COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

Fuel Industry Bill 2020

Submitted to:

Finance and Expenditure Committee

7 July 2020

Commerce Commission submission on Fuel Industry Bill 2020

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the Fuel Industry Bill 2020 (the Bill).

2. In light of our proposed functions under the Bill, our submission to the Finance and Expenditure Committee (the Committee) is focused upon the practical implementation of the Bill with the objective of:

    2.1 Assisting with the development of legislative provisions that are clear for industry and readily administered and enforced by the relevant chief executive and the Commission; and

    2.2 Assisting to ensure that the Act reflects what we understand to be the intended policy approach of the Government.

3. The body of our submission summarises our key points. Attached is a more detailed list of specific drafting comments and suggestions.

Executive summary

4. There are several areas where we consider that the Bill could be clarified or elaborated upon. In particular:

    4.1 A clearer statement of the Commission's functions, duties and powers with respect to analysis and reporting of information disclosed under the information disclosure requirements would be helpful to provide certainty about the scope of work for the Commission contemplated by the Bill.

    4.2 Stipulating a single commencement date for the Bill and removing the ability to change the commencement dates for the substantive parts of the Bill would provide more certainty for industry and the Commission about the time available to prepare for implementation of the new regime. For example, the Commission will need sufficient notice of the date of implementation to adequately resource its new functions, duties and powers. If the ability to change the commencement dates via Order in Council is retained, we would suggest consideration is given to the introduction of a requirement that a reasonable notice period is given before the various parts of the Bill come into force.

    4.3 The Bill would benefit from clarification of the circumstances in which it is contemplated that a private litigant may seek compensation for loss or damage suffered as a consequence of breach of provisions of the Bill without the need for the Commission to seek a pecuniary penalty or seek compensation on their behalf.

4.4 Placing the burden of proof on the wholesale supplier where the wholesale supplier seeks to rely on specific exceptions to the wholesale contract rules in clauses 16, 17 and 18 would make those clauses more effective. This is because the wholesale supplier is in the best position to prove (on the balance of probabilities) that the exception applies, since the supplier will have the best understanding and possess the necessary information to show that something is reasonably necessary to enable, or to enable recovery of, specific investment, or in order to protect the reasonable commercial interests of the supplier.

5. We support the introduction of a regulatory backstop in the near future. The existence of a regulatory backstop will provide a strong incentive for fuel companies to change their behaviour by providing a clear pathway to further regulation if the initial reforms do not deliver improved competition and outcomes for consumers. A mechanism providing for the introduction of a regulatory backstop could be considered for inclusion in the Bill, leaving details to be determined at a later date.

6. We note there are still important details to be worked through in Regulations that will have a bearing on the implementation and effectiveness of the new regulatory regime.

Context

7. The Commerce Commission is New Zealand's primary competition, consumer and economic regulatory agency.

8. In December 2018, the Minister of Commerce and Consumer Affairs asked us to undertake a study into factors affecting competition for the supply of retail petrol and diesel used for land transport in New Zealand. The study was carried out under Part 3A of the Commerce Act 1986 (Commerce Act). We completed a study of the retail fuel market in New Zealand in December 2019 and provided a report to Government for its response.

9. Having considered the findings of our report, the Government developed the Fuel Industry Bill 2020. The Bill progresses most of the recommendations from the Commission's market study and, in particular, it seeks to promote the development of an active wholesale market for fuel.

10. The Bill proposes an enforcement role for the Commission in respect of the new fuel regulatory regime. It also enables the Commission (in addition to the Chief Executive of the Ministry for Business, Innovation and Employment (MBIE)) to publish any analysis or summary they have made of information that is disclosed to them under the information disclosure requirements. The Bill allows the Commission (in addition to the Chief Executive of MBIE) to specify the form and manner in which information required to be disclosed under the information disclosure requirements (to be set in Regulations) must be provided. To support the Commission's enforcement of the regulatory regime, the Bill also provides the Commission with the ability to use certain powers under the Commerce Act, including s 98 which enables the Commission to require the provision of information for the purposes of carrying out its functions and exercising its powers.

11. In light of our proposed functions under the Bill, our submission to the Committee is focused upon the practical implementation of the Bill with the objective of:

    11.1 Assisting with the development of legislative provisions that are clear for industry and readily administered and enforced by the relevant chief executive and the Commission; and

    11.2 Assisting to ensure that the Act reflects what we understand to be the intended policy approach of the Government.

12. Certainty and clarity are important for an effective regulatory regime. Uncertainty in the regulatory framework or its enforcement could, for example, undermine incentives for new investment, including by firms who may enter and improve competition.

There are areas where the Bill could be improved

13. We have attached to this submission a list which identifies areas of the Bill that could be improved, including suggestions for clarification or elaboration.

14. Below, we highlight some of the key areas where the Bill could be improved.

More detail in relation to the Commission's functions and powers

15. It would be helpful if the Bill was more explicit about the Commission's functions, duties and powers with respect to analysis and reporting of information disclosed under the information disclosure requirements. The Bill is not as clear as it could be about what scope and purpose of analysis the Commission is empowered to undertake, nor whether we are able to gather information beyond that disclosed under the information disclosure requirements for the purposes of that analysis. Clarifying this would provide greater certainty about the scope of the Commission's work and the proper use of information gathering powers related to it.

Providing for certainty in relation to commencement

16. Stipulating a single commencement date for the Bill by removing the ability for the commencement dates for the substantive parts of the Bill to be brought forward ahead of the dates specified in the Bill would provide more certainty for industry and the Commission about the time available to prepare for implementation of the new regime. For example, before the relevant requirements come into force:

    16.1 Industry participants will need to review and renegotiate their wholesale contracts, develop systems and processes for implementing terminal gate pricing, put in place systems to collect, store and process the information required to be collected and disclosed under the information disclosure regime, and update their signage at retail fuel sites to comply with consumer information requirements.

    16.2 The Commission will need to establish the capacity, capability and systems necessary to effectively perform its functions under the regulatory regime and to provide any guidance for industry that may help the industry adapt to the new regime. The Commission may also need to seek additional funding to ensure we can adequately resource the implementation of the regime.

17. If the ability to change the commencement dates via Order in Council is retained, we would suggest consideration is given to the introduction of a requirement that a reasonable notice period is given before the various parts of the Bill come into force.

Providing for rights of private action

18. At present, the Bill appears to contemplate that:

    18.1 Only the Commission may seek a pecuniary penalty for breach of specified provisions of the Bill and the court may order compensation in any such proceeding (under cl 31(3)) or make any other order (under cl 38); and

    18.2 Private litigants may bring an application for injunction (under cl 34) and seek additional orders (under cl 38).

19. We encourage clarification of two matters relating to the rights of private litigants:

    19.1 First, it is unclear whether a private litigant can bring a proceeding for any purpose other than an injunction. For example, it is not clear whether they may bring a proceeding for a declaration of breach of the Bill and seek orders under cl 38. This is because cls 38(1) and 38(2) provide for orders to be made only in 'any proceedings under this subpart' – being proceedings brought by the Commission seeking a pecuniary penalty under cl 29 or proceedings brought by a private litigant or the Commission for an injunction under cl 34.

    19.2 An injunction may not always be appropriate or necessary. For example, where at the time proceedings are brought the wholesale supplier has ceased the conduct complained of, or the reseller has exited the market as a consequence of the breach of the Bill. It would be useful to clarify that a

private litigant can independently bring proceedings relating to contravention of the Bill, seeking orders under cl 38, without first seeking an injunction.

19.3 One way to achieve this would be to amend cl 38(1) to read:

'Where, in any proceedings under this subpart, or on the application of any person, the court finds that a party …'.

19.4 Clause 38(2) would require similar amendment to read:

'… the court may, in any proceedings under this subpart, or on the application of any person, make an order …'.

19.5 This would be consistent with the approach to the making of 'other orders' in s 43 of the Fair Trading Act 1986 (Fair Trading Act) and more generally with the ability of private litigants to pursue compensation under the Commerce Act.

19.6 Second, we consider that a party could attempt to argue that the 'other orders' that can be made under cl 38(1) may not include orders for compensation given that this is expressly provided for in cl 31 but not in cl 38(1). Assumedly, orders for compensation may be made by the court given that cl 38(1) requires a finding that a party has suffered loss or damage because of a contravention of the Act before 'other orders' can be made. Further, there is no restriction on what 'other order' may be made by the court. Nevertheless, to provide greater clarity in relation to the rights and obligations of parties affected by the Bill, it would be useful to clarify in cl 38(1) that the orders that the court can make include orders for compensation.

19.7 If the Bill is amended to clarify that orders that the court can make under cl 38(1) include orders for compensation, we suggest also adding a limitation period for compensation claims. We suggest that could be achieved by adding a new subclause to cl 38 based on s 43A of the Fair Trading Act and/or s 82(2) of the Commerce Act.

20. The Commission supports the approach outlined above because restriction of the ability for affected parties to seek compensation for themselves under the Bill may create an unnecessary reliance on the Commission to take enforcement action and seek compensation on their behalf. In this regard, we note that:

20.1 The Commission cannot always pursue every case of alleged non-compliance, and must prioritise its enforcement activities. Public interest is a key consideration when deciding whether to bring an enforcement case;

20.2 In cases where a contravention of the law has caused loss to a specific party or parties, and the benefit of taking the case would largely accrue to those parties, it may not be appropriate for the Commission to pursue that case (depending on whether there are issues of wider public interest involved);

20.3 The Commission may come to a different view from that of the affected party about whether the law has been contravened, or about the seriousness of any contravention. Affected parties should be able to seek compensation without the need to seek it through the Commission;

20.4 Private litigants are best placed to quantify and claim loss or damage that they suffer; and

20.5 Private action can lead to the development of key legal precedent which benefits all parties affected by the regulatory regime.

21. We doubt that the provision of a right of private action would necessarily give rise to a raft of private litigation. However, the ability to bring that action may better incentivise conduct that avoids loss or damage and/or resolves claims of loss or damage.

22. Further, we note that the issues raised above would apply equally to both arbitration and court proceedings. This is because, where a matter is referred to arbitration under the Bill, the arbitrator would be in the same position as the court in terms of the circumstances in which it could award compensation.

23. In summary, we support greater clarification in the Bill of the circumstances in which it is contemplated that a private litigant may seek compensation for loss or damage suffered as a consequence of breach of provisions of the Bill without the need for the Commission to seek a pecuniary penalty or seek compensation on their behalf.

Burden of proof for exceptions to wholesale contracts rules

24. For each of clauses 16, 17 and 18 (which all relate to wholesale contract terms), an exception is provided in circumstances where a contractual provision is reasonably necessary to enable, or to enable recovery of, specific investment, or in order to protect the reasonable commercial interests of the supplier. As the Bill is drafted, the burden of proof will lie with the Commission or reseller to show that it is not reasonably necessary to enable, or to enable recovery of, specific investment, or in order to protect the reasonable commercial interests of the supplier. We consider the burden of proof should lie with the wholesale supplier. This is because the wholesale supplier is in the best position to prove (on the balance of probabilities) that the exception applies, since the supplier will have the best understanding and possess the necessary information to show that something is reasonably necessary to enable, or to enable recovery of, specific investment, or in order to protect the reasonable commercial interests of the supplier.

The importance of a regulatory backstop

25. We note the Government's decision not to include a regulatory backstop in this Bill and to instead continue to develop one to be introduced at a later date. We support the introduction of a regulatory backstop in the near future. A mechanism providing for the introduction of a regulatory backstop could be considered for inclusion in the Bill, leaving details to be determined a later date.

26. The existence of a mechanism for the introduction of a regulatory backstop would provide a strong incentive for fuel companies to offer more competitive terminal gate prices by providing a clear pathway to further regulation if the initial reforms do not deliver improved competition and outcomes for consumers.

The importance of the Regulations to be made pursuant to the Bill

27. We note there still important details to be worked through in Regulations that will have a bearing on the implementation and effectiveness of the new regulatory regime. We have indicated to MBIE officials that we are available to provide input on the development of the Regulations as that work progresses.

Ensuring the Commission is funded for this work

28. It will be important to the effective operation of the fuel regulatory regime that the Commission is funded to carry out its functions, duties and powers under the legislation. Further resourcing will be required to give effect to implementing the new regime. We will continue to discuss this with MBIE as our monitoring agency.

Conclusion

29. We thank the Committee for this submission opportunity and would be pleased to provide any further assistance that you may require, including by speaking to this submission.

30. If you have any specific questions on this submission please contact Matthew Lewer, Manager Regulatory Developments (matthew.lewer@comcom.govt.nz) in the first instance.

Attachment 1: List of specific drafting comments and suggestions

Reference	Comment	Suggestion
Clause 2; Schedule 1	The substantive parts of the Bill are set to come into force at the earlier of: • a date specified in the Bill; or • a date appointed by the Governor-General by Order in Council. Stipulating a single commencement date for the Bill by removing the ability for the commencement dates for the substantive parts of the Bill to be brought forward ahead of the dates specified in the Bill would provide greater certainty for industry about the time they have to update their commercial affairs as necessary ahead of the requirements of the Bill coming into force. It would also provide certainty to the Commission about the period of time the Commission would have to establish capacity, capability, and the systems necessary to effectively perform its functions under the regulatory regime and to provide any guidance for industry that may help the industry adapt to the new regime. The Commission may also need time to seek additional funding to ensure we can adequately resource the implementation of the regime.	Consider stipulating a single commencement date for the Bill and removing the ability for the commencement dates for the substantive parts of the Bill to be brought forward ahead of the dates specified in the Bill. If the ability to change the commencement dates via Order in Council is retained, we would suggest consideration is given to the introduction of a requirement that a reasonable notice period is given before the various parts of the Bill come into force.
Clause 4	The term "wholesale contract" is defined as "a contract between a wholesale supplier and a distributor or dealer for the sale and supply of engine fuel". In that definition, it is unnecessary to specify both "distributor" and "dealer", since the term "reseller" would capture both.	In the definition of "wholesale contract", replace "distributor or dealer" with "reseller"
Clause 4	The term "wholesale supplier" is defined as "a person that sells and supplies engine fuel, as the whole or part of its business, to persons other than end users". It will be important that industry participants have clarity about whether they fall within the scope of the definition. As an example, under the definition in the Bill there may some room for doubt as to whether a	We suggest consideration be given to whether the definition of "wholesale supplier" provides sufficient clarity about which industry participants are caught and which are not.

	person that has recently ceased supplying under wholesale contracts continues to be a wholesale supplier and therefore continues to be subject to, for example, the TGP regime.	
Part 2, Subpart 1 – Terminal gate pricing		

Clause 11(5)(b)	Clause 11(5)(b) contains an ambiguity.
	
	Clause 11(5)(b) could be read as:
	
	• a party to a fixed wholesale contract with the wholesale supplier; or
	• an interconnected body corporate of the wholesale supplier
	
	Or it could be read as:
	
	• a party to a fixed wholesale contract with:
	  ○ the wholesale supplier; or
	  ○ an interconnected body corporate of the wholesale supplier
	
	We assume the latter is the intended reading, as the first reading would end up partially duplicating clause 11(5)(a).
		We suggest clarifying the ambiguity in clause 11(5)(b).
		
		One option for doing so would be to add the words shown here in bold:
		
		a party to a fixed wholesale contract with the wholesale supplier or **a party to a fixed wholesale contract with** an interconnected body corporate of the wholesale supplier.

Part 2, Subpart 2 – Wholesale contractual terms		
Clause 18(1)(a)	Clause 18(1)(a) provides that a "wholesale supplier must not enter into, or offer to enter into, a wholesale contract that contains a provision that is likely to limit the ability of the reseller to compete with the wholesale supplier or any other person". The provision implies that the reseller is the other party to the wholesale contract, but it would be helpful for the provision to be explicit about it.	In clause 18(1)(a), insert the words "who is a party to the wholesale contract" after "is likely to limit the ability of the reseller"

Clause 18(4)(b)(ii)	Clause 18(4) sets out examples of provisions that may be likely to limit the ability of the reseller to compete with the wholesale supplier or any other person. The example given in clause 18(4)(b)(ii) is 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". We understand the policy intent behind this example to be that a wholesale supplier should not prioritise the allocation of fuel to its own retail sites over the allocation to the reseller (in the event of a supply constraint). A provision that had this effect would likely limit the reseller's ability to compete because the reseller could face a supply shortage in circumstances where there is only enough fuel to supply the wholesale supplier's own retail fuel sites. The wording of the current clause would, however, enable a wholesale supplier to prioritise supply to its own retail sites, so long as the prioritisation was not disproportionate. It is not clear what would amount to a disproportionate or proportionate prioritisation. This ambiguity could undermine the effectiveness of the provision, as a wholesale supplier could exploit the ambiguity to prioritise supply to its own retail sites.	In clause 18(4)(b)(ii), delete the word "disproportionately"
Clauses 16(2)(a); 17(3); 18(1)(b)	For each of clauses 16, 17 and 18, an exception is provided in circumstances where a contractual provision is reasonably necessary to enable, or to enable recovery of, specific investment, or in order to protect the reasonable commercial interests of the supplier. As the Bill is drafted, the burden of proof will lie with the Commerce Commission or reseller to show that it is not reasonably necessary to enable, or to enable recovery of, specific investment, or in order to protect the reasonable commercial interests of the supplier.	In each of clauses 16, 17 and 18, provide that the burden of proof lies on the wholesale supplier to show that the exception applies. For example, a new subclause 18(1A) could be added to provide that: "For the purpose of subsection (1)(b), a term in a wholesale contract must be presumed not to be reasonably necessary in order to protect the

	We consider the burden of proof should lie with the wholesale supplier. This is because the wholesale supplier is in the best position to prove (on the balance of probabilities) that the exception applies, since the supplier will have the best understanding and possess the necessary information to show that something is reasonably necessary to enable, or to enable recovery of, specific investment, or in order to protect the reasonable commercial interests of the supplier.	reasonable commercial interests of the supplier, unless the supplier proves otherwise."
Various	Part 2, Subpart 2 imposes a number of obligations on wholesale suppliers with respect to their new and existing wholesale contracts. In most instances, the Bill provides a 24-month lead time for wholesale suppliers to bring their existing wholesale contracts into compliance with the relevant obligations of Part 2, Subpart 2 (unless an order in Order-in-Council brings the provisions into force sooner – see our earlier comment on this).	We suggest consideration be given to whether the Bill should provide for a contingency if parties are unable to agree changes to existing wholesale contracts to make them compliant within the period before the wholesale contract terms provisions come into force for existing contracts.
Part 2, Subpart 4 – Disclosure of information		
Various	The Bill is not as clear as it could be about what scope and purpose of analysis the Commission is empowered to undertake, nor whether the Commission is able to gather information beyond that disclosed under the information disclosure requirements for the purposes of that analysis. Clause 27 of the Bill provides that: "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." (ie, read strictly, it only confers a power on the Commission and MBIE to *publish* certain information). It is arguable that clause 27, read together with the purpose statement for information disclosure in clause 23, gives the Commission and MBIE an implied function to (1) monitor the performance of fuel markets; and (2) assess whether the purpose of the Bill is being met. However, the Bill is not explicit about this.	We suggest clarifying the Commission's powers, functions and duties with respect to its analysis and reporting role under the Bill. One approach (which draws on s 53B(2) of the Commerce Act) would involve splitting clause 27 into two subclauses: • one which provides that the chief executive (of MBIE) or the Commission may undertake summary and analysis for the purpose of the purposes of this subpart; and

	Furthermore, even if such an analysis function is implied, the content and limits of such a function are not clear. For example: • It is not clear what the function enables the Commission and MBIE to do. Section 27 provides that we may publish any analysis or summary, but it does not say for what purpose nor what the boundaries of the summary and analysis are. • It is arguable that the Commission would not be permitted to use its compulsory information gathering power (s 98 of the Commerce Act) to obtain additional information to support it in carrying out the function. This is because: o clause 27 could be interpreted to limit MBIE and the Commission to using only information provided in response to the information disclosure requirements for the purposes of carrying out the summary and analysis function; and o clause 32, which imports the Commission's s 98 Commerce Act power, could be interpreted to be limit the Commission's use of its s 98 powers to enforcement purposes only.	• one that provides (as the current cl 27 does) that the chief executive (of MBIE) or the Commission may publish any such summary or analysis. The approach outlined above would not resolve the ambiguity we describe with respect to the Commission's ability to use its s 98 Commerce Act information gathering powers for the purposes of carrying out its summary and analysis function under the Bill. We suggest this would require clarification of both cl 27 and cl 32 to address the ambiguities noted in the adjacent column. Another approach would be to introduce a provision similar to section 9A of the Telecommunications Act, which gives an explicit monitoring power and unambiguously enables the Commission to use s 98 of the Commerce Act to obtain information to support the monitoring power.
Clause 26	Clause 26 provides that the "chief executive or the Commission may specify the form and manner in which any information that is required to be disclosed under this subpart must be disclosed". It appears that the Bill does not provide a mechanism to enforce any failure to comply with the form and manner requirements.	Include an obligation to comply with form and manner requirements in Part 2, Subpart 4. This could be achieved by inserting an additional subparagraph in clause 26: "A fuel industry participant that is required to disclose information to the chief executive or the Commission under this subpart must disclose the information in the form or manner specified under this section".

		Make a failure to comply with the form and manner requirements a contravention, subject to pecuniary penalties under clause 29.
Clause 28	Information sharing between the Commission and MBIE under clause 28 is limited to the purposes of "this subpart" (ie, subpart 4 of part 2, Disclosure of Information), rather than the Act as a whole. This means that clause 28 does not explicitly provide that information can be shared for the purpose of enforcement, for example. It would be beneficial if information held by either MBIE or the Commission could be shared for the purposes of the Act.	Delete the word "subpart" in subclauses 28(1)(a)-(b) and 28(2) and replace with "Act".
Part 3, Subpart 1 – Enforcement		
Private rights of action	At present, the Bill appears to contemplate that: • Only the Commission may seek a pecuniary penalty for breach of specified provisions of the Bill and the court may order compensation in any such proceeding (under cl 31(3)) or make any other order (under cl 38); and • Private litigants may bring an application for injunction (under cl 34) and seek additional orders (under cl 38). We encourage clarification of two matters relating to the rights of private litigants: • First, it is unclear whether a private litigant can bring a proceeding for any purpose other than an injunction. • Second, we consider that a party could attempt to argue that the 'other orders' that can be made under cl 38(1) may not include	It would be useful to clarify that a private litigant can independently bring proceedings relating to contraventions of the Bill, seeking orders under cl 38, without first seeking an injunction. One way to achieve this would be to amend cl 38(1) to read: 'Where, in any proceedings under this subpart, or on the application of any person, the court finds that a party …'. Clause 38(2) would require similar amendment to read: '… the court may, in any proceedings under this subpart, or on the application of any person, make an order …'.

	orders for compensation given that this is expressly provided for in cl 31 but not in cl 38(1). We note that the issues raised above would apply equally to both arbitration and court proceedings. This is because, where a matter is referred to arbitration under the Bill, the arbitrator would be in the same position as the court in terms of the circumstances in which it could award compensation. A more detailed account of these points is provided at paragraphs 18 to 23 of the body of this submission.	To provide greater clarity in relation to the rights and obligations of parties affected by the Bill, it would be useful to clarify in cl 38(1) that the orders that the court can make include orders for compensation. If the Bill is amended to clarify that orders that the court can make under cl 38(1) include orders for compensation, we suggest also adding a limitation period for compensation claims. We suggest that could be achieved by adding a new subclause to cl 38 based on s 43A of the Fair Trading Act and/or s 82(2) of the Commerce Act.
Clause 29	The pecuniary penalty provisions in clause 29 do not capture a contravention of clauses 11(3) or 11(4).	Either make failure to comply with clauses 11(3) or 11(4) a contravention subject to a pecuniary penalty under clause 29(1); or a contravention subject to a pecuniary penalty under clause 29(3).
Clause 29(2)	The maximum penalty of $5 million may be too small to deter some conduct that may be highly profitable to the party undertaking it.	We suggest consideration be given to including a gain-based maximum for contravening parties other than individuals, as in s 80(2B)(b)(ii) of the Commerce Act. Another option would be to provide for a further penalty for continuing breach, as in s 156M of the Telecommunications Act 2001.
Clause 29	Clause 29(3) states that the District Court may order a person to pay a pecuniary penalty "if satisfied that the person has contravened a notice given by the Commission under section 22." However, the relevant obligation in clause 22(3) is that the person "must comply with the notice within the specified period". The description of the contravention in clause 29(3) should correspond with the obligation as expressed in clause 22(3). Clause 40(a) includes similar language.	In clause 29(3), replace "contravened a notice given by the Commission under section 22" with "failed to comply with a notice given by the Commission under section 22 within the specified period". In clause 40(a), delete "contraventions of corrective notices issued under section 22"

Clause 29	Clause 29(5) does not include past conduct as a factor to be considered in determining the appropriate penalty. While 29(5) permits "any other relevant matter" to be taken into account, it would be helpful if the Bill explicitly included the factor, as do similar provisions in the Commerce Act (see, for example, s 83(2)).	Insert new subclause 29(5)(ba) "whether or not the person has previously been found by the court in proceedings under this Part to have engaged in any similar conduct".
Clauses 31 and 34	Clauses 31(1); 34(1)(a); 34(1)(b)(ii) – each of these clauses refers to contraventions "of this Act or regulations". However, contraventions are of obligations in the Act, not the regulations. A failure to comply with the regulations will be a contravention of a provision in the Act, rather than a contravention of the regulation. This is reinforced by the availability of pecuniary penalties only in relation to provisions in the Act (see clauses 29(1)(a) and 29(3)). Relatedly, cl 38(5) states that, in that section, "a contravention of this Act includes a reference to a contravention of any regulations made under this Act". This seems unnecessary (for the reasons above) unless it is intended that orders under clause 38 are able to be made for failures to comply with regulations that stand outside of the Act's contraventions.	In each of clauses 31(1); 34(1)(a); 34(1)(b)(ii) delete "or regulations" Delete clause 38(5).
Clause 32	Clause 32 applies certain provisions of the Commerce Act "to this subpart" (ie, Subpart 1 – Enforcement, of Part 3 – Enforcement and miscellaneous provisions). The application "to this subpart" has what appears to be unintended consequences, for example: • Section 106 (Proceedings privileged) will provide protection to Commission staff and the Commission only when exercising its enforcement function. In contrast, under the Commerce Act, s 106 applies to the exercise of any of the Commission's function under that Act;	In clause 32, delete "subpart" and replace with "Act".

	• Sections 101/102 will apply only to notices under the subpart, which are s 98 notices, and not to other notices under the Bill (such as a clause 22 notice) We consider the Commerce Act provisions would be better expressed as applying "to this Act".	
Clause 38	Clause 38(1)(a) refers to a "person in contravention". This could be argued to limit the provision to a person who is currently contravening a provision.	In clause 38(1)(a), delete "in contravention" and replace with "who has contravened".
Part 3, Subpart 2 – Miscellaneous provisions		
Clause 42	Clause 42(f) applies Schedule 5 of the Commerce Act to the Fuel Industry Act. This appears unnecessary, since Schedule 5 relates only to determinations made under Part 4 of the Commerce Act.	Delete clause 42(f).
Clause 43	The wording of clause 43(4) "*they may refer the dispute to arbitration*" suggests that agreement of the parties is required to refer the matter to arbitration. Commonly, dispute resolution provisions in agreements provide that where parties are unable to resolve matters in mediation, either party can instigate the arbitration proceedings. In the present case, if agreement of the parties is required to proceed to arbitration, this would mean either party could decline to proceed to arbitration. This could be to the detriment of a reseller where a wholesale supplier declines to proceed to arbitration in an effort to force the adversely affected reseller into prolonged and expensive litigation.	We suggest that clause 43(4) be amended to provide that either party may refer the dispute to arbitration.
Clause 43	We consider there is a need for a defined timeframe within which the mediation is to be concluded after which the parties can proceed to arbitration (or otherwise to the courts).	We suggest adding the words "within the prescribed timeframe" after the word "mediation" in clause 43(4). Regulations should then specify the timeframe within which the mediation is to be concluded after which the parties can proceed to arbitration (or otherwise to the courts). (Typically, the timeframe

		allowed for mediation would be 14, 21 or 30 days from appointment of the mediator).