or its fixed wholesale contracts ~~or under its contracts with end users~~ or to meet forecast demand) ~~must, if required to do so by regulations,~~ provide or publish a notice in accordance with ~~those~~ any regulations made under this subpart. 15
- (4) A wholesale supplier that has supplied the prescribed minimum supply amount to an independent reseller (or to independent resellers) during a prescribed time period ~~must, if required to do so by any regulations,~~ provide or publish a notice in accordance with ~~those~~ any regulations made under this subpart. 20
- (5) For the purposes of ~~subsections (2) to (4)~~ this section, **independent reseller** means a reseller that is not—
- (a) an interconnected body corporate of the wholesale supplier; or
 - (b) a party to a fixed wholesale contract with the wholesale supplier or with an interconnected body corporate of the wholesale supplier. 25
- 12 Regulations under this subpart**
- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations—
- (a) prescribing any engine fuels that are included in, or excluded from, the definition of specified engine fuel for the purpose of **section 7(2)**; or 30
 - (b) prescribing requirements relating to ~~setting and posting~~ terminal gate prices ~~for the purpose of **section 8(2)**,~~ for example,—
 - (i) ~~how frequently terminal gate prices may be changed; or~~
 - (ii) how terminal gate prices must be expressed (for example, as cents per litre and whether they are inclusive or exclusive of tax); or 35
 - (ia) how any additional charges must be itemised (for example, that additional charges, fees, duties, or taxes must be identified separately); or
 - (iii) where terminal gate prices must be posted (for example, on a wholesale supplier's Internet site); or 40

- (iv) ~~how any additional charges must be itemised (for example, that additional charges, fees, duties, or taxes must be identified separately); or~~
- (c) prescribing requirements relating to requests by resellers under **section 9**; or 5
- (d) ~~prescribing the following terms and conditions for the purposes of sections 10(2) and 11(1)(b), for example,—:~~
 - (i) the documentation that must be provided by wholesale suppliers to resellers for each sale at the terminal gate price; ~~or;~~
 - (ii) ~~conditions of access to bulk storage facilities (for example, providing for pre-certification to allow wholesale suppliers to determine before supply if the reseller is likely to pay or to meet health and safety requirements); or~~ 10
- (e) prescribing the minimum purchase amount for the purpose of **section 11(1)(a)**; or 15
- (f) prescribing the period over which demand may be forecast for the purpose of **section 11(1)(e)(ii)**; or
- (g) prescribing any other grounds to refuse to supply for the purpose of **section 11(1)(f)**; or
- (h) prescribing the time period for the purpose of **section 11(2)**; or 20
- (i) prescribing the minimum supply amount for the purpose of **section 11(2)**; or
- (j) prescribing requirements relating to notices under **section 11(3) and (4)** (for example, the information that must be contained in the notice, the form and manner in which it must be published or provided, ~~and or~~ 25 to whom it must be provided).
- (2) The Minister may make a recommendation only if—
 - (a) the Minister has consulted any fuel industry participants that the Minister considers are likely to be significantly affected by the regulations:
 - (b) in the case of regulations specifying engine fuels that are included in, or excluded from, the definition of specified engine fuel,— 30
 - (i) the Minister has had regard to the impact of the regulations on incentives to innovate and to invest in markets for specified engine fuels; and
 - (ia) the Minister is satisfied that a significant proportion of the relevant engine fuel is used by motor vehicles (as defined in section 2(1) of the Land Transport Act 1998); and 35
 - (ii) the Minister is satisfied that the regulations are necessary or desirable ~~to promote competition for the long-term benefit of end users~~

of specified engine fuels after having regard to the purpose of this Act.

Subpart 2—Wholesale Fixed wholesale contractual terms

13 Application of this subpart

This subpart applies to fixed wholesale contracts for any engine fuel. 5

14 Transparency obligation

A wholesale supplier must ensure that the terms of its fixed wholesale contracts are expressed clearly, concisely, and in plain language.

15 ~~Pricing methodology in~~ Transparent pricing under fixed wholesale contracts 10

(1) A wholesale supplier must ensure that—

(a) its fixed wholesale contracts ~~contain a transparent pricing methodology prescribed by any regulations made under this subpart specify, in accordance with any regulations made under this subpart, the method (**pricing method**) by which the price of any engine fuel supplied under those contracts is to be calculated;~~ and 15

(b) the price of any engine fuel supplied under its fixed wholesale contracts is ~~set~~ calculated using that pricing ~~methodology~~ method.

(2) A wholesale supplier must not vary a ~~the pricing methodology~~ method ~~specified~~ in a fixed wholesale contract, except in accordance with any regulations made under this subpart. 20

16 Right to terminate certain fixed wholesale contracts

(1) A distributor may terminate a fixed wholesale contract with a wholesale supplier at any time after it has been in force for longer than the maximum duration prescribed by any regulations made under this subpart. 25

(2) However, ~~subsection~~ **Subsection (1)** does not apply if—

(a) it is reasonably necessary for the contract to be in force for longer than the prescribed maximum duration to enable, or to enable the recovery of, specific investment by the wholesale supplier for the benefit of the distributor; or 30

(b) the contract does not require the distributor to purchase a minimum amount of engine fuel from the wholesale supplier.

(3) A distributor may terminate a fixed wholesale contract under ~~this section~~ **subsection (1)** by giving reasonable notice in writing to the wholesale supplier.

- 17 Maximum percentage of annual requirement of engine fuel that may be subject to exclusivity**
- (1) A provision in a fixed wholesale contract is of no effect to the extent that it requires the distributor to purchase from the wholesale supplier more than the maximum percentage (as prescribed by any regulations made under this sub-part) of the distributor's annual requirement for engine fuel. 5
- (2) A wholesale supplier must not enter into, ~~or offer to enter into,~~ a fixed wholesale contract that contains a provision of the kind described in **subsection (1)**.
- (3) ~~However, **subsections (1) and (2)** do not apply if a provision of the kind referred to in **subsection (1)** is reasonably necessary to enable, or to enable the recovery of, specific investment by the wholesale supplier for the benefit of the distributor.~~ 10
- (4) A wholesale supplier may, in any fixed wholesale contract with a distributor, require the distributor, —
- (a) (for the purpose of ensuring that the wholesale supplier can comply with **subsections (1) and (2)**), to provide to the wholesale supplier the distributor's forecast of its annual requirement for supply of engine fuel under the contract; and 15
- (b) to give reasonable notice to the wholesale supplier of the distributor's intention to take supply from another supplier. 20
- 18 Wholesale ~~contract~~ contractual terms that limit ability of reseller to compete**
- (1) A wholesale supplier must not enter into, ~~or offer to enter into,~~ a fixed wholesale contract that contains a provision that —
- (a) is likely to limit the ability of the reseller who is a party to that contract to compete with the wholesale supplier or any other person; and 25
- (b) is not reasonably necessary in order to protect the reasonable commercial interests of the supplier.
- (1A) A provision that is prohibited under **subsection (1)** is of no effect.
- (2) In determining whether a provision of a wholesale contract is prohibited under **subsection (1)**, a court must take into account — 30
- (a) the fixed wholesale contract as a whole; and
- (b) any other matters that the court thinks are relevant.
- ~~(3) No provision that is prohibited under **subsection (1)** is enforceable.~~
- (4) Without limiting **subsection (1)(a)**, the following are examples of provisions that may be likely to limit the ability of the reseller to compete with the wholesale supplier or any other person: 35
- (a) provisions that limit the ability of the reseller to obtain supply of fuel from another wholesale supplier following the end of the term of the

fixed wholesale contract (for example, a provision that gives the wholesale supplier a right to renewal of the fixed wholesale contract):

- (b) provisions that prevent the reseller from competing in any retail market that the wholesale supplier is active in, for example,—
 - (i) a provision preventing the reseller from competing in a certain geographic area; or
 - (ii) a provision that ~~disproportionately~~ prioritises the allocation of engine fuel to the wholesale supplier’s retail fuel sites over allocation to the reseller, in the event of a supply constraint:
- (c) provisions that restrict the ability of the reseller to make independent decisions about the conduct of their business (for example, a provision that gives the wholesale supplier a first right of refusal for the transfer of ownership of the reseller’s business).

19 Regulations under this subpart

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations—
 - (a) ~~prescribing transparent pricing methodologies relating to the specification of a pricing method in a fixed wholesale contract for the purpose of **section 15(1)(a)**~~; or
 - (b) prescribing the circumstances in which a pricing ~~methodology~~ method may be varied for the ~~purposes~~ purpose of **section 15(2)** (for example, as to notice to the other party or the agreement of the other party); or
 - (c) prescribing the maximum duration for the purpose of **section 16**; or
 - (d) prescribing the maximum percentage for the purpose of **section 17**.
- (2) The Minister may make a recommendation under **subsection (1)** only if—
 - (a) the Minister has consulted any fuel industry participants that the Minister considers are likely to be significantly affected by the regulations; and
 - (b) the Minister is satisfied that the regulations are necessary or desirable after having regard to the purpose of this Act.

Subpart 3—Consumer information requirements

19A Purpose of this subpart

The purpose of this subpart is to provide transparency in retail fuel prices so that end users are able to make informed purchasing decisions.

20 Obligation to comply with consumer information requirements

A retailer, or the person responsible for displaying information at a retail fuel site, must comply with any requirements prescribed by regulations made under this subpart.

20A Notice to take corrective action

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(1) If satisfied that a retailer, or a person responsible for displaying information at a retail fuel site, has failed to comply with any requirements prescribed by regulations under this subpart, the Commission may, by written notice given to the retailer or person, require the retailer or person to take any steps specified in the notice to—

10

(a) remedy the non-compliance; or

(b) ensure that the non-compliance is not continued or repeated.

(2) A notice given under this section must specify a reasonable period (a **specified period**) within which the required steps must be taken.

(3) A retailer, or person responsible for displaying information at a retail fuel site, given a notice under this section must comply with the notice within the specified period.

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21 Consumer information requirements may be prescribed

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations prescribing requirements relating to the display of information at retail fuel sites about the price of engine fuels.

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(2) In particular, the regulations may prescribe—

(a) the engine fuels and kinds of retail fuel sites the regulations apply to; or

(b) the information in relation to the price of those engine fuels that must be displayed; or

25

(c) the circumstances in which the information must be displayed; or

(d) the form and manner in which the information must be displayed; or

(e) any information that must not be displayed (for example, discounts on the price of engine fuels).

(3) ~~The Minister may make a recommendation under **subsection (1)** only if satisfied that the regulations are needed to provide transparency in retail fuel prices so as to facilitate end users' ability to make informed purchasing decisions.—~~

30

(a) the Minister has consulted any fuel industry participants that the Minister considers are likely to be significantly affected by the regulations; and

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(b) the Minister is satisfied that the regulations are necessary or desirable after having regard to the purposes of this Act and this subpart.

22 Notice to take corrective action

- (1) ~~If satisfied that the retailer, or the person responsible for displaying information at a retail fuel site, has failed to comply with any requirements prescribed by regulations under this subpart, the Commission may, by written notice given to the retailer or person, require the retailer or person to take any steps specified in the notice to—~~ 5
- ~~(a) remedy the non-compliance; or~~
- ~~(b) ensure that the non-compliance is not continued or repeated.~~
- (2) A notice given under this section must specify a reasonable period (a **specified period**) within which the required steps must be taken. 10
- (3) A retailer, or person responsible for displaying information at a retail fuel site, given a notice under this section must comply with the notice within the specified period.

Subpart 4—Disclosure of information

23 Purposes of this subpart 15

The purposes of this subpart are—

- (a) to enable the chief executive and the Commission to monitor the performance of engine fuel markets; and
- (b) to ensure that sufficient information is readily available to the chief executive and the Commission to assess whether the purpose of this Act is being met. 20

24 Obligation to comply with information disclosure requirements

- (1) Every fuel industry participant to which requirements prescribed by the regulations made under this subpart apply must comply with those requirements.
- (2) Without limiting **subsection (1)**, a fuel industry participant must disclose information to the chief executive or Commission in any circumstances prescribed by the regulations. 25
- (3) The fuel industry participant must disclose the information in any form and manner specified by the chief executive or Commission (as the case may be).

25 Information disclosure requirements may be prescribed 30

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations prescribing requirements relating to record keeping, and the retention and disclosure of information, about engine fuel markets.
- (2) In particular, the regulations may prescribe— 35
- (a) the kinds of fuel industry participants, the engine fuels, and other matters that the regulations apply to; or

- (b) the information that must be recorded and retained; or
- (ba) the methodologies that must be applied in recording the information, including—
- (i) how common costs are to be allocated; and
- (ii) how assets are to be valued; or 5
- (c) the circumstances in which information must be disclosed to the chief executive, the Commission, or both (for example, when requested by the chief executive or the Commission, at a specified time, or on the occurrence of a specified event); or
- (d) requirements relating to the publication of information that is required to be disclosed to the chief executive or the Commission; ~~or,~~ 10
- (e) ~~the methodologies that must be applied in recording the information, including—~~
- (i) ~~how common costs are to be allocated; and~~
- (ii) ~~how assets are to be valued.~~ 15
- (3) The Minister may make a recommendation under **subsection (1)** only if satisfied that the regulations are needed for the purposes of this subpart. ~~—~~
- (a) the Minister has consulted any fuel industry participants that the Minister considers are likely to be significantly affected by the regulations; and 20
- (b) the Minister is satisfied that the regulations are necessary or desirable after having regard to the purpose of this Act and this subpart.
- 26 Form and manner in which information disclosed**
- The chief executive or the Commission may specify the form and manner in which any information that is required to be disclosed to them under this subpart must be provided. 25
- 27 Publication of analysis or summary**
- The chief executive or the Commission may publish any analysis or summary they have made of information that is disclosed to them under this subpart.
- The chief executive or the Commission may, ~~—~~ 30
- (a) for the purposes of this subpart, analyse and summarise any information disclosed to them under this subpart; and
- (b) publish any resulting analysis or summary.
- 28 Information sharing between Commission and chief executive**
- (1) The Commission may provide to the chief executive, and the chief executive may provide to the Commission, any information, or a copy of any document, that the Commission or the chief executive (as the case may be) ~~—~~ 35

- (a) holds in relation to the exercise of powers, or the performance of functions and duties, in respect of this subpart; and
- (b) considers may assist the other for the ~~purpose~~ purposes of this subpart.
- (2) The Commission and the chief executive may use any information, or a copy of any document, provided under this section for the ~~purpose~~ purposes of this subpart. 5
- (3) The Commission ~~and or~~ the chief executive must not provide any information or document under this section unless ~~the Commission or the chief executive (as the case may be)~~ is satisfied that appropriate protections are or will be in place to maintain the confidentiality of the information or document (~~in particular, including~~ including information that is personal information within the meaning of the Privacy Act ~~1993~~ 2020). 10
- (4) This section applies despite anything to the contrary in any contract, deed, or document.
- (5) Nothing in this section limits the Privacy Act ~~1993~~ 2020. 15

Part 3

Enforcement Proceedings and miscellaneous provisions

Subpart 1—Enforcement Proceedings

29 Pecuniary penalties

- (1) The High Court may, on the application of the Commission, order a person to pay to the Crown a pecuniary penalty if satisfied that the person— 20
- (a) has contravened any of the following provisions:
- (i) **section 8 or 10** (terminal gate pricing):
- (ii) **section 14, 15, 17(2), or 18(1)** (wholesale contractual terms):
- (iii) **section 20** (consumer information requirements); or 25
- (iv) **section 24** (~~information disclosure requirements~~); or
- (b) has attempted to contravene any of those provisions; or
- (c) has aided, abetted, counselled, or procured any other person to contravene any of those provisions; or
- (d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene any of those provisions; or 30
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of any of those provisions; or
- (f) has conspired with any other person to contravene any of those provisions. 35

- (1A) The High Court may, on the application of the Commission or the chief executive, order a person to pay to the Crown a pecuniary penalty if satisfied that the person—
- (a) has contravened **section 24** (information disclosure requirements); or
 - (b) has attempted to contravene that provision; or 5
 - (c) has aided, abetted, counselled, or procured any other person to contravene that provision; or
 - (d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene that provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of that provision; or 10
 - (f) has conspired with any other person to contravene that provision.
- (2) The amount of any pecuniary penalty under **subsection (1) or (1A)** must not exceed,—
- (a) in the case of an individual, \$500,000 for each act or omission; or 15
 - (b) in any other case, \$5,000,000 for each act or omission.
- (3) ~~The District Court may, on the application of the Commission, order a person to pay to the Crown a pecuniary penalty if satisfied that the person has contravened a notice given by the Commission under **section 22**.~~
- (3) The District Court may, on the application of the Commission, order a person to pay to the Crown a pecuniary penalty if satisfied that the person— 20
- (a) has failed to provide or publish a notice as required by **section 11(3) or (4)**; or
 - (b) has failed to comply with a notice given by the Commission under **section 20A(1)**. 25
- (4) The amount of any pecuniary penalty under **subsection (3)** must not exceed,—
- (a) in the case of an individual, \$10,000 for each act or omission; or
 - (b) in any other case, \$30,000 for each act or omission.
- (5) In determining an appropriate penalty under this section, the court must have regard to,— 30
- (a) in the case of a contravention referred to in **subsection (1)(a) or (3)(b)**,—
 - (i) the nature and extent of the contravention; and
 - (ii) the nature and extent of any loss or damage suffered by any person because of the contravention; and 35
 - (iii) any gains made or losses avoided by the person in contravention; and

- (iv) whether or not the person in contravention has paid an amount in compensation or taken other steps for reparation or restitution; and
- (b) the circumstances in which the contravention or other act or omission took place (including whether it was intentional, inadvertent, or caused by negligence); and 5
- (ba) any previous contraventions of a similar nature; and
- (c) any other relevant matter.
- (6) ~~Proceedings under this section may be commenced no later than 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.~~ 10
- (7) Where conduct by any person constitutes a contravention of 2 or more provisions referred to in **subsection (1)(a)**, proceedings may be instituted under this Act against that person in relation to the contravention of any 1 or more of the provisions. 15
- (8) However, no person is liable to more than 1 pecuniary penalty under this section in respect of the same conduct.

Compare: 1986 No 5 s 80

30 Proceedings for pecuniary penalties

In any proceedings under this subpart for a pecuniary penalty,— 20

- (a) the standard of proof is the standard of proof that applies in civil proceedings; and
- (b) the Commission may, by order of the court, obtain discovery and administer interrogatories.

Compare: 1986 No 5 s 79A 25

31 Court may order compensation

- (1) If a court orders a person to pay a pecuniary penalty under **section 29** in respect of a contravention of this Act ~~or the regulations made under this Act~~, the court may, in addition, order the person to pay compensation to any person who has suffered, or is likely to suffer, loss or damage as a result of the contravention. 30
- (2) An application for orders under this section may be made by the Commission.
- (3) The application must be made as part of proceedings under **section 29**.
- (4) In proceedings under this section, the court may make any orders as to costs that it thinks fit. 35

Compare: 1986 No 5 s 87A

Application of Commerce Act 1986

32 Application of Commerce Act 1986

The following provisions of the Commerce Act 1986 apply to this subpart with any necessary modifications:

- (a) section 74A (Commission may accept undertakings): 5
- (b) section 74B (matters included in undertakings):
- (c) section 74C (enforcement of undertakings):
- (d) section 79 (evidence not otherwise admissible):
- (e) section 90 (conduct by employees, agents and others):
- (f) section 98 (Commission may require person to supply information or documents or give evidence): 10
- (g) sections 98A and 98G (Commission's powers of search and seizure):
- (h) section 99 (powers of Commission to take evidence):
- (i) section 100 (powers of Commission to prohibit disclosure of information, documents, and evidence): 15
- (j) section 100A (Commission may state case for opinion of High Court):
- (k) sections 101 (notices) and 102 (service of notices):
- (l) section 106 (proceedings privileged):
- (m) section 106A (judicial notice):

33 Additional proceedings

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Proceedings brought under this Act are in addition to any proceedings brought under any other Act.

Compare: 2003 No 52 s 114

Injunctions

34 Court may grant injunction

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(1) The court may, on the application of the Commission or any other person, grant an injunction—

- (a) restraining a person from engaging in conduct that constitutes or would constitute a contravention of this Act ~~or regulations~~ (including any matter referred to in **section 29(1) or (3)(b)**): 30
- (b) requiring a person to do an act or a thing if—
 - (i) that person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do that act or thing; and
 - (ii) the refusal or failure was, is, or would be a contravention of this Act ~~or regulations~~. 35

- (2) The court may at any time rescind or vary an injunction granted under this subpart.

Compare: 2013 No 69 s 480

35 When court may grant restraining injunctions

- (1) The court may grant an injunction restraining a person from engaging in conduct of a particular kind if— 5
- (a) it is satisfied that the person has engaged in conduct of that kind; or
 - (b) it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind.
- (2) The court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if in its opinion it is desirable to do so. 10
- (3) **Subsections (1)(a) and (2)** apply whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind.
- (4) ~~**Subsections (1)(b) and (2)** apply whether or not the person has previously engaged in conduct of that kind or there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.~~ 15
- (4) **Subsections (1)(b) and (2)** apply whether or not—
- (a) the person has previously engaged in conduct of that kind; or
 - (b) there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind. 20

Compare: 2013 No 69 s 481

36 When court may grant performance injunctions

- (1) A court may grant an injunction requiring a person to do an act or a thing if—
- (a) it is satisfied that the person has refused or failed to do that act or thing; 25
or
 - (b) it appears to the court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing.
- (2) The court may grant an interim injunction requiring a person to do an act or a thing if in its opinion it is desirable to do so. 30
- (3) **Subsections (1)(a) and (2)** apply whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing.
- (4) **Subsections (1)(b) and (2)** apply whether or not—
- (a) ~~whether or not~~ the person has previously refused or failed to do that act or thing; or 35
 - (b) ~~where~~ there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that act or thing.

37 Commission's undertaking as to damages not required

- (1) If the Commission applies to the court for the grant of an interim injunction under this subpart, the court must not, as a condition of granting an interim injunction, require the Commission to give an undertaking as to damages.
- (2) In determining the Commission's application for the grant of an interim injunction, the court must not take into account that the Commission is not required to give an undertaking as to damages. 5

Compare: 2013 No 69 s 482

*Other orders***38 Other orders**

- (1) Where, in any proceedings under this subpart, the court finds that a party to the proceedings has suffered, or is likely to suffer, loss or damage because of another person's contravention of any of the provisions of this Act, the court may (whether or not it grants an injunction or makes any other order under this subpart) make any order that it thinks appropriate against another party— 10
- (a) who is the person in contravention; or
- (b) who did any act referred to in **section 29(1)(b) to (f) or (1A)(b) to (f)** in relation to the contravention. 15
- (2) Where a contract is entered into in contravention of this Act, or contains a provision that ~~(if given effect to) would contravene this Act~~(under this Act) is of no effect, the court may, in any proceedings under this subpart, make an order— 20
- (a) varying the contract as it thinks fit, but not so that it is inconsistent with the provisions of this Act; or
- (b) cancelling the contract; or 25
- (c) requiring any party to the contract to make restitution or pay compensation to any other party to the contract.
- (3) Nothing in subpart 5 of Part 2 of the Contract and Commercial Law Act 2017 applies to any contract entered into in contravention of this Act or to any contract that contains a provision that ~~if given effect to would constitute a contravention of this Act~~(under this Act) is of no effect. 30
- (4) Despite any enactment or rule of law, if a contract is entered into in contravention of this Act because the contract contains a particular provision, or the contract contains a provision that ~~if given effect to would contravene this Act~~(under this Act) is of no effect, the enforceability of any other provision of the contract is not affected. 35
- (5) ~~In this section, a reference to a contravention of this Act includes a reference to a contravention of any regulations made under this Act.~~

- (5) A person who has suffered, or is likely to suffer, loss or damage because of another person's contravention of any of the provisions of **subpart 2 of Part 2**, or because they are party to a contract that contains a provision that (under **subpart 2 of Part 2**) is of no effect, may apply to the court for an order under this section (whether or not they are also party to any other proceedings under this subpart in relation to the contravention). 5

Compare: 1986 No 5 s 89

Jurisdiction

39 Jurisdiction of High Court

In accordance with this subpart, the High Court must hear and determine the following matters: 10

- (a) applications for orders under section 74C of the Commerce Act 1986 to enforce undertakings:
- (b) proceedings to determine whether a provision of a wholesale contract is prohibited under **section 18**: 15
- (c) proceedings for the recovery of pecuniary penalties under **section 29(1) or (1A)**:
- (d) applications for orders for compensation under **section 31**:
- (e) applications for injunctions under **section 34**:
- (f) applications for orders under **section 38**. 20

Compare: 1986 No 5 s 75

40 Jurisdiction of District Court

In accordance with this subpart, the District Court must hear and determine the following matters:

- (a) proceedings for the recovery of pecuniary penalties under **section 29(3)** ~~for contraventions of corrective notices issued under **section 22**~~: 25
- (b) proceedings for offences against **section 41** (offences):
- (c) proceedings for offences against section 100 of the Commerce Act 1986.

Compare: 1986 No 5 s 76

Offences 30

41 Offences in respect of sections 98 and 98A of Commerce Act 1986

- (1) ~~No~~ A person may not,—
- (a) without reasonable excuse, refuse or fail to comply with a notice under section 98 of the Commerce Act 1986; or

- (b) in purported compliance with such a notice, provide information, or produce a document, or give evidence, or authorise the making of a statement in a document, knowing it to be false or misleading; or
- (c) resist, obstruct, or delay an employee of the Commission acting under a warrant issued under section 98A of the Commerce Act 1986. 5
- (2) ~~No~~ A person may ~~must not~~ attempt to deceive or knowingly mislead the Commission in relation to any matter before it.
- (3) ~~No~~ A person must not, having been required to appear before the Commission in accordance with section 98(1)(c) of the Commerce Act 1986, ~~may~~,—
 - (a) without reasonable excuse, refuse or fail to appear before the Commission to give evidence; or 10
 - (b) refuse to take an oath or make an affirmation as a witness; or
 - (c) refuse to answer any question; or
 - (d) refuse to produce to the Commission any book or document that that person is required to produce. 15
- (4) A person who contravenes **subsection (1), (2), or (3)** commits an offence and is liable on conviction to,—
 - (a) in the case of an individual, a fine not exceeding \$100,000;
 - (b) in any other case, a fine not exceeding \$300,000.
- (5) ~~Proceedings for an offence against **subsection (4)** may be commenced no later than 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.~~ 20

Compare: 1986 No 5 s 103

Other matters

- 41A Onus of proving certain provisions are reasonably necessary** 25

In any proceedings relating to **section 16, 17, or 18**, if the defendant claims that a provision of a fixed wholesale contract is reasonably necessary for a reason referred to in **section 16(2)(a), 17(3), or 18(1)(b)**, it is for the defendant to prove, on the balance of probabilities, that the provision is reasonably necessary for that reason. 30
- 41B Limitation period for proceedings**
 - (1) Proceedings for offences against **section 41** of this Act or against section 100 of the Commerce Act 1986 may be commenced no later than 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. 35
 - (2) Any civil proceedings relating to a contravention of any of the provisions of this Act may be commenced—

- (a) no later than 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered; and
- (b) no later than 10 years after the matter giving rise to the contravention.

Subpart 2—Miscellaneous provisions

42	Application of Commerce Act 1986	5
	The following provisions of the Commerce Act 1986 apply to this Act with any necessary modifications:	
	(a) section 13 (termination of appointment of members):	
	(b) section 15 (meetings of Commission):	
	(c) section 16 (chairperson may direct Commission to sit in Divisions):	10
	(d) section 25 (functions of Commission in relation to dissemination of information):	
	(da) <u>sections 101 (notices) and 102 (service of notices):</u>	
	(db) <u>section 106 (proceedings privileged):</u>	
	(dc) <u>section 106A (judicial notice):</u>	15
	(e) section 109 (Commission may prescribe forms):	
	(f) Schedule 5 (material incorporated by reference).	
43	Dispute arising from subpart 1 or 2 of Part 2 must be referred to mediation	
(1)	This section applies to any dispute between a wholesale supplier and a reseller that arises from the performance or non-performance of a duty or the exercise of a right under subpart 1 or 2 of Part 2 .	20
(2)	If a dispute to which this section applies is unable to be resolved by agreement between the parties, the dispute must be referred to mediation.	
(3)	Mediation under subsection (2) must be carried out in accordance with the procedure prescribed in any regulations made under this subpart.	25
(4)	If the parties are unable to resolve the dispute at mediation <u>within any time frame prescribed by regulations made under this subpart</u> , they either party may refer the dispute to arbitration.	
(5)	If a dispute is referred to arbitration under subsection (2) , the provisions of the Arbitration Act 1996 apply to that dispute.	30
(6)	Nothing in this section and no action taken under this section prevents proceedings from being brought by the Commission against a person for a failure to comply with any of that person's obligations under this Act.	
	Compare: 2013 No 91 s 117	35

44 Other regulations

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations—
- (a) prescribing procedures for the purpose of **section 43** (dispute arising from **subpart 1 or 2 of Part 2** must be referred to mediation): 5
 - (b) specifying or setting out a method of calculation for how mediation costs incurred under **section 43** must be split between the parties:
 - (ba) prescribing 1 or more dispute resolution schemes for the purpose of **section 43**:
 - (c) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect. 10
- (2) The Minister may make a recommendation under this section only if the Minister has consulted any fuel industry participants that the Minister considers are likely to be significantly affected by the regulations.

45 Differential regulations 15

~~Regulations made under this Act—~~

- ~~(a) may prescribe requirements for a particular engine fuel or a class or classes of engine fuels; or~~
- ~~(b) may prescribe different requirements for different engine fuels or classes of engine fuels; or~~ 20
- ~~(c) may prescribe different requirements for different fuel industry participants or other persons, or classes of such persons; or~~
- ~~(d) may prescribe different requirements for different retail fuel sites or classes of such sites; or~~
- ~~(e) may otherwise make different provision for different cases on any differential basis.~~ 25

45 Differential regulations

- (1) Regulations made under this Act may make different provision for different cases on any differential basis.
- (2) Without limiting **subsection (1)**, regulations made under this Act— 30
- (a) may prescribe requirements for a particular engine fuel or a class or classes of engine fuels; or
 - (b) may prescribe different requirements for different engine fuels or classes of engine fuels; or
 - (c) may prescribe different requirements for different fuel industry participants or other persons, or classes of such persons; or 35
 - (d) may prescribe different requirements for different retail fuel sites or classes of such sites.

46 Chief executive may ~~prescribe~~ approve forms

For the purposes of this Act, the chief executive may ~~from time to time pre-~~
~~scribe~~ approve forms of applications, notices, and other documents required for
the purposes of this Act.

Compare: 1986 No 5 s 109

5

Schedule 1

Transitional, savings, and related provisions

s 5

Part 1

Provisions relating to this Act as enacted

5

1 Interpretation in this Part

In this Part, **commencement**, in relation to a provision of this Act, means the commencement of the provision.

2 Application of subpart 2 of Part 2 to existing contracts

- (1) **Section 16** (right to terminate certain fixed wholesale contracts) applies to contracts entered into before commencement in the same way in which it applies to contracts entered into on or after commencement. 10
- (2) The rest of **subpart 2 of Part 2** does not apply to an existing contract until the earlier of—
- (a) the date appointed by the Governor-General by Order in Council for the purpose of this clause: 15
- (b) 2 years after the date on which this Act receives the Royal assent.
- (3) The Governor-General may, by Order in Council, appoint a date for the purpose of this clause.

3 Transitional provision relating to references to Privacy Act 2020

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- (1) This clause applies if an Order in Council is made under **section 2(3)(b)** bringing the provisions of **subpart 4 of Part 2** into force before 1 December 2020.
- (2) Until the close of 30 November 2020, **section 28(3) and (5)** applies as if the references to the Privacy Act 2020 were to the Privacy Act 1993. 25

Legislative history

30 June 2020

Introduction (Bill 301–1), first reading and referral to Finance and Expenditure Committee