



Biofuels Statutory Review

Discussion Paper – October 2019

Published by

Better Regulation Division
Department of Customer Service
McKell Building
2-24 Rawson Place, Sydney NSW 2000
www.customerservice.nsw.gov.au

Disclaimer

This publication avoids the use of legal language, with information about the law summarised or expressed in general statements. The information in this document should not be relied upon as a substitute for professional legal advice.

For access to legislation in force in NSW go to the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au

Copyright Information

© State of New South Wales through Department of Customer Service 2019

You may copy, distribute, display, download and otherwise freely deal with this information provided you attribute NSW Fair Trading as the owner. However, you must obtain permission from NSW Fair Trading if you wish to 1) modify, 2) charge others for access, 3) include in advertising or a product for sale, or 4) obtain profit, from the information. Important: For full details, see NSW Fair Trading's copyright policy at www.fairtrading.nsw.gov.au/copyright.html or email publications@customerservice.nsw.gov.au

Contents

Contents	3
Purpose of this Discussion Paper	4
NEXT STEPS	4
IMPORTANT NOTE: PUBLICATION OF SUBMISSIONS	4
Background	6
Scope of Biofuels Act and Regulation	9
Application of Act	10
Minimum biofuel requirements	11
EXEMPTIONS FROM THE BIOFUELS REQUIREMENTS.....	12
Registration, returns and records	13
The role of the Independent Pricing and Regulatory Tribunal	15
Compliance and enforcement	16
The Biofuels Expert Panel	17
Appendix A – List of Discussion Paper Questions	18

Purpose of this Discussion Paper

This Discussion Paper aims to encourage and facilitate public discussion about the regulation of biofuels in New South Wales.

The sale of biofuels in NSW is regulated by the *Biofuels Act 2007* (Biofuels Act) and the Biofuels Regulation (No 2) 2016 (Biofuels Regulation). The Minister for Better Regulation and Innovation administers both the Act and the Regulation.

The purpose of this regulatory regime is to foster a viable and dynamic biofuels industry which reduces consumers' dependence on fossil fuels and the state's reliance on imported petroleum.

Section 32 of the Biofuels Act requires the Minister to review the Act to determine whether the policy objectives of the Act remain valid and whether the Act's provisions remain appropriate for securing those objectives. The review must commence before 30 June 2019 and a report on the outcome of the review must be tabled in each House of Parliament within 12 months. That is, by 30 June 2020.

This Discussion Paper forms a part of this review. It provides an opportunity for you to express your opinions about the biofuels regulatory regime in NSW.

The issues and questions identified in this Discussion Paper are not exhaustive, as they intend to facilitate discussion and do not indicate Government policy.

We welcome further comments on any other general matters that are relevant to improving the current regulatory framework established by the Biofuels Act and Regulation.

The NSW Government's Guide to Better Regulation, which sets out how to apply the seven better regulation principles to regulatory proposals, may assist you in considering the issues and preparing a submission. The Guide is available at: [http://productivity.nsw.gov.au/sites/default/files/2018-05/Guide to Better Regulation-October 2016.pdf](http://productivity.nsw.gov.au/sites/default/files/2018-05/Guide%20to%20Better%20Regulation-October%202016.pdf)

Next steps

Once the consultation period has closed, all comments and submissions will be considered. A report on the review and its findings will be submitted to the Minister for Better Regulation and Innovation. The final report will then be tabled in each House of Parliament by 30 June 2020.

Important Note: Publication of submissions

The consultation process is public and open. Submissions will be published on the NSW Fair Trading website. If there is any part of your submission you do not want published, please indicate this clearly

in your submission. However, be aware that there may be circumstances in which the Government is required by law to release the information, for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*.

Background

Biofuels are liquid fuels made from organic material, such as starch, sugar, animal fats and vegetable oils. In Australia, biofuels are generally derived from the waste amassed from the production of other products, such as flour.

There are two main types of biofuels produced in Australia that are used in the transportation industry, such as vehicles. These are bioethanol and biodiesel. For simplicity, the term 'biofuels' is generally used throughout this Discussion Paper to refer to both bioethanol and biodiesel. The production of these two fuels involves blending biofuels with regular unleaded petrol and diesel fuel. E10 and E85 are the most commonly available bioethanol blends, with E10 containing 10 per cent ethanol and E85 containing 85 per cent. Biodiesel is available in a number of different blends, with the most common being B5 (5 per cent biodiesel) and B20 (20 per cent biodiesel). The production of ethanol blended fuels is regulated by the Commonwealth government, and producers must meet certain requirements for ethanol to be added to petrol for fuel.

It is widely acknowledged that biofuels improve environmental quality by reducing emissions of harmful pollutants and greenhouse gases. A CSIRO study found that E10 fuel produced in Australia has between two to five per cent lower carbon dioxide emissions than regular unleaded petrol.¹ E10 is considered to be a safe and reliable fuel, and most vehicles built since 2000 will be compatible with E10 blended fuel. For compatible vehicles there should be no change to performance or drivability.²

Around the world, biofuels are becoming increasingly used as a mechanism to improve fuel security, lower greenhouse gas emissions, and therefore improve health outcomes in cities and regional areas. The United States and Brazil are the two biggest producers of biofuels, creating 70 per cent of the world's biofuels. In the United States, federal and state government programs have promoted biofuels to address issues of energy security, sustainability and regional jobs creation. In 2005, the European Union mandated that renewable fuels (including biofuels) must make up 10 per cent of total transportation fuels by 2020. Sweden is the European leader in renewable energy in the transport sector, with biofuels making up to 20 per cent of the total transportation fuel market.³

In Australia, governments have taken various measures to encourage the use of biofuels in transport in order to harness their environmental, sustainability and cost benefits. For example, the Commonwealth Government ran an Ethanol Production Grants Program between 2002 and 2015, which removed excise rates for domestic ethanol, while maintaining the full excise for imported

¹ CSIRO, *Biofuels in Australia – an overview of issues and prospects*, 2007, p. 5.

² <https://e10ok.initiatives.qld.gov.au/about/vehicle-performance>

³ Queensland University of Technology, *Biofuels to bioproducts: a growth industry for Australia*, 2018, p. 3.

ethanol. The purpose of this program was to support the production and use of ethanol as a sustainable transport fuel in Australia.⁴

The first biofuels mandate in Australia commenced in NSW on 1 October 2007. This mandate required certain fuel retailers to sell a minimum percentage of biofuels. It was introduced as a step towards reducing NSW's dependence on fossil fuels and reducing the state's reliance on imported petroleum products. The *Biofuels (Ethanol Content) Act 2007* initially only applied to primary fuel wholesalers, such as Caltex, BP, Mobil and Shell, and required these wholesalers to ensure that biofuels made up a minimum of 2 per cent of fuel sold in NSW.

In 2009, the *Biofuels Act 2007* (Biofuels Act) was amended to extend the biofuels mandate to major retailers, defined as persons who operate or control the operation of 20 or more service stations. In addition, the Biofuels Act was revised to include a series of graduated increases to the ethanol mandate, increasing to four per cent by 2010, then to six per cent in 2011.

In 2015, the NSW Government asked the Independent Pricing and Regulatory Tribunal (IPART) to identify and assess the effectiveness of options to increase the uptake of ethanol blended petrol in NSW. This review is available on the IPART website:

<https://www.ipart.nsw.gov.au/Home/Industries/Special-Reviews/Reviews/Ethanol/Assessment-of-options-to-increase-the-uptake-of-ethanol-blended-petrol>

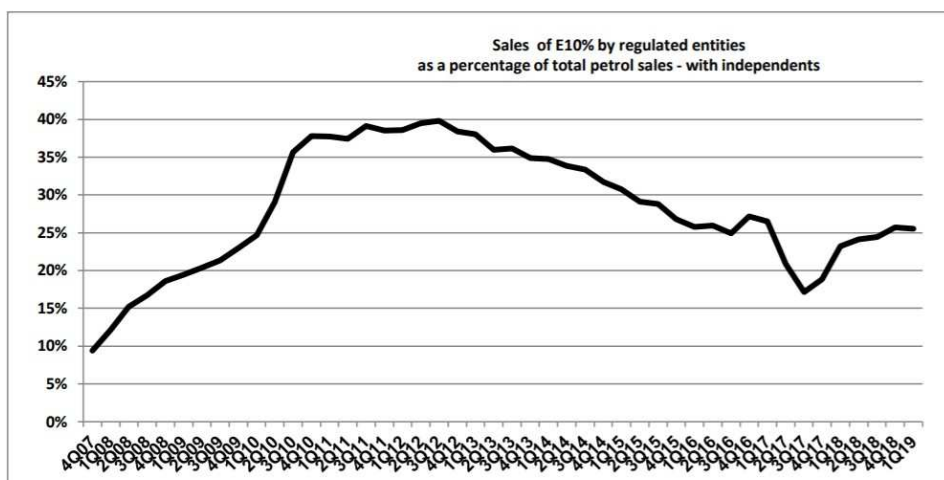
Following this report, from 1 January 2017, new biofuels laws commenced in NSW which extended to volume fuel retailers, which is any person who operates a volume fuel service station. A volume fuel service station is one which sells three or more types of petrol or diesel and sells in excess of 900,000 litres per quarter of petrol and diesel combined, in two consecutive quarters. There are approximately 200 volume fuels retailers captured under this definition, which operate around 1,000 volume fuel service stations in NSW.

The bioethanol mandate in NSW is currently six per cent, and the biodiesel mandate is two per cent.

NSW Fair Trading collects data on the sale of ethanol and publishes it quarterly. The table below shows the sale of E10 as a percentage of total petrol sales, from the final quarter of 2007 until the first quarter of 2019.⁵

⁴ <https://www.anao.gov.au/work/performance-audit/ethanol-production-grants-program>

⁵ https://www.fairtrading.nsw.gov.au/data/assets/pdf_file/0010/530875/E10-Sales-Progress-charts.pdf



In January 2017, Queensland followed NSW's lead and became the second state in Australia to mandate the minimum sale of biofuels, by introducing a three per cent biofuels mandate. In July 2018, the mandate increased to four per cent. In comparison, the biodiesel mandate requires 0.5 per cent of all diesel fuel sold by certain entities to be biodiesel. Since the mandate commenced in Queensland, there has been a significant increase in service stations offering E10 – the most common type of biofuel – from 343 sites to 693 at December 2018.⁶

This Discussion Paper is intended to stimulate discussion about the biofuels regulatory regime in NSW to ensure it remains valid and effective. The different sections of the Discussion Paper correspond to the different parts of the Biofuels Act and Regulation and the obligations they prescribe.

⁶ Department of Natural Resources, Mines and Energy, *Discussion Paper: Review of the Queensland Biofuels Mandate*, 2019, p. 5.

Scope of Biofuels Act and Regulation

The primary objective of the Biofuels Act is to support the development of a sustainable and competitive biofuels industry in NSW.

The secondary objectives are to:

- improve air quality
- address climate change by reducing greenhouse gas emissions
- provide consumers with cheaper fuel options
- reduce the reliance of NSW on imported petroleum products, and
- support regional development⁷

The Act intends to balance these objectives with the interests of small to medium fuel retailers and franchisees, many of whom are small business owners.⁸

1. Are the objects of the Biofuels Act and Regulation still valid? Why or why not?
2. Are there any other economic, social, environmental and consumer costs and benefits associated with biofuels that Government should further consider to ensure the regulatory regime is effective?
3. Are there any developments, innovations or emerging trends in the broader transport or fuel industry that Government should consider in assessing the biofuels regulatory regime?

⁷ NSW Fair Trading, *Regulatory Impact Statement: Biofuels Regulation – May 2016*, p. 3.

⁸ The Hon Victor Dominello MP, *Biofuels Amendment Bill 2016, Second reading speech*, March 2016.

Application of Act

Different legislative requirements apply to different entities under the biofuels regulatory regime.

For example, the mandate to sell a certain percentage of biofuels applies to volume fuel retailers.

These are a person or business that:

- operates or controls one or more volume fuel service station, which is a service station selling three or more types of petrol or diesel and more than 900,000 litres of petrol and diesel combined per quarter, in two consecutive quarters, or
- that operates or controls the operation of 20 or more service stations, none of which are volume fuel service stations.

Some activities of primary wholesales are also regulated by the Biofuels Act. Primary wholesalers are fuel wholesalers who operate or supply petrol or diesel fuel from an oil refinery or a shipping facility. Additionally, the Biofuels Regulation provides that a primary wholesaler also includes a person engaged with blending ethanol with petrol or biodiesel to produce biofuels blended petrol or diesel and who resells the blend.

Primary wholesalers are not subject to the requirements of the ethanol mandate. That is, the requirement to sell a certain percentage of biofuels. However, they are required to register and report quarterly volumes to NSW Fair Trading. The Biofuels (Registration) Order 2016 prescribes the information that primary wholesalers must provide to Fair Trading for the purpose of registration.

4. Are there any entities that should be included in or excluded from the Act? If so, which entities and why?
5. Are the definitions of volume fuel retailers and primary wholesalers adequate? If not, how could the definitions change?
6. Does the Act appropriately balance the interests of small businesses with the broader objectives of the mandate? Please provide comments.

Minimum biofuel requirements

The biofuels mandate is established by sections 6 and 7 of the Biofuels Act. It mandates that at least six per cent of all petrol sold in NSW by volume fuel retailers must be ethanol, and that two per cent of all diesel sold must be biodiesel. The Biofuels Act indicates an intention to increase the biodiesel mandate to five per cent from January 2012, however, that particular provision never commenced and so the biodiesel mandate continues to be two per cent. The Biofuels Act provides that the volume of petrol-ethanol blend is determined as the combined volume of petrol and ethanol in the blend. The volume of biodiesel is also determined as the combined volume of diesel and biodiesel in the biodiesel blend.

Only biofuels that comply with a biofuel sustainability standard can be counted towards meeting the mandate. The standards prescribed in the Biofuels Regulation are *RSB Principles & Criteria for Sustainable Biofuel Production (Version 2.1)* and ISO 13065:2015 *Sustainability criteria for bioenergy*.

The intention of these sustainability standards is to reflect the most modern and best-practice approaches to biofuel production and accreditation.

In addition to these requirements, volume fuel retailers must also ensure that:

- a biofuels blend is made available at each of the volume fuel retailer's volume fuel service stations, and
- at each of a volume fuel retailer's volume fuel service stations, a biofuels blend is made as accessible to the customer as any other type of petrol.

7. Should the prescribed mandate for ethanol and biodiesel sales remain at the current rate? If not, how should it change and why?
8. Are the biofuel sustainability standards adequate? Please provide comments.
9. Are there emerging industry standards or developments that should be taken into account when assessing and defining sustainability?

Exemptions from the biofuels requirements

The Biofuels Act authorises the Minister to grant an exemption to a volume fuel retailer from complying with the six per cent or two per cent mandate. Exemptions can also be granted from providing biofuels blends at service stations and from making biofuels blends as accessible to customers as other types of petrol.

No exemptions apply to the obligations to provide NSW Fair Trading with certain information and keep appropriate records. These requirements are detailed in the next section of the Discussion Paper.

Any requests for exemptions are first considered by the Biofuels Expert Panel and the Secretary of the Department of Customer Service (formerly, the Department of Finance, Services and Innovation).

The Biofuels Regulation provides that the exemption period is two years. This means that an exemption must not be granted for a period of more than two years.

NSW Fair Trading has published the *Biofuels Exemptions Framework and Guidelines* to provide information about the exemptions framework that applies under the Biofuels Act and Regulation and about the approach that will generally be taken to exemption applications. These Guidelines are available online:

https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0007/381373/Biofuels_mandate_exemption_framework.pdf.

10. Is the exemption process for not meeting the minimum biofuels requirements adequate? Should the factors that the Minister must take in to account before granting an exemption change?
11. What is the process like to seek an exemption? Are there any changes that could be made to ensure the process is as seamless and as user-friendly as possible?
12. Is the *Biofuels Exemption Framework and Guidelines* document easy to understand and comply with? Should any of the matters outlined in the Guidelines be included instead in the Biofuels Regulation to ensure abundant legal clarity?

Registration, returns and records

Before 30 June 2016, primary wholesalers, volume fuel retailers, and other operators of service stations who did not meet the definition of a volume fuel retailer were required to register with NSW Fair Trading under the Biofuels (Registration) Order 2016. However, this requirement ended on 30 June 2016.

Fair Trading now proactively registers relevant entities. It does so by collating data from the FuelCheck app and service, which requires all service stations in NSW to register with the service. Fair Trading then reviews each service station's quarterly sales of fuel to determine whether they are captured by the Biofuels Act requirements and registers any service stations accordingly.

Primary wholesalers, volume fuel retailers and service station operators must also lodge financial returns with Fair Trading. To ensure the accuracy of returns, the Act requires that records be kept.

The returns are lodged quarterly and report on:

- the total volume of petrol sold (including ethanol)
- the total volume of petrol-ethanol blend sold
- the total volume of diesel sold (including biodiesel)
- the total volume of biodiesel blend sold
- details on the number of bowsers and nozzles that are available to deliver both petrol-ethanol blend and regular unleaded petrol.

The records must be retained for no less than seven years after the end of the reported quarter and must detail for each sale of petrol (including petrol-ethanol blend) and diesel (including biodiesel):

- the volume of petrol or diesel sold
- whether the petrol or diesel sold was petrol-ethanol blend or biodiesel blend
- if the sale was for petrol-ethanol blend or biodiesel, the amount of ethanol or biodiesel in the blend
- whether the blend complies with the biofuels sustainability standard, including details of certification

13. Are the current registration, return and record keeping requirements adequate? Please provide comments.
14. How much time approximately does it take primary wholesales, volume fuel retailers and other operators of service stations to provide the return to NSW Fair Trading?
15. What other reporting and financial regulatory requirements are primary wholesalers, volume fuel retailers and other operators of service stations required to comply with? For example, at the Commonwealth level.

The role of the Independent Pricing and Regulatory Tribunal

The Independent Pricing and Regulatory Tribunal (IPART) has two ongoing roles under the NSW Biofuels Act:

1. to determine, and periodically review a 'reasonable wholesale price' for ethanol for use in the production of petrol-ethanol blends such as E10, and
2. to monitor the retail market (including prices) for petrol-ethanol blend and report to the Minister on the effect of a determination of the reasonable price for wholesale ethanol.

The NSW Government has worked with IPART to assess the levels of ethanol supply and demand in NSW and monitor the retail market for ethanol-blended petrol. As part of their responsibilities under the Act, IPART also periodically reports on a maximum price for wholesale ethanol based on an estimated import price for ethanol. These reports are available on IPART's website at www.ipart.nsw.gov.au.

16. Are IPART's functions and role adequate to help achieve the objectives of the Biofuels Act? Please provide comments.
17. Are there any other functions, research or role could IPART take in the biofuels regulatory regime?
18. What information and data would be useful in ensuring regulation fosters a competitive biofuels industry?

Compliance and enforcement

The Biofuels Act and Regulation also provide a compliance and enforcement framework.

As a general rule, Fair Trading's enforcement policy provides education as the first response to prevent ongoing breaches and achieve future compliance. Less serious incidences of non-compliance are generally dealt with by penalty notice.

Penalty notices can be issued for:

- failing to comply with a biofuel mandate (\$5,500)
- failing to make a petrol-ethanol blend available at a volume fuel service station which is, at a minimum, as accessible as regular unleaded petrol (\$5,500)
- contravening a condition of an exemption (\$5,500)
- failing to provide a biofuels return (quarterly report) or knowingly providing a return which contains false or misleading information (\$5,500)
- failing to keep records as required in the legislation or knowingly keeping records which are false or misleading (\$5,500)
- failing to register as a volume fuel retailer or primary wholesaler and keep details up to date (\$1,100).

Prosecution is only used where other methods of achieving compliance have been unsuccessful or where there is a case of significant consumer or community harm. If prosecution leads to a guilty verdict, the court can impose penalties up to \$550,000.

19. Is the current compliance and enforcement approach working well? Please provide comments.

20. Is the current approach appropriate and should any changes be made (such as to penalty amounts) to make the compliance and enforcement approach more effective?

The Biofuels Expert Panel

The Biofuels Act also establishes an Expert Panel. The role of this Panel is to advise the Minister on:

- proposed exemptions from the mandate and other biofuels requirements
- the suspension of the biofuel minimum requirements and the variation or revocation of such exemptions, and
- other matters related to the Biofuels Act.

Section 24 of the Biofuels Act sets out the Expert Panel members and also provides the Minister with discretion to appoint up to three people to the Panel who are not prescribed in the legislation.

- the Secretary or the Secretary's nominee
- an officer employed in the Department of Industry with expertise in regional industry development nominated by the Secretary of that Department
- the Chairperson of the Environment Protection Authority or the Chairperson's nominee
- the Director-General of the Department of Primary Industries within the Department of Industry or the Director-General's nominee
- the Commissioner for Fair Trading or the Commissioner's nominee
- the Secretary of the Treasury or the Secretary's nominee
- up to 3 persons appointed by the Minister who have recent experience or expertise in the petroleum or biofuels industry. These are:
 - Australian Institute of Petroleum,
 - Bioenergy Australia,
 - NRMA.

21. Is the role and composition of the Biofuels Expert Panel still valid? Please provide comments.

22. Do you have any other general comments on the biofuels regulatory regime? Please provide further detail.

Appendix A – List of Discussion Paper Questions

1. Are the objects of the Biofuels Act and Regulation still valid? Why or why not?
2. Are there any other economic, social, environmental and consumer costs and benefits associated with biofuels that Government should further consider to ensure the regulatory regime is effective?
3. Are there any developments, innovations or emerging trends in the broader transport or fuel industry that Government should consider in assessing the biofuels regulatory regime?
4. Are there any entities that should be included in or excluded from the Act? If so, which entities and why?
5. Are the definitions of volume fuel retailers and primary wholesalers adequate? If not, how could the definitions change?
6. Does the Act appropriately balance the interests of small businesses with the broader objectives of the mandate? Please provide comments.
7. Should the prescribed mandate for ethanol and biodiesel sales remain at the current rate? If not, how should it change and why?
8. Are the biofuel sustainability standards adequate? Please provide comments.
9. Are there emerging industry standards or developments that should be taken in to account when assessing and defining sustainability?
10. Is the exemption process for not meeting the minimum biofuels requirements adequate? Should the factors that the Minister must take in to account before granting an exemption change?
11. What is the process like to seek an exemption? Are there any changes that could be made to ensure the process is as seamless and as user-friendly as possible?
12. Is the *Biofuels Exemption Framework and Guidelines* document easy to understand and comply with? Should any of the matters outlined in the Guidelines be included instead in the Biofuels Regulation to ensure abundant legal clarity?
13. Are the current registration, return and record keeping requirements adequate? Please provide comments.
14. How much time approximately does it take primary wholesales, volume fuel retailers and other operators of service stations to provide the return to NSW Fair Trading?

15. What other reporting and financial regulatory requirements are primary wholesalers, volume fuel retailers and other operators of service stations required to comply with? For example, at the Commonwealth level.
16. Are IPART's functions and role adequate to help achieve the objectives of the Biofuels Act? Please provide comments.
17. Are there any other functions, research or role could IPART take in the biofuels regulatory regime?
18. What information and data would be useful in ensuring regulation fosters a competitive biofuels industry?
19. Is the current compliance and enforcement approach working well? Please provide comments.
20. Is the current approach appropriate and should any changes be made (such as to penalty amounts) to make the compliance and enforcement approach more effective?
21. Is the role and composition of the Biofuels Expert Panel still valid? Please provide comments.
22. Do you have any other general comments on the biofuels regulatory regime? Please provide further detail.