

9 July 2021

Dear stakeholder

## **Open letter – Fuel Industry Act 2020**

1. In the lead up to the first parts of the Fuel Industry Act 2020 (the **Act**) taking effect on 11 August 2021, we have written this letter to:
  - 1.1 Remind you of your rights and obligations under the Act and when they take effect
  - 1.2 Explain our roles under the Act, and what to expect from us in performing these roles
  - 1.3 Explain how and when we expect to engage with you.
2. The Act was passed in August last year to promote competition in engine fuel markets for the long-term benefit of end users of engine fuel products. The Commission will be responsible for enforcing the requirements of the Act, as well as undertaking monitoring of information disclosed under the information disclosure requirements.

### **Requirements under the Act**

3. The Act establishes a range of requirements for industry participants. The requirements are detailed further in the Fuel Industry Regulations 2021, which were published on 8 July 2021.<sup>1</sup>
4. Ahead of the requirements of the Act coming into force, we encourage parties that consider they may be impacted by the Fuel Industry Act to seek legal advice to ensure they understand any obligations and rights that apply to them under the Act. In particular, we encourage fuel industry participants to familiarise themselves with the Act's definitions of wholesale supplier, reseller, distributor, dealer, retailer and retail fuel site to ensure they understand which role they have and the requirements that apply to them.

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<sup>1</sup> The Fuel Industry Regulations 2021 cover all areas other than the information disclosure requirements. MBIE is currently developing the information disclosure requirements, which are expected to be set out in regulations before the information disclosure subpart of the Act comes into force in February 2022.

5. Different requirements come into force at different times, as summarised in the table below.

Date	Requirements that come into force on that date (unless brought forward by Order in Council)
<b>11 August 2021</b>	<ul style="list-style-type: none"> <li>• Terminal gate pricing requirements</li> <li>• Fixed wholesale contractual terms requirements for all contracts entered into on or after 11 August 2021.</li> <li>• Distributor’s right generally to terminate a fixed wholesale contract after five years (irrespective of date contract entered into)</li> <li>• Dispute resolution process for wholesale suppliers and resellers to resolve disputes arising from the terminal gate price regime or the rules on fixed wholesale contractual terms</li> </ul>
<b>11 February 2022</b>	<ul style="list-style-type: none"> <li>• Consumer information requirements</li> <li>• Information disclosure requirements</li> </ul>
<b>11 August 2022</b>	<ul style="list-style-type: none"> <li>• Fixed wholesale contractual terms requirements for contracts entered into prior to 11 August 2021</li> </ul>

6. We have briefly summarised each of these sets of requirements below.

*Requirements coming into force on 11 August 2021*

Terminal gate pricing

7. The terminal gate pricing requirements come into force on 11 August 2021. From that date, wholesale suppliers will be required to publish prices at which they will sell their fuel from terminals. Resellers will have the right to request same-day supply at the posted price, and requests for fuel must be supplied by wholesale suppliers unless the wholesale supplier meets one of the reasonable grounds to refuse supply specified in Act.
8. The Fuel Industry Regulations 2021 further detail the requirements of the terminal gate pricing regime. For example, the regulations set out how a wholesale supplier must publish terminal gate prices.

### Fixed wholesale contractual terms

9. The requirements in relation to fixed wholesale contracts (**contracts**) also come into force on 11 August 2021, but only for contracts entered into on or after 11 August 2021.
10. Wholesale suppliers will need to ensure that their contracts are expressed clearly, concisely, and in plain language, and contain transparent pricing methods. There are also requirements aimed at providing more opportunities for distributors to shop around for better wholesale prices – including by providing rights of termination and placing limits on exclusive contracts. The rules also contain a general prohibition against contractual terms that limit the reseller’s ability to compete with the wholesale supplier or any other person.
11. From 11 August 2022, these obligations and rights will also apply to all contracts entered into before 11 August 2021. The exception to this is the right to terminate after 5 years, which applies to all contracts from 11 August 2021 regardless of when they were entered into.<sup>2</sup>
12. This means that if you enter a new contract after 11 August 2021, it must comply with the requirements. And by 11 August 2022, all contracts must comply.

### Dispute resolution

13. The dispute resolution provisions in the Act also come into force from 11 August 2021. These provisions provide a mediation and arbitration pathway for wholesale suppliers and resellers to resolve disputes arising from the terminal gate price regime or the rules relating to fixed wholesale contractual terms.
14. The detail of the dispute resolution process is set out in the Fuel Industry Regulations 2021.

### *Requirements coming into force on 11 February 2022*

#### Consumer information requirements

15. The consumer information requirements will come into force on 11 February 2022. From that date, all retail fuel sites (other than truck stops and sites that predominantly re-fuel marine vehicles) will be required to display on their price boards the standard retail price of all fuels for sale at the retail site. The Fuel Industry Regulations 2021 specify the information that must be displayed and by whom in more detail.

#### Information disclosure requirements

16. The Act requires fuel industry participants to comply with information disclosure requirements. The information disclosure requirements will be set out in regulations, which MBIE is currently developing ahead of the information disclosure subpart of

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<sup>2</sup> The right to terminate is subject to two exceptions, which are set out in s 17(2) of the Act.

the Act coming into force on 11 February 2022. The regulations will specify what information must be provided to the Commission and/or MBIE, which industry participants must provide that information, and when they must provide it.

*Requirements coming into force on 11 August 2022*

17. As noted in the section above about fixed wholesale contractual terms, those provisions initially only apply to contracts entered into after 11 August 2021.<sup>3</sup> From 11 August 2022 onwards, they will apply to all fixed wholesale contracts.

**The Commission's role under the Act**

18. Under the Act, the Commission has an enforcement role and a monitoring role. As indicated above, our enforcement role commences on 11 August 2021, and our monitoring role on 11 February 2022.

*Our enforcement role*

19. The Commission is responsible for enforcing the requirements of the Act. Accordingly, we will be monitoring compliance with the requirements of the Act, investigating potential non-compliance, and taking enforcement action where appropriate.
20. Where we have concerns about potential non-compliance, we may investigate. If we consider a breach has likely occurred, we will apply our Enforcement Criteria to decide on an appropriate enforcement response.<sup>4</sup> A range of enforcement responses are available, including bringing proceedings in the High Court or District Court seeking pecuniary penalties. Our Enforcement Response Guidelines provide more information about our approach to enforcement.<sup>5</sup>
21. We expect that fuel industry participants will comply with the requirements of the Act from the time those requirements come into force. If you have any concerns about complying with the Act, please advise us ahead of the requirements coming into force. We have no ability under the regulatory regime to extend timeframes for compliance or to grant exemptions. However, proactive communication about potential non-compliance is something we are likely to take into account in determining our enforcement response.

*Our monitoring role*

22. The Commission is empowered to analyse information disclosed under the information disclosure requirements, and we may publish that analysis.

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<sup>3</sup> As noted above, the exception to this is the right to terminate after 5 years, which applies to all contracts from 11 August 2021 regardless of when they were entered into.

<sup>4</sup> Our Enforcement Criteria are explained on our website at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>.

<sup>5</sup> Our Enforcement Response Guidelines are available at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>.

23. We intend to use this power to monitor the competitive performance of the fuel market and whether we are seeing signs of competition improving for the long-term benefit of fuel consumers.
24. As indicated above, MBIE is currently developing the information disclosure requirements that will determine what information fuel industry participants are required to provide us with for the purposes of our analysis. The information disclosure requirements will be set out in regulations to be made by the Governor General on the recommendation of the Minister of Energy and Resources. Once the information disclosure requirements are set, we will be in a better position to consider our approach to analysis and reporting and to share more information about this.

#### Setting the form and manner in which information must be provided

25. Separate from the process of making the information disclosure regulations, the Act provides both MBIE and the Commission the ability to specify the form and manner in which the information must be provided.
26. The information disclosure regulations will specify the information that must be provided to us and/or MBIE, by whom, and how often. Once the information disclosure regulations have been made, we expect to specify the form and manner in which that information must be provided to us. In practice, that means we will likely develop templates that reflect the information disclosure regulations, specify the file format in which that information must be provided, and specify the means by which that information is to be submitted to us (eg, via a secure, online portal).
27. We intend to start engaging with the industry this year about how we might specify the form and manner in which information must be provided to us.

#### Commercial sensitivity

28. We appreciate that much of the information that we will receive under the information disclosure requirements is likely to be commercially sensitive. We take the protection of commercially sensitive information seriously and will have robust systems and processes in place for receiving and handling this information. When we come to report on our analysis of information disclosure data, we will consider how we can make information available about the competitive performance of the fuel market without revealing commercially sensitive information.
29. All information held by the Commission is subject to the Official Information Act (OIA). Under the OIA, all information is to be made available unless good reasons exist to withhold it. Reasons to withhold disclosure include where release would unreasonably prejudice the commercial position of the supplier or subject of the information, although this must be balanced against the public interest in disclosing the information. When the Commission receives a request for information which covers confidential or commercially sensitive material, we generally consult with the parties that provided, or are the subject of, the information.

*Competition and consumer protection laws*

30. In addition to the Fuel Industry Act, the Commission enforces other legislation that applies to the fuel sector. This includes the Commerce Act which prohibits anti-competitive conduct and acquisitions that substantially lessen competition, and the Fair Trading Act, which prohibits false and misleading conduct and other unfair business practices.
31. The Fuel Industry Act does not limit fuel industry participants' obligations under those other pieces of legislation.

**Next steps**

32. As a part of establishing an ongoing relationship, we are keen to meet with industry participants to make introductions and to answer any initial questions you may have.
33. We have begun contacting industry participants to arrange these meetings, prioritising those industry participants facing obligations under the Act. Please contact us if you would like to meet with us but have not yet heard from us.
34. If you have any queries about this letter or our fuel sector work more generally, please contact Scott Pearse-Smith (Acting Manager, Fuel Regulation) at [regulation.branch@comcom.govt.nz](mailto:regulation.branch@comcom.govt.nz). If you have a complaint about potential non-compliance with the Act, please submit your complaint using our webform at <https://comcom.govt.nz/make-a-complaint>.

Yours sincerely



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