



Regulatory Impact Statement

Biofuels Regulation – May 2016



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Trading

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Executive Summary

Background

The primary objective of the Biofuels Act is to support the development of a sustainable biofuels industry in NSW. The Act seeks to meet this objective by introducing a minimum volumetric biofuels mandate for fuel sales in NSW to increase local production, distribution and consumer uptake of biofuels.

The secondary objectives of the Act 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 development.

In January 2015, the Premier asked the Independent Pricing and Regulatory Tribunal (IPART) to review policy options for improving compliance with the biofuels regime through increased uptake of ethanol. IPART undertook a detailed analysis of a range of policy options for the NSW biofuels regime, including a detailed cost benefit analysis for each option. IPART's findings informed and guided the development of the reforms announced on 20 December 2015, the subsequent amendments to the Biofuels Act and the provisions of the proposed Regulation. IPART's report was published by the Government in December 2015, together with a statement about the Government's response.¹

The IPART report and addendum considered a range of possible options to increase compliance with the biofuels mandate. While none of these completely match the options adopted in the Amendment Act and draft regulations, they provide some indication of likely costs and benefits.²

On 23 March 2016 the NSW Parliament passed the Biofuels Amendment Bill 2016. After assent on 6 April 2016, this became the *Biofuels Amendment Act 2016*. The data collection provisions (Clause 6 of Schedule 1 of the Biofuels Act) commenced on assent of the amendment Act. Commencement of the remaining provisions of the amendment Act will occur once the Regulation has been finalised.

¹ Victor Dominello MP, Minister for Innovation and Better Regulation, "Reforms To Biofuels Mandate To Boost Competition And Transparency", 20 December 2015 (<https://www.finance.nsw.gov.au/about-us/media-releases/reforms-to-ethanol-mandate-to-boost-competition-and-transparency>)

²http://www.ipart.nsw.gov.au/Home/Industries/Other/Reviews/Ethanol/Assessment_of_options_to_increase_the_uptake_of_ethanol_blended_petro

Key aspects of the draft Regulation

The draft Regulation seeks to provide necessary regulatory and administrative detail to allow the amended Act to operate.

Currently, only retailers with 20 or more sites are regulated under the Biofuels Act. These retailers must comply with the biofuels mandates and report on fuel sales and related matters. The Amendment Act extends the mandate to all retailers selling more than a minimum amount of fuel. The threshold will be set through the definition of a *volume fuel service station*. This will be defined as a service station which sells three or more types of petrol and diesel and has annual fuel sales above the volume level prescribed in the Regulation. Operators of one or more volume fuel service stations will be required to comply with the mandates and reporting obligations and make an ethanol-blended fuel available to customers.

The Government is currently seeking industry-wide data on fuel sales. Industry members have been asked to respond by 30 June 2016. The regulatory threshold will be determined after assessing this data. However, initial comment and submissions from industry and other stakeholders on this issue is invited.

Some of the key issues in the draft Regulation are the following:

- the volume fuel sales threshold which determines the type of service stations that will be required to comply with the biofuels mandates
- an expanded 'reasonable steps' test by which a regulated retailer can apply for an exemption from the biofuels mandates
- a maximum period of two years for an exemption
- a requirement that at a regulated service station an ethanol blended fuel is at least as accessible as other types of petrol
- reporting and record keeping requirements
- the prescribed biofuel sustainability standard, and
- penalty notice offences and the amount of the penalty.

The making of the final Regulation

The consultation process is public and open with submissions published on the NSW Fair Trading website. Regardless of whether submissions request that certain information is not made public there may be circumstances in which the NSW Government is required by law to release this information.

The closing date for submissions is **COB Tuesday 28 June 2016**. After this date, all submissions will be considered and assessed in accordance with the criteria set out in the *Subordinate Legislation Act 1989*. If required, further targeted consultation may be undertaken after the formal consultation period has concluded. The NSW Government will then decide on the content of the final Regulation.

It is proposed that the Regulation will commence by the end of August 2016.

Consultation process

Making a submission

Interested organisations and individuals are invited to provide submissions on any matter relevant to the effective operation and good management of the NSW biofuels regime, whether or not it is addressed in this Regulatory Impact Statement or the Draft Regulation.

Submissions should be submitted electronically. We request that any documents provided to us are produced in an 'accessible' format. Accessibility makes documents more easily available to those members of the public who have some form of impairment, whether visual, physical or cognitive. For further information about making your submission accessible go to: <http://webaim.org/techniques/word/>.

We invite you to read this Regulatory Impact Statement and provide comments on the draft Regulation. Additional copies of the Regulatory Impact Statement and the Regulation can be downloaded from www.fairtrading.nsw.gov.au.

You can make submissions by:

- email to: biofuels.regulation@finance.nsw.gov.au
- or, post submissions to the following address:

Biofuels Regulation 2016
Policy & Legislation Division
PO Box 972
PARRAMATTA NSW 2124

The closing date for submissions is COB Tuesday 28 June 2016.

Important note: Confidentiality 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. Automatically generated confidentiality statements in emails are not sufficient for this.

However, be aware that even if you state that you do not wish certain information to be published, 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*.

It is also a statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament.

Identified stakeholders

The Regulatory Impact Statement has been provided directly to some key stakeholders and organisations. A list of these is provided at Appendix 3.

Evaluation of submissions

All submissions will be considered and assessed in accordance with the criteria set out in the *Subordinate Legislation Act 1989*. If required, further targeted consultation may be undertaken after the formal consultation period has concluded.

The Minister for Innovation and Better Regulation will then decide on the content of the final Regulation.

Commencement of the Regulation

After the NSW Government has finalised the Regulation, it will be submitted to the Governor for approval.

Once approved by the Governor, the Regulation will be published on the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au and in the NSW Government Gazette. Information on how to access the Gazette is available at www.legislation.nsw.gov.au.

It is proposed that the Regulation will commence by the end of August 2016.

Objective and rationale of the Regulation

Objective

The NSW Parliament passed the *Biofuels Amendment Bill 2016* on 23 March 2016. The Bill contains amendments to the *Biofuels Act 2007*.

The amendments:

- remove the obligation for fuel wholesalers to comply with the biofuels mandates
- extend the application of the biofuels mandates to additional fuel retailers and require regulated retailers to make an ethanol blended fuel available for purchase at their sites
- require additional reporting by retailers
- provide IPART with the power to make a determination about the reasonable wholesale price of ethanol, and
- require all fuel retailers, including those who are not required to comply with the biofuels mandates, to provide a return with information on fuel sales, principally to collect data for setting an appropriate threshold in the regulations for compliance with the biofuels mandates.

The *Biofuels Amendment Act 2016* received assent from the Governor on 6 April 2016. The data collection provisions commenced on assent. The remainder of the amendments to the Act will commence when there are appropriate regulations in place to support their operation.

The primary objective of the Regulation is to provide the legislative support and administrative detail for the operation of the Biofuels Act as amended.

The proposed draft Regulation will provide for:

- the volume fuel sales regulatory threshold which determines the type of service stations that will be required to comply with the biofuels mandates
- an expanded 'reasonable steps' test by which a regulated retailer can apply for an exemption from the biofuels mandates
- a maximum period of two years for an exemption

- a requirement that at a regulated service station an ethanol blended fuel is at least as accessible as other types of petrol
- reporting and record keeping requirements for regulated service stations
- the prescribed biofuel sustainability standard, and
- penalty notice offences and the amount of the penalty.

Rationale

It is necessary to remake the Regulation at this time because:

- the recent amendments to the Biofuels Act will introduce significant changes to the regulatory framework for the NSW biofuels regime. Therefore, the current regulatory and administrative arrangements are no longer in-line with NSW Government policy as expressed in the amended Act. The amendments to the Biofuels Act cannot commence until the proposed changes are made to the Regulation, and
- on 1 September 2016, the Biofuels Regulation 2007 (the 2007 Regulation) will be subject to automatic repeal under the provisions of the Subordinate Legislation Act.

Options for achieving objectives

The primary objective of the proposed Regulation is to provide operational and administrative detail to support the operation of the Biofuels Act. Options for achieving those objectives are:

Option 1

Maintain the status quo – Do not make the proposed Regulation, and instead remake the Regulation to be identical to the existing Regulation.

Option 2

Make a simplified Regulation – Make a regulation which deals with only the most basic elements of the regulatory regime such as the forms for quarterly reports. This regulation would not address matters such as the reasonable steps test which would instead be dealt with by the expert panel, ministerial discretion and ultimately the courts.

Option 3

Make the proposed Regulation – The provisions of the Regulation will provide the legislative support and administrative detail for the operation of the Biofuels Act, including the amendments made by the Biofuels Amendment Act.

Impact assessment of options

Assessment of option 1

Maintain the status quo – Do not make the proposed Regulation and instead remake the Regulation to be identical to the existing Regulation.

Option 1 – Costs

This option would remake the existing Regulation without change. If the Regulation is not updated to accommodate the amendments to the Act, the new legislation will not have the necessary administrative detail and legislative support to be able to fully achieve its objectives. This means this option would create significant opportunity costs. As the amendments to the Biofuels Act would not be able to operate effectively without the proposed Regulation, industry would not be able to benefit from provisions such as the exemption arrangements.

There is significant administrative cost for Government if there is no regulatory threshold to allow the smallest fuel retailers to be excluded from the biofuels regime. The direct costs to industry would also be considerable, especially for those retailers with fuel sales below the proposed regulatory threshold who would be otherwise have been excluded from the legislative requirements.

Option 1 – Benefits

The key benefit would be that as the existing Regulation is well known and understood by industry and Government, no costs would be incurred in making any administrative changes required by the proposed Regulation. However, these benefits would be very low.

Option 1 – Conclusion

Option 1 is unlikely to have any substantial positive impact. The full benefits and objectives of the amended Act cannot be realised without the proposed Regulation. Consequently, the overall benefit of this option has been assessed as low.

Assessment of Option 2

Make a simplified Regulation – Make a regulation which deals with only the most basic elements of the regulatory regime such as the forms for quarterly reports and not more complex matters such as the reasonable steps test.

Option 2 - Costs

Allowing the 2007 Regulation to lapse and replacing it with a basic regulation would mean that much of the administrative detail would be left to decisions by the expert panel, ministerial discretion and ultimately rulings by the courts.

This would result in less certainty for industry, biofuels producers, conventional fuel producers and retailers. This would be likely to create confusion and disruption to industry and consumers.

This option would provide less assurance for Government that the biofuels mandates and the policy intent of the legislation could be achieved.

As with Option 1 there would be significant opportunity costs and direct costs for Government and industry.

Both Options 2 and 3 involve setting a regulatory threshold for the definition of a volume fuel seller. The cost involved depends on where the threshold is set. The IPART reports contain some discussion of the costs involved in some possible thresholds. For example, it contains analysis of a potential threshold set at 3 million litres per year.³

Option 2 – Benefits

Option 2 is likely to provide only minimal benefits. A simpler regulation would provide more flexibility to industry. To the extent that industry can comply with the mandate in innovative ways, this flexibility may result in reduced costs. However, the absence of a ‘bright line test’ in the regulations would increase search costs for industry members. Individual businesses would have to obtain their own legal advice to determine whether they were complying with legal obligations established under the legislation.

Option 2 - Conclusion

As with the previous option, Option 2 is unlikely to have any substantial positive impact. The full benefits and objectives of the amended Act cannot be realised without the proposed Regulation. Consequently, the overall benefit of this option has been assessed as low.

Assessment of Option 3

Make the proposed Regulation – The provisions of the Regulation will provide the legislative support and administrative detail for the Biofuels Act, including for the amendments made by the Biofuels Amendment Act.

Option 3 - Costs

Option 3 will result in costs for industry and Government in adjusting to the new requirements. These costs will include the administration costs associated with amending and updating systems as well as reporting and recordkeeping costs.

³ Addendum report, p3

Option 3 - Benefits

The key benefit will be that this option will provide for the effective implementation of the recent reforms to the NSW biofuels regime. A detailed Regulation will provide industry with greater clarity and certainty on meeting their obligations under the legislation.

The proposed Regulation will update legislative arrangements. For example, it will prescribe the sustainability standard for assessing the quality of biofuels which can be used for compliance under the Act. This may include providing for consistency with the standard to be used in Queensland under its biofuels mandate, providing advantages for biofuels producers and fuel retailers.

The proposed Regulation provides for an exemption period of up to two years. Currently, exemptions are provided on a quarter by quarter basis. Providing the Minister with the discretion to give fuel retailers exemptions for up to two years will significantly benefit those businesses which demonstrate the need for such a transition period to comply with the reforms to the Act.

Option 3 – Conclusion

The implementation of many of the recent reforms to the Biofuels Act relies on the provisions of the proposed Regulation. The benefits of Option 3 to stakeholders and the community have been assessed as high and are considered to substantially outweigh any costs to be borne by industry and the Government.

Summary of costs and benefits for each option

Option	Likely costs	Likely benefits	Overall benefit
Option 1	High	Low	Negative
Option 2	High	Low	Negative
Option 3	Medium	High	Positive

Preferred option

Option 3 - making the proposed Regulation, is the preferred option.

It will facilitate the operation of the Biofuels Act as amended, and give full effect to its provisions with all the associated benefits of the reforms to the biofuels regime recently passed by Parliament.

Discussion of the proposed regulation

While submissions are welcome on any aspect of the proposed Regulation or any other relevant issue, whether or not raised in this Regulatory Impact Statement, the following discussion points provide greater context for some provisions in the Regulation and explore some regulatory options.

Administrative arrangements

Date of Commencement

It is proposed that the Regulation commence by the end of August 2016. This commencement date is proposed because the existing Regulation is scheduled for automatic repeal on 1 September 2016 under the provisions of the Subordinate Legislation Act.

It is also proposed that the remaining provisions of the Biofuels Amendment Act commence at the same time as the Regulation. These provisions have not been commenced earlier as the Regulation will provide the necessary administrative detail for their implementation and operation.

While the new legislation will commence by the end of August 2016, the Government is committed to working with industry on the appropriate timing for implementing the new laws. This will include providing transition periods for industry where necessary or appropriate. For example, the Minister will have the power to give retailers exemptions for up to two years where the business needs a transition period to comply with the Act.

- **Is the proposed commencement date for the Regulation and the remaining provisions of the Biofuels Amendment Act appropriate?**

Penalty Notices

Schedule 1 contains the penalty notice amounts for notices issued in respect of certain breaches of the Biofuels Act. A penalty notice is an alternative compliance mechanism for dealing with minor offences where there is clear evidence that an offence under the Act has been committed.

If the person receiving the penalty notice does not wish to have the matter determined by a court, they may pay the amount of the penalty. Payment of the penalty is not regarded as an admission of liability.

The aim of the penalty notice scheme is to encourage changes in a business's conduct to achieve compliance with the laws. Penalty notices are generally issued in response to offences of a minor or technical nature. Circumstances where stronger disciplinary action would be more appropriate might include repeat or deliberate breaches or behaviour that has caused serious detriment to consumers.

- **Are the proposed penalty notice arrangements appropriate?**

Sustainability Standard

Clause 5 of the Regulation prescribes the biofuels sustainability standard for the Act. Sections 6 and 7 of the Act specify that only ethanol and biodiesel that complies with the prescribed biofuel sustainability standard may be counted towards the retailer's obligation to comply with a biofuel mandate. The existing Regulation prescribes the *Global Principles and Criteria For Sustainable Biofuels Production (Version Zero)*, published by the Roundtable on Sustainable Biofuels (RSB) on 13 August 2008.

It is proposed that the Regulation be amended to prescribe the current version of this standard - *RSB Principles & Criteria For Sustainable Biofuels Production (Version 2.1)* which was published in March 2011. The existing standard has been in use since 2008 there may be challenges for industry in meeting the requirements of the new version. However it is preferred that the mandate reflects the more modern standard to ensure that it accounts for current best-practise approaches to biofuels production and accreditation.

It is also noted that there are other standards applied in other jurisdictions and feedback is requested on whether any of these alternatives would be more appropriate.

Requirements for Applications

Clause 4 of the Regulation deals with exemption applications under the Act having to be in the approved manner and to include specified documents.

Volume fuel sellers who have not met the biofuels mandate can apply to the Secretary for an exemption. The Exemptions framework is approved by the Minister and is a public document published on the Fair Trading website. The Exemptions framework sets out the eligibility grounds and process for applying for an exemption. The requirements of Clause 2 of the Regulation will be supported by an updated and revised Framework document which will be published in August 2016.

The volume sales threshold

Operators of service stations which sell three or more types of petrol or diesel fuel and have sales volumes above the volume sales threshold must comply with the biofuels mandates and other requirements of the Act. Having the volume sales threshold prescribed by Regulation means that it is easier for it to be amended over time to ensure it remains appropriate to prevailing market conditions.

In the draft Regulation the specific value of the volume sales threshold was not stated and feedback is sought on the appropriate figure.

On 6 May 2016 the *Biofuels (Return by Operators of Service Stations) Notice 2016* was published on the NSW legislation website (www.legislation.nsw.gov.au). The Notice requires service station operators to provide information about fuel sales volumes for the two most recent quarters - 1 October 2015 to 31 December 2015 and 1 January 2016 to 31 March 2016.

Responses to both the information request and the consultation on the draft Regulation will inform the setting of the volume sales threshold.

- **What is the appropriate volume sale threshold (litres per quarter)?**
- **What issues should be considered in setting the regulatory threshold?**

Exemptions

Reasonable steps test

Clause 8 of the Regulation sets out the grounds which a volume fuel retailer can use as a defence for failing to comply with a biofuel mandate. These grounds are known as the 'reasonable steps test' and support the efficient operation of the Act.

The provisions of subclauses 1 and 2 of Clause 8 in the draft Regulation re-state the grounds in Clause 7 of the existing Regulation. These are that applicants for an exemption from complying with a biofuel mandate must show that they have taken all reasonable steps to:

- upgrade storage, distribution and retail infrastructure as necessary to be able to supply biofuel blended fuels
- obtain sufficient supplies of biofuel blended fuels to be able to comply with the mandate
- ensure E10 contains at least 9 percent ethanol, and
- market biofuel blended fuels on an ongoing basis.

- **Is the 'reasonable steps' test in the proposed Regulation sufficient or should additional items be included?**

Maximum period for an exemption

Clause 9 of the Regulation provides that the Minister can grant an exemption from the biofuels mandates for up to two years. Currently, exemptions are provided on a quarter by quarter basis. While most exemptions will continue to be granted on a quarter by quarter basis, the intent of this provision is to allow the Minister the option of providing regulated fuel retailers, particularly newly regulated retailers

who do not currently sell E10, a transition period in which to make necessary changes so that they can comply with the mandates. As with quarter by quarter exemptions, once the term of an exemption expires, the retailer can apply for a further exemption if necessary.

In relation to the maximum term of an exemption, one consideration is that the amendments to the Act will require the Minister to commence a review of the Act less than three years into the life of the new Regulation, that is before 30 June 2019. The purpose of this review will be to determine whether the policy objectives of the Act, as amended, remain valid and whether the terms of the Act remain appropriate for securing those objectives. It would be difficult to answer these questions if some regulated businesses had been continuously exempt from the legislation.

- **Is two years the appropriate maximum period for an exemption?**

Potential for changes to the exemption process

The process by which exemptions are provided and assessed is provided for in Part 3 of Act and there are a number of powers which make it possible for the regulations to refine the exemption process. The draft Regulation does not propose to utilise any of these powers.

Feedback is requested on any whether there are any alternative processes that should be considered and how they could be implemented.

For example, it may be possible to introduce different classes or categories of exemptions with different evidentiary and assessment processes applying to each category. Under such a framework, classes of exemption application that were categorised as higher risk could be required to provide more detailed evidence than lower risk applications.

It is noted that there are statutory limitations on the type of alternative frameworks that could be implemented through the Regulation.

- **Should an alternative exemption process be developed?**
- **What factors should be considered?**

The availability of petrol-ethanol blends

Clause 7 of the draft Regulation supports the operation of section 8 of the Act. This clause provides that service stations required to comply with the mandate must make petrol-ethanol blend available for retail sale in a manner that is as accessible as compared to other petrol types.

- **Is the availability requirement appropriate?**

Reporting and recordkeeping

The reporting and recordkeeping provisions are set out in clauses 10 and 11 of the proposed Regulation.

Reporting

The reporting requirements are largely unchanged from the existing arrangements. The key reporting requirement for businesses regulated under the Biofuels Act is to provide a quarterly return. This return must be lodged with the Secretary within a month of the end of the quarter.

In the return, retailers must provide details of:

- fuel sales for the quarter
- the number of the retailer's service stations which meet the definition of volume fuel service station
- the number of the retailer's service stations which offer ethanol blended fuel and regular unleaded petrol, and
- the number of bowsers and nozzles which supply ethanol blended fuel and regular unleaded petrol at the retailer's service stations.

Reports must be provided in the approved format. Reporting forms are published on the Fair Trading website. As a broader range of service stations will be regulated under the amended legislation, it may be necessary to develop different reporting forms for different classes or types of businesses. Fair Trading will consult widely with different sectors of the industry before making any changes to reporting forms.

Recordkeeping

The recordkeeping requirements are unchanged from the existing Regulation. The recordkeeping requirements ensure that a regulated business has records of fuel sales sufficient to be able to report on the total volume of fuel sales and the proportion of those sales which are of a biofuel blended fuel.

The Regulation requires that records be maintained for not less than seven years after the end of the reporting period to which they relate.

- **Does the Regulation need to include additional recordkeeping requirements?**

Appendix 1

About the Regulation

The Biofuels Regulation 2016 will replace the Biofuels Regulation 2007 which is scheduled for automatic repeal on 1 September 2016.

The Regulation has been drafted so as to provide the administrative and regulatory detail to support the operation of the Biofuels Act 2007, as amended by the Biofuels Amendment Act 2016.

The legislative framework for the NSW biofuels regime is provided by the Act and the Regulation. While the Act provides for the primary legislative powers, it also specifies that certain administrative details can be dealt with in the Regulation.

The most important provisions of the proposed Regulation are

Clause 5 - the biofuel sustainability standard for the Biofuels Act. Only biofuels which comply with the standard can be included by regulated businesses in reporting on their compliance with the mandates.

Clause 6 - defines the volume fuel sales threshold for a volume fuel service station for the purposes of the Biofuels Act. The obligation to comply with the biofuels mandates and offer ethanol-blended petrol will only apply to retailers who operate 20 or more retail sites or which operate one or more sites which supply three or more types of petrol or diesel and which have fuel sales above the volume threshold prescribed in Clause 6.

Clause 7 - specifies that to comply with the requirements of Section 8 of the Biofuels Act, an ethanol blended fuel must be at least as available as any other type of petrol offered to customers at the service station.

Clause 8 - prescribes the 'reasonable steps' test. This is the grounds on which a defence can be made against a prosecution for failing to comply with a biofuels mandate under the Act. The grounds for a defence also form the grounds on which a business can request an exemption from the Minister.

Clause 9 - prescribes that the maximum term for an exemption is 2 years.

Clauses 10 and 11 - prescribe the mandatory information which must be included in returns by primary wholesalers and volume fuel retailers and the records which must be kept by volume fuel retailers to comply with section 11 of the Act and the manner in which the records must be kept.

Schedule 1 - contains the penalty notice amounts for notices issued in respect of certain breaches of the Biofuels Act.

Appendix 2

Background information

The Retail Fuel Market

Currently there are around 2,000 service stations in NSW. The retail fuel market in NSW accounts for approximately 30 percent of the volume of retail fuel sales in Australia. Together, NSW, Victoria and Queensland represent over 75 percent of retail fuel sales in Australia.

The retail fuel market is dominated by a relatively small number of companies. In its Report on Fuel Retailing in Australia issued in August 2015, IBIS World noted that in Australia, the fuel retailing industry has a high level of market share concentration, with the four major players accounting for over 70 percent of industry revenue. This has not changed significantly in the past five years, although merger and acquisition activity by market participants has led to changes in market share between the retail chains.

The most notable recent re-alignment of the retail market is the growing importance of supermarket chains, with oil companies focussing more on the upstream sector. The entrance of supermarket chains has coincided with the rising importance of revenue from the sale of convenience store items for fuel retail site profitability.

The long-term trend is for fewer, larger service stations, with revenue from co-located services, such as on-site convenience stores or mini-supermarkets, contributing significant revenue to the overall business.

Legislative Background

Introduction of the Biofuels Act 2007

Before the NSW biofuels legislation was introduced in 2007, biofuels had made little progress in NSW in gaining access to the mainstream fuel market. The major oil companies controlled the fuel system from production or importation through to distribution and finally retail to the consumer. Small independent fuel wholesalers and retailers supplied a niche biofuels market but were at a disadvantage because of the market power and supply chain dominance of the major oil companies. Little progress had been made by the major oil companies in implementing the then Commonwealth Government's voluntary biofuels target of 350 million litres per annum by 2010.

The NSW Government decided to implement a wholesale-level volumetric mandate to ensure that all major oil companies offer biofuels blends to their customers, allowing biofuels to become part of the mainstream fuel market. In February 2007 the then Premier, Morris Iemma, announced that if re-elected, NSW would adopt an ethanol mandate. The 2 percent mandate was to be the first step towards a 10 percent mandate by 2011, followed by the withdrawal of regular unleaded petrol from the market.

The *Biofuel (Ethanol Content) Act 2007* was assented to on 4 July 2007, and commenced on 1 October 2007. The *Biofuel (Ethanol Content) Amendment Act 2009*, which was assented to on 7 April 2009 and commenced on 1 October 2009, made a number of changes to the legislation, including introducing a biodiesel mandate and re-naming of the Act as the *Biofuels Act 2007*.

Objectives of the Biofuels Act 2007

The primary objective of the Biofuels Act was to support the development of a sustainable biofuels industry in NSW. The Act sought to meet this objective by introducing a minimum volumetric biofuels mandate for fuel sales in NSW to increase local production, distribution and consumer uptake of biofuels.

The secondary objectives of the Act were 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 development.

Major policy change - retaining RULP in the NSW market

On 31 January 2012, the Government announced a major policy change for the NSW biofuels regime. The Government would not be proceeding with the statutory requirement to withdraw regular unleaded petrol (RULP) from the NSW retail fuel market.

The intent had been that after a transitional period to allow the necessary infrastructure to be put in place for the supply of E10, it would replace RULP as the base fuel in the NSW market.

Initially, the biofuels legislation had not included a requirement for service stations to supply biofuels. The legislation required volume fuel sellers to comply with the mandate, but they chose which of the service stations within their networks were to supply biofuel blends.

Because of the decision to retain RULP, the Government had to identify new policy options for achieving the volumetric ethanol mandate of six percent. In late 2013, the Ethanol Mandate Consultation Paper was released. The Paper discussed a number of options to increase the number of fuel retailers who would be required to comply with the mandate and introducing a premium ethanol blended fuel to the market.

Transfer to DFSI and NSW Fair Trading

On 1 July 2015, administrative responsibility for the Biofuels Act and the NSW biofuels regime was transferred to the Department of Finance, Services and Innovation (DFSI). NSW Fair Trading within DFSI is the regulatory agency for the biofuels legislation.

The Biofuels Amendment Act 2016

On 23 March 2016, the NSW Parliament passed the Biofuels Amendment Bill 2016. On assent on 6 April 2016, this became the Biofuels Amendment Act 2016.

The data collection provisions (Clause 6 of Schedule 1 of the Biofuels Act) commenced on assent of the amendment Act.

Commencement of the remaining provisions of the amendment Act will occur once the Regulation has been completed to provide the necessary administrative detail for the new provisions.

Appendix 3

List of Stakeholders

Associations

Australasian Convenience and Petroleum Marketers Association (ACAPMA)

Australian Institute of Petroleum (AIP)

Biofuels Association of Australia (BAA)

National Roads & Motorists' Association (NRMA)

Industry Members

Biodiesel Industries Australia (BIA)

BP Australia

Caltex

Coles

ExxonMobil

Farmacule Bioindustries Ltd

Manildra

MBD Energy

Park Fuels

7-Eleven

Syngenta Biotechnology Inc

United Petroleum

Viva Energy Australia

Woolworths

Appendix 4

Summary of the Regulation

Clauses 1, 2 and 3 of the Regulation include preliminary items and are largely administrative in nature. Matters addressed are the title and commencement date of the Regulation and definitions for the Regulation.

Clause 4 requires that applications made under the Act must be in the approved form and include any required documents.

Clause 5 prescribes the biofuel sustainability standard for the Biofuels Act.

Clause 6 defines the volume fuel sales threshold for a volume fuel service station for the purposes of the Biofuels Act.

Clause 7 specifies the manner in which ethanol blended fuel is to be made available for sale to comply with the requirements of Section 8 of the Biofuels Act.

Clause 8 prescribes the 'reasonable steps' test which is the grounds on which a defence can be made against a prosecution for failing to comply with a biofuels mandate under the Act. The grounds for a defence also form the grounds on which a business can request an exemption from the Minister.

Clause 9 prescribes that the maximum term for an exemption is 2 years.

Clause 10 prescribes the mandatory information which must be included in return by primary wholesalers and volume fuel retailers.

Clause 11 prescribes the records which must be kept by volume fuel retailers to comply with section 11 of the Act and the manner in which the records must be kept.

Clause 12 specifies that the penalty notice offences and the penalty for each offence is set out in Schedule 1 of the Regulation.

Schedule One

Schedule 1 contains the penalty notice amounts for notices issued in respect of certain breaches of the Biofuels Act.

Schedule Two

Schedule 2 repeals the Biofuels Regulation 2007.

Appendix 5

Biofuels Regulation 2016

The following is the full text of the proposed Regulation.

The Regulation is draft at this stage and it is likely that it will be amended before commencement.

You are invited to provide a submission on the draft Regulation as a whole or on specific provisions, or on any other relevant matters.



New South Wales

Biofuels Regulation 2016

under the

Biofuels Act 2007

[The following enacting formula will be included if this Regulation is made:]

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Biofuels Act 2007*.

Minister for Innovation and Better Regulation

Explanatory note

The objects of this Regulation are to repeal the current regulations under the *Biofuels Act 2007* (the *principal Act*) and make new regulations to commence on the same date as Schedule 2 of the *Biofuels Amendment Act 2016*:

- (a) to provide for the threshold for application of the principal Act as amended to retailers (see the definition of *volume fuel service station* in section 3 of the principal Act), and
- (b) to provide for the manner in which petrol-ethanol blend must be made available for retail sale for the purposes of the new minimum biofuel requirement in section 8 of the principal Act, and
- (c) to provide for the details of the reasonable steps to be taken for compliance with the new minimum biofuel requirement (see sections 9 and 9A (2) of the principal Act), and
- (d) to provide for details relating to the availability of petrol-ethanol blend as compared to regular unleaded petrol to be included in returns under section 11 of the principal Act to support the additional minimum biofuel requirement, and
- (e) to provide for the maximum period of an exemption that allows a volume fuel retailer time to take steps to comply with a minimum biofuel requirement (see section 9B (5A) (b)), and
- (f) to provide for the form of applications for registration or exemption under the principal Act as amended, and
- (g) to update the reference to the biofuel sustainability standard that must be met by ethanol and biodiesel fuel, and
- (h) to update the penalty notice offences, and
- (i) to remake provisions of the current regulations relating to the reasonable steps defence for the existing minimum biofuel requirements and to records to be included in sales records under section 12 of the principal Act and the retention period for such records.

This Regulation is made under the *Biofuels Act 2007*, including sections 3, 8, 9A, 9B, 11, 12, 29 and 30 (the general regulation making power).

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Biofuels Regulation 2016 [NSW]
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Biofuels Regulation 2016 [NSW]

Biofuels Regulation 2016

under the

Biofuels Act 2007

1 Name of Regulation

This Regulation is the *Biofuels Regulation 2016*.

2 Commencement

This Regulation commences on the day on which Schedule 2 of the *Biofuels Amendment Act 2016* commences and is required to be published on the NSW legislation website.

3 Definitions

- (1) In this Regulation:
the Act means the *Biofuels Act 2007*.
- (2) Notes included in this Regulation do not form part of this Regulation.

4 Applications

An application under the Act must be:

- (a) made in the manner and form approved by the Secretary, and
- (b) accompanied by the documents specified by the Secretary.

5 Biofuel sustainability standard (section 3 of Act)

The standard prescribed for the definition of *biofuel sustainability standard* in section 3 (1) of the Act is the document entitled *RSB Principles & Criteria for Sustainable Biofuel Production (Version 2.1)*, published by the Roundtable on Sustainable Biomaterials in March 2011.

Note. The document is available at

<http://rsb.org/pdfs/standards/11-03-08%20RSB%20PCs%20Version%202.1.pdf>.

6 Volume fuel service station (section 3 of Act)

For the purposes of paragraph (b) of the definition of *volume fuel service station* in section 3 (1) of the Act, the threshold is met if the total volume of petrol and diesel fuel sold by retail for the fuelling of motor vehicles at the service station (calculated as set out in section 9 of the Act) during the immediately preceding relevant period exceeded [X] litres or during each of the last 2 immediately preceding relevant periods exceeded [Y] litres.

7 Availability of petrol-ethanol blend for retail sale (section 8 of Act)

For the purposes of section 8 of the Act, petrol-ethanol blend must be available for sale by retail for the fuelling of motor vehicles in a manner that makes it as accessible to a customer attending the service station for the fuelling of a motor vehicle as any other type of petrol available to a customer for that purpose.

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Biofuels Regulation 2016 [NSW]

8 Reasonable steps for compliance with minimum biofuel requirements (section 9A of Act)

- (1) For the defence under section 9A (2) (a) of the Act for a prosecution for failure to comply with a minimum biofuel requirement imposed by section 6 of the Act, all of the following steps must be taken by the volume fuel retailer:
 - (a) the taking of all reasonable action to upgrade the volume fuel retailer's infrastructure to enable it to distribute sufficient petrol-ethanol blend to ensure compliance with section 6 of the Act,
 - (b) the taking of all reasonable action to ensure the availability of facilities for the sale of petrol-ethanol blend at those service stations at which the business of selling petrol is controlled by the volume fuel retailer or at which the person who conducts that business leases or subleases the premises from the volume fuel retailer,
 - (c) the making of all reasonable efforts (on a continuing basis) to secure sufficient supplies of ethanol or petrol-ethanol blend to ensure compliance with section 6 of the Act,
 - (d) the taking of all reasonable action (on a continuing basis) to market petrol-ethanol blend to ensure compliance with section 6 of the Act,
 - (e) the taking of all reasonable action (on a continuing basis) to ensure that all E10 sold by the volume fuel retailer contains at least 9% ethanol.
- (2) For the defence under section 9A (2) (a) of the Act for a prosecution for failure to comply with a minimum biofuel requirement imposed by section 7 of the Act, all of the following steps must be taken by the volume fuel retailer:
 - (a) the taking of all reasonable action to upgrade the volume fuel retailer's infrastructure to enable it to distribute sufficient biodiesel blend to ensure compliance with section 7 of the Act,
 - (b) the taking of all reasonable action to ensure the availability of facilities for the sale of biodiesel blend at those service stations at which the business of selling diesel fuel is controlled by the volume fuel retailer or at which the person who conducts that business leases or subleases the premises from the volume fuel retailer,
 - (c) the making of all reasonable efforts (on a continuing basis) to secure sufficient supplies of diesel or biodiesel blend to ensure compliance with section 7 of the Act,
 - (d) the taking of all reasonable action (on a continuing basis) to market biodiesel blend to ensure compliance with section 7 of the Act.

9 Exemption period for taking steps to comply (section 9B of Act)

The period prescribed for section 9B (5A) (b) is 2 years.

10 Returns (section 11 of Act)

- (1) For the purposes of section 11 (1) of the Act:
 - (a) a primary wholesaler and a volume fuel retailer must provide a return to the Secretary within 1 month after the end of each relevant period, and
 - (b) if the Secretary requires an operator of a service station who is not a volume fuel retailer to provide a return for a specified relevant period, the operator must provide the return to the Secretary within 1 month after the end of the specified relevant period, and

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Biofuels Regulation 2016 [NSW]

- (c) a return must be in the form notified by the Secretary to primary wholesalers, volume fuel retailers or operators of service stations who are not volume fuel retailers (as the case requires).
- (2) For the purposes of section 11 (2) (e) of the Act, a return of a volume fuel retailer must specify the following information for sales of petrol during the relevant period:
 - (a) the number of the retailer's service stations at which petrol-ethanol blend is available, how many of those service stations are volume fuel service stations and how many bowsers and nozzles are available for the delivery of petrol-ethanol blend at each of those service stations,
 - (b) the number of the retailer's service stations at which regular unleaded petrol is available, how many of those service stations are volume fuel service stations and how many bowsers and nozzles are available for the delivery of regular unleaded petrol at each of those service stations.

11 Records (section 12 of Act)

- (1) For the purposes of section 12 (2) of the Act, the records must include a record of each sale of petrol (including petrol-ethanol blend) or diesel fuel (including biodiesel blend) by the person showing:
 - (a) the volume of petrol or diesel fuel sold, and
 - (b) whether the petrol sold was or was not petrol-ethanol blend, and
 - (c) whether the diesel fuel sold was or was not biodiesel blend, and
 - (d) in the case of a sale of petrol-ethanol blend—the amount of ethanol in the petrol-ethanol blend, and
 - (e) in the case of a sale of biodiesel blend—the amount of biodiesel in the biodiesel blend, and
 - (f) whether the petrol-ethanol blend or biodiesel blend sold complies with a biofuel sustainability standard, including details of any relevant certification.
- (2) For the purposes of section 12 (3) of the Act:
 - (a) the records may be kept in the form of copies of invoices or other records of sale, and
 - (b) records of petrol or diesel fuel sold during any relevant period must be retained for not less than 7 years after the end of the relevant period.

12 Penalty notices (section 29 of Act)

For the purposes of section 29 of the Act:

- (a) each offence arising under a provision specified in Column 1 of Schedule 1 is prescribed as a penalty notice offence, and
- (b) the prescribed penalty for such an offence is the amount specified in relation to the offence in Column 2 of Schedule 1.

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Schedule 1 Penalty notice offences

(Clause 12)

Column 1	Column 2
Offence	Penalty
Biofuels Act 2007	
Section 9A (1)	\$5,500
Section 9B (3A)	\$5,500
Section 13 (1A)	\$1,100
Section 13 (1)	\$5,500
Section 13 (2)	\$5,500

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Schedule 2 Repeal of Biofuels Regulation 2007

The *Biofuels Regulation 2007* is repealed.



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