

3 November 2022

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Fuel Industry Amendment Bill**

### **Purpose**

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1. We have considered whether the Fuel Industry Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 24587/4.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 25(c) (right to be presumed innocent until proven guilty) and s 21 (right to be secure against unreasonable search and seizure). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Fuel Industry Act 2020 (principal Act) to introduce a regulatory backstop to the terminal gate pricing (TGP) regime. The TGP regime requires wholesale fuel suppliers to post a daily spot price at which they must supply fuel. The creation of a wholesale spot market is intended to encourage new entry and expansion in new areas by existing players.
5. The regulatory backstop introduced by the Bill introduces a threat of price regulation to incentivise wholesale suppliers to offer competitive TGPs. The Bill sets out a process to activate the regulatory backstop which will give effect to price regulation. This involves the Commerce Commission (Commission) considering the TGP levels and providing a recommendation to the Minister of Energy and Resources on whether to price regulate the TGP of one or more wholesale suppliers. Price regulation will be introduced by Order in Council, and the Commission must then set a pricing principle or methodology that the supplier or suppliers are required to follow when setting TGPs.
6. The Bill also incorporates certain powers from the Commerce Act 1986 (Commerce Act) in relation to the regulatory backstop provisions, and amends an offence in the principal Act.

### **Consistency of the Bill with the Bill of Rights Act**

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#### **Section 21 - Right to be secure against unreasonable search and seizure**

7. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

8. Clause 290 of the Bill imports some of the Commission's existing powers under the Commerce Act including its powers to require certain information under sections 53N and 53ZD of that Act. A power to compel information constitutes a search for the purpose of section 21 of the Bill of Rights Act. For completeness, we have considered whether these powers are reasonable in this context.<sup>1</sup>
9. The powers to require information are linked to the Commission's monitoring functions and regulation of price-quality paths. Any intrusion into privacy is minimal, the information that the Commission may require relates to the activities regulated under the Bill, and there will not be another viable way for the Commission to obtain the information. We consider that the incorporation of the existing powers into this context to be reasonable to ensure that the Commission has the necessary tools to monitor the TGP regime.

### **Section 25(c) - Right to be presumed innocent until proven guilty**

10. Clause 9 of the Bill amends an existing strict liability offence in section 42 of the principal Act. The existing offence provides that a person must not, without reasonable excuse, refuse or fail to comply with a notice under section 98 of the Commerce Act. The amendment adds sections 53N and 53ZD of the Commerce Act to this provision, so that it will be an offence to, without reasonable excuse, fail to comply with a notice under those sections as well.
11. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by finding that certain facts occurred without proof of *mens rea*. The accused is then required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability; whereas usually in criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.
12. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of section 5 of that Act. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.<sup>2</sup>
13. Strict liability offences may nevertheless be justifiable limits on rights under s 5 of the Bill of Rights Act. They have been found to be more likely to be justifiable where:
  - a. The offences are regulatory in nature and apply to persons participating in a highly regulated industry;
  - b. The defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and,
  - c. The penalty for the offence is proportionate to the importance of the Bill's objective.

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<sup>1</sup> The Supreme Court has held that an unreasonable search logically cannot be demonstrably justified under section 5 of the Bill of Rights Act and therefore the inquiry does not need to be undertaken (see *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162] per Blanchard J). Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable.

<sup>2</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

14. The strict liability offence in the Bill supports the Commission's ability to gather information required to monitor compliance and carry out its regulatory functions in relation to the TGP regime. Sections 53N and 53ZD of the Commerce Act allow the Commission to require certain information by notice for the purpose of monitoring compliance with a price-quality path (see s 53N), or for carrying out its functions or exercising its powers in relation to the regulation of the price and quality of goods or services in certain markets (see s 53ZD). This supports the objective of promoting wholesale competition in fuel markets, which we consider to be an important objective.
15. We consider that the strict liability offence as amended by the Bill can be justified under s 5 of the Bill of Rights Act. This is because:
  - a. the offence is of a public welfare nature, applying to persons in a highly regulated industry (wholesale fuel supply);
  - b. the defendant is likely to be in the best position to justify an apparent failure to comply with the relevant notice; and
  - c. the penalty for the offence is a fine (a maximum of \$100,000 for an individual, or \$300,000 for an entity), and does not involve imprisonment.
16. As such, we are satisfied that the strict liability offences set out above place a justifiable limit on the right to be presumed innocent until proven guilty.

## **Conclusion**

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17. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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