

Guideline for fuel sellers - reasonable steps for achieving the Sustainable Biofuel Requirement

Sale of sustainable biofuel under Part 5A of the *Liquid Fuel Supply Act 1984*

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Approval

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1.Introduction

The purpose of this guideline is to provide fuel sellers guidance on what the Department of Natural Resources, Mines and Energy (the department) may consider when investigating potential non-compliance with section 35B or 35C of the *Liquid Fuel Supply Act 1984* (the Act).

This guideline outlines some of the actions that the department may consider when investigating if a fuel seller has conducted all reasonable steps possible when trying to comply with the requirement to sell the minimum amount of sustainable biobased fuel.

In making determinations of these matters, the department requires information and evidence from fuel sellers which is sufficient, relevant and reliable in order to inform and direct the decision making process.

The department understands each fuel seller's circumstances may be different to another and therefore each potential offence will be assessed on a case by case basis.

This guideline does not require, direct, nor force fuel sellers to undertake certain actions to achieve compliance with the Act. This guideline aims to provide guidance to fuel sellers when responding to requests for information and evidence from the department about the reasonableness of actions that have been taken in response to complying with the Act's sustainable biofuel requirement.

This guideline is a separate guideline to the Biofuels Exemption Guideline. The department encourages fuel sellers to read both guidelines to determine which is most appropriate for their circumstances.

Definitions for terms within this guideline are as per Schedule 1 of the Act.

1.1 Background to the *Liquid Fuel Supply Act 1984*

Part 5A of the Act requires fuel sellers to meet targets for the sale of biobased fuels. The Act requires fuel sellers to sell the prescribed minimum amount of biobased fuel in any given quarter. This is known as 'the sustainable biofuel requirement'.

2.The Sustainable Biofuel Requirement

2.1. What is the requirement?

Fuel sellers who meet the prescribed criteria must comply with the requirement to sell at least the minimum amount of sustainable biobased fuel in each calendar quarter.

Sustainable biobased petrol requirement

Section 35B states the sustainable biobased petrol requirement placed on retailers. Currently, 4% of the total volume sold (of regular unleaded petrol and regular unleaded petrol blends) is to be sustainable biobased petrol.

Sustainable biobased diesel requirement

Section 35C states the sustainable biobased diesel requirement placed on wholesalers. Section 35C requires that 0.5% of the total volume of diesel sold by wholesalers is to be sustainable biobased diesel.

2.2. Who must comply with the requirement?

The sustainable biofuel requirement applies to the sale of biobased petrol blends and biobased diesel blends by a fuel seller, to a person in Queensland, or for delivery in Queensland (whether or not the sale is made in Queensland).

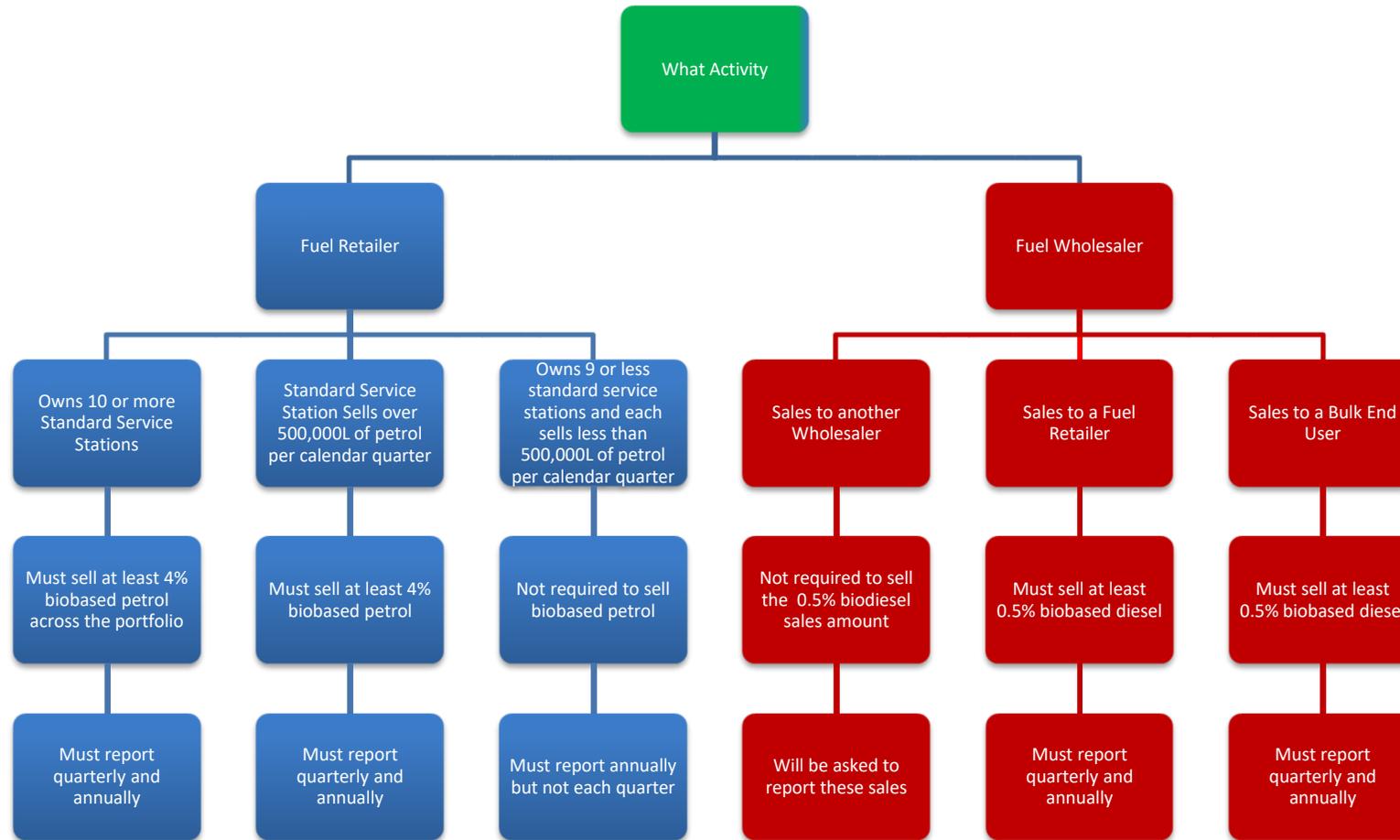
However, it should be noted that the sustainable biofuel requirement *does not* apply to the sale of:

- sustainable biofuel blends by a fuel wholesaler to another fuel wholesaler, or
- diesel fuel by a fuel retailer.

Furthermore, the sustainable biofuel requirement only applies to the sale of petrol fuel by a fuel retailer if:

- the fuel retailer owns or operates 10 or more standard service stations; or
- sells more than 500,000 litres of petrol fuel in a calendar quarter at any one of the service stations that they own or operate.

The flow chart below demonstrates if fuel sellers are required to comply with the sustainable biofuel requirement and when they are required to report their sales amounts. Fuel Sellers are encouraged to review the chart to gain a comprehensive understanding of their legislative obligations under the Act.



- **Fuel retailer** means a person who sells petrol or diesel to the public other than for resale by members of the public.
- **Fuel wholesaler** means a person who sells petrol or diesel to fuel retailers for resale by the fuel retailers, whether or not the person also sells petrol or diesel to another person for the person's own use. A large volume of diesel sold in Queensland by fuel wholesalers is sold directly to major fuel users such as agricultural, mining or transport companies bypassing the fuel retailer. The definition of fuel wholesaler therefore recognises this. Such sales are to be considered as sales by the fuel wholesaler.
- **Standard service station** means a service station that does not sell low aromatic fuel.
- **Service station** means a place where petrol or diesel is sold to the public, whether or not the place is used for another purpose, including, for example, for selling other products.
- **Calendar quarter** means a period of 3 calendar months starting on 1 January, 1 April, 1 July or 1 October of a year.

3. Consideration of Reasonable Steps

The compliance approach taken by the department will be conducted in accordance with the Biofuels Mandate Compliance and Enforcement Strategy where enforcement and prosecution is used only on occasions that warrant such action.

In proceeding for an offence against section 35B or 35C of the Act, it is a defence for the person¹ charged with the offence to prove that the person took all reasonable steps to prevent the offence.

Section 35D subsection (2) of the Act states that in deciding whether a person took all reasonable steps, the court may consider the following:

- a) efforts the person made to secure enough supply of a sustainable biofuel blend;
- b) efforts the person made to promote the sale of a sustainable biofuel blend;
- c) any upgrade of infrastructure the person arranged to enable enough sales of a sustainable biofuel blend;
- d) facilities the person made available for the sale of a sustainable biofuel blend.

The above considerations apply equally for sustainable biobased petrol and for sustainable biodiesel.

The department may follow these considerations as guiding principles (but will not be limited to them) when deciding if escalated enforcement action is warranted.

It should be noted that fuel sellers will not need to address every consideration above. The department will conduct an assessment of each individual fuel seller's circumstances to determine if the actions taken are reasonable for their particular situation.

3.1. 'All reasonable steps' is an objective test

'All reasonable steps' is not defined in the Act and therefore is determined objectively. To assist the fuel seller in determining what may be considered as 'all reasonable steps', the fuel seller should consider:

- 'what can be done' - that is, what is possible in their circumstances to achieve compliance with the Act.
- consider whether it is 'reasonable, in their circumstance' to do all that is possible.
- if the actions taken to comply with the Act, meet the standard expected of a reasonable person if they were in the fuel seller's position.

This means that what can be done should be done unless it is reasonable in their circumstances for the fuel seller to do something less.

3.2. Standard of proof required to justify all reasonable steps

Where fuel sellers fail to sell the prescribed amount of sustainable biofuel, the fuel seller should demonstrate through the provision of evidence that all reasonable steps in their individual circumstance were taken to comply with the requirement.

The amount of evidence which a fuel seller should provide will vary. Each fuel seller's circumstances will be different and the evidence provided will vary accordingly.

¹ A person includes a reference to a corporation as well as an individual

The evidence provided should aim to demonstrate the claim that the fuel seller has taken all reasonable steps to comply with the sustainable biofuel requirement.

The department recognises that the defence only needs to be fairly raised on the balance of probabilities. In order to satisfy the department, a fuel seller should provide evidence which is relevant and reliable to prove the fuel seller has done everything that can reasonably be expected of a fuel seller in their specific circumstances.

The evidence provided by the fuel seller will be thoroughly considered by the department before it makes a decision on whether the fuel seller has taken all reasonable steps in their circumstances. Such evidence may include photographs of sign boards, photographs of E10 suitability checkers (in the case of retailers), copies of dated contracts, dated letters, statutory declarations, dated quotes and supplier contracts.

The department acknowledges fuel sellers may have concerns about disclosing commercial in confidence information. All information received by the department is handled confidentially in accordance with the *Information Privacy Act 2009* (Qld).

The department may make investigations of its own before making a decision. This may include site inspections, requests for further information or evidence and other actions the department deems necessary to substantiate any information or evidence submitted.

In certain situations, the department may also compel fuel sellers to provide information and documents under section 40 of the Act. This is a legislative requirement and failure to comply with this requirement to provide information may result in penalties.

3.3. What are 'reasonable steps'?

To demonstrate that a fuel seller has taken all reasonable steps in their circumstances, evidence is to be provided which demonstrates that the work conducted or steps taken in an attempt to comply with the sustainable biofuel requirement are thorough and comprehensive. This should include evidence to demonstrate that the steps taken by a person are all those which could reasonably be taken.

The evidence provided by the fuel seller will be considered in light of their individual circumstances. The examples below are not a comprehensive list of all reasonable steps in all circumstances and should only be used as a guide. Fuel sellers may wish to review the list for further reasonable steps which they may not have considered.

The type of information that should be considered and evidence that should be provided to the department, may consist of, but should not be limited to the following examples.

*NOTE – The following are **examples only and not requirements** the fuel seller must undertake to demonstrate they have taken all reasonable steps in their circumstance. –*

1. Examples of evidence that the fuel seller made efforts to secure a sufficient supply of a sustainable biofuel blend

- What evidence are you able to provide to show that you did everything practicable that you could to secure a supply of sustainable biofuel blend (e.g. dated emails, meeting minutes, quotations)?
- What meetings or negotiations did you organise and with who? What evidence can you provide that these took place and on what date (e.g. meeting minutes, emails)?
- What contracts were drafted and signed / not signed to secure a supply of sustainable biofuel / biofuel blends? What evidence can you provide of this (e.g. tender/quotation requests and/or evaluations including dates)?
- Are you contracted to only purchase fuel solely from one biorefinery, wholesaler or multiple wholesalers? Who is your supplier/s? When does your contract end? What evidence can you provide to substantiate this claim (e.g. signed contractual agreements)?
- Was there a shortage of supply of sustainable biofuel blends available for purchase? What evidence can you provide to demonstrate this (e.g. emails or correspondence from the supplier)?

2. Examples of evidence that the fuel seller made efforts to promote the sale of a sustainable biofuel blend (some examples may not apply to wholesalers)

- What evidence are you able to provide to demonstrate that you took every reasonable step to promote and therefore sell sustainable biofuel blends (e.g. onsite or web based advertisement)?
- What training have you given staff regarding the promotion sustainable biofuel blends (e.g. meeting minutes, training documentation provided to staff)?
- What ability did you have to use price to promote the sale of sustainable biobased fuel (e.g. were you able to lower the price of biobased fuel, or did you have any short term or ongoing discounts / offers)? What evidence can you provide for this?
- Did you have a price board displaying the price of sustainable biofuel blends? Are you able to provide evidence of this (e.g. photographs, receipt of works)?
- Did you have anywhere for consumers to check if their car is suitable for biofuel blends (e.g. iPad station or computer)? Are you able to provide evidence of this?
- Have you developed any internal documentation and/or reports to support your efforts towards achieving compliance with the Act (e.g. marketing plans, forecasting reviews, feasibility studies, cost benefit analysis, funding approval from company directors)?

- Were brochures promoting the use of sustainable biofuel blends made available to consumers? Were these in an easily accessible location? Are you able to provide evidence of this (e.g. the brochure itself, photographs of brochures displayed)?

3. Examples of evidence of upgrades to infrastructure the fuel seller arranged to enable enough sales of sustainable biofuel blend

- Have you conducted an upgrade to your infrastructure to comply with the sustainable biofuel requirement? What evidence can you provide to substantiate this claim (e.g. business cases, project plans, contracts, invoice for works)?
- Have you enlisted the services of a contractor to upgrade the infrastructure onsite to enable the sale of sustainable biofuel blends? If not, what reasons do you have for not enlisting these services (e.g. heavy demand on reputable competent contractors resulting in delays to construction start dates)? What evidence can you provide to substantiate this?
- If any upgrades were investigated and not conducted, what evidence are you able to provide to substantiate that the upgrades were not reasonable to conduct (e.g. finance could not be secured, construction delays, incompatible infrastructure, unreasonable cost)? What evidence can you provide to demonstrate that this was the only possibly pathway to achieving compliance.
- Are there any issues with the size of the site which restricts/impedes further development (e.g. cost of tank conversion is unreasonable, council development approval required)? What evidence can you provide to substantiate this?
- Were you required to approach the Local Government for a development approval to upgrade your infrastructure? Did this occur and what was the outcome? What evidence can you provide to substantiate this?

4. Examples of the facilities the fuel seller made available to sell a sustainable biofuel blend

- How many tanks do you have on your site and what is the total capacity of these tanks?
- What tank capacity has been dedicated to the storage (and therefore the supply) of sustainable biofuel blends?
- What evidence can you show to demonstrate that you purchased a sustainable biofuel blend so that you had it available for sale (e.g. purchase receipts, sales consignment)?
- For retailers, how many pumps and bowsers do you have onsite? What evidence can you provide to confirm the number of pumps and bowsers collectively (e.g. photographs)? What is the configuration of the fuel types on each bowser (E10, 91, 95, 98, Diesel)?
- How many of those pumps and bowsers are dedicated to the supply of sustainable biofuel blends? What evidence can you provide to confirm the number of pumps and bowsers that supply biofuel blends (e.g. photographs)?

5. Examples of other actions that may have an impact on your ability to sell the minimum amount.

In the interests of fairness, a fuel seller also has the opportunity to provide details of any other actions or circumstances that may have impacted on the ability to comply with the sustainable biofuel requirement. While not legislated as a defence to a proceeding under section 35B or 35C, as points 1 to 4 above are, the department recognises there may be other factors affecting a fuel seller's ability to meet the prescribed minimum sales amount. The department will consider, for example, the following information on a case by case basis:

- Were there any periods of time in which a sustainable biofuel blend could not be sold at a site as a result of circumstances such as a natural disaster, pump malfunctions, infrastructure damage or fuel contamination? What evidence can you provide to demonstrate this?
- Where is the location of your standard service station/s and what is the primary fuel that is sold (e.g. diesel or regular unleaded petrol)?
- What evidence can you provide that would indicate that, due to the location of your site, there is limited demand for sustainable biobased fuels (e.g. your primary customer base are users who purchase marine fuel for boats)?
- Is there a possibility that compliance with the sustainable biofuel requirement may result in a risk to public health or safety? What evidence can be provided to support this?
- Did you not comply with the sustainable biofuel requirement due to an honest and reasonable, but mistaken belief that you were not required to? *Note: Ignorance of the law is not a reasonable excuse to justify a failure to comply with the sustainable biofuel requirement.*
- Is there any other reason for not selling the minimum amount?

4. Natural justice

Prior to making a decision which may adversely affect a fuel seller, the department will always provide natural justice to the affected fuel seller.

Taking into consideration the information that has been provided by the fuel seller to demonstrate that they have taken all reasonable steps in an effort to comply with the sustainable biofuel requirement, the department will first -

- **Notify** - notify the fuel seller that the department is considering making adverse findings; and
- **Respond** - provide the fuel seller with an opportunity to respond to the allegation; and
- **Consider** - consider whether the fuel seller conducted all reasonable steps with supporting evidence submitted by it before finalising the decision.

Should a breach be identified, the department will contact the fuel seller to allow them the opportunity to respond to the alleged offence. Fuel sellers will be advised that they do not have to respond as the department has no power to compel them to respond to the alleged offence. However it will always be in a fuel sellers' best interest to demonstrate the reasonable steps taken to achieve compliance.

If no sufficient mitigating circumstances exist and the department is satisfied that all reasonable steps have not been taken and an offence has been committed, then escalated enforcement action will occur in accordance with the [Biofuels Compliance and Enforcement Strategy](#).

It is important to note that the Biofuel Mandate Compliance and Enforcement Strategy and Reasonable Steps for Achieving the Sustainable Biofuel Requirement are guides only and not directions. They are designed to assist in compliance and enforcement actions to achieve consistency, efficiency, effectiveness and transparency in the administration of the Act by the department.

5. Approval

Approved

Date: 14/02/2019

Paul Walsh

A/General Manager

Strategic and Fuels Reforms

Department of Natural Resources, Mines and Energy