

Departmental Disclosure Statement

Sustainable Biofuel Obligation Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry for Business, Innovation and Employment (**MBIE**).

MBIE certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

12 October 2022

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Part One: General Policy Statement

To assist with the transition from liquid fossil fuels to low-emissions fuels and reduce the greenhouse gas emissions from transport, the Government is introducing a sustainable biofuels obligation.

The Bill introduces an obligation for any person or company that imports or refines more than 50,000 litres of liquid fossil fuels for transport in New Zealand to reduce the greenhouse gas emissions intensity of those fuels by also supplying sustainable biofuels. The obligation excludes aviation fuels.

The required emission intensity reduction percentages for 2024 to 2035 are set out in *Schedule 2*. The percentages for 2024 to 2025 are fixed. The percentages for 2026 to 2035 can be reviewed by the responsible Minister after consulting with such persons as the Minister considers appropriate and considering a set of criteria. This will assist with keeping the emissions intensity reduction percentages at an appropriate level should there be significant change that would make the provisional targets for 2026 to 2035 too low or too high.

The Bill requires the responsible Minister to recommend regulations which set out how biofuels will be determined to be sustainable. Before recommending, the Minister must first consider a set of matters provided for in the Bill, except in the case of biofuels created from specified waste or residue products. In that case, the set of matters do not have to be first considered. The regulations will provide assurance that biofuels are not being produced at the expense of other environmental and social outcomes.

They will allow for excluding or limiting the use of particular biofuels to meet the obligations. They also require the emissions intensity of biofuels and liquid fossil fuels to be assessed based on life-cycle emissions (i.e., the cumulative emissions from each part of the production and supply chain), although alterations to this lifecycle assessment can be made for biofuels made from specified waste or residue products. This will ensure that emissions that occur overseas are accounted for, and the obligation is effective in reducing global emissions. The Bill also allows the Minister to make regulations concerning certification schemes which could play a role in certifying the sustainability and emissions intensity of biofuels along the supply chain.

The Bill also provides for—

- flexibility mechanisms that allow obligated parties to trade emissions reductions between each other, or to “bank” emissions reductions into the next year, or “borrow” them from the next year. This assists the obligated parties to more easily manage small deficits or surpluses in their achievement of the emissions intensity reductions and smooth the cost of meeting the obligation between years:
- a requirement for obligated parties to report on their achievement of the emissions intensity reduction percentage annually:
- powers for the Environmental Protection Authority to monitor and enforce the new requirements, including by means of a civil pecuniary penalty for noncompliance of \$800 per tonne of carbon dioxide equivalent emissions not achieved.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
The publicly available reports that informed the policy to be given effect by this Bill are: <ul style="list-style-type: none">• <i>Biofuel Insights</i>, March 2021, prepared by Sapere for the Energy Efficiency and Conservation Authority. Available here.• <i>Ināia tonu nei: a low emissions future for Aotearoa (chapter 14 - transport)</i>, May 2021, Climate Change Commission. Available here.• <i>Discussion document on the proposals for regulations on the sustainable biofuels obligation</i>, June 2022, Ministry for Business, Innovation and Employment and Te Manatū Waka. Available here.• <i>Discussion document on the preferred design of a sustainable biofuels mandate</i>, June 2021, Ministry for Business, Innovation and Employment and Te Manatū Waka. Available here.	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
A regulatory impact statement (RIS) was prepared to support Cabinet's decision in April 2021 to consult on a proposed biofuels mandate: <i>Sustainable Transport Biofuels Mandate supplementary analysis report and Regulatory Impact Statement</i> , April 2021, Ministry of Business, Innovation and Employment and Te Manatū Waka. Another RIS was prepared to support Cabinet's decision in October 2021 on the final policy design of the sustainable biofuels mandate (now known as the sustainable biofuels obligation): <i>Sustainable Biofuels Mandate: final policy design – Regulatory impact statement</i> , October 2021, Ministry of Business, Innovation and Employment and Te Manatū Waka. Both RISs are accessible at https://www.mbie.govt.nz/have-your-say/increasing-the-use-of-sustainable-biofuels-in-aotearoa-new-zealand/ and can also be found and downloaded at https://www.treasury.govt.nz/publications/informationreleases/ris .	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
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A quality assurance panel with representatives from the Regulatory Impact Analysis Team at the Treasury and the Ministry of Transport reviewed the April 2021 RIS “Sustainable Transport Biofuels Mandate” produced by the Ministry of Business, Innovation and Employment and the Ministry of Transport. The panel considered that it met the Quality Assurance criteria.

The October 2021 RIS did not meet the threshold for receiving an independent opinion on the quality of the RIS from the RIS Team based in the Treasury.

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?

YES

The following are policy changes were not analysed in either RIS:

- Changing when the Obligation comes into effect from 1 April 2023 to 1 April 2024. The current timeframe provides fuel suppliers with limited options to meet the target in 2023 due to lack of infrastructure in New Zealand for first generation biofuels. A push back in the implementation date would allow for infrastructure to get up to speed and would less likely result in fuel suppliers opting to pay the penalty for not meeting the target in 2023 (which would result in zero emission reductions).
- Including a threshold so that an obliged person must import or refine more than 50,000 litres of liquid fuel. This moves the definition of an ‘obliged person’ to align with the Climate Change Response Act 2002 (CCRA), ensures that the Obligation aligns with the Emissions Trading Scheme and excludes small-scale importers of liquid fuels.
- Introducing a regulation-making power that allows the relevant Minister to include biofuels made from specific wastes or residues to be considered as sustainable without considering those against the statutory pre-requisites for sustainability when prescribing those as sustainable.
- Introducing a regulation-making power that allows the relevant Minister to place limits or prohibitions on the extent to which an obliged person can meet their biofuel obligation with particular kinds of biofuel. This would allow for regulations to exclude or limit types of biofuels produced from feedstock unlikely to be sustainable.
- Allowing an obliged person to apply to the relevant Minister to borrow up to 20 percent of the next year’s emissions reduction. This would allow flexibility for smaller obliged persons who have fewer fuel deliveries in a year and would experience a larger impact if a fuel shipment was delayed.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

YES

Sustainable Biofuels Obligation - Volumes and Price Impacts, August 2022, Hale & Twomey Limited. The report is available on MBIE’s website. It provided possible scenarios of how the biofuel obligation might be met by the obliged persons and estimated the associated fuel price impacts. The analysis also considered the likely impact of proposed options for the delegated legislation provided for in the Bill.

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The RISs addresses the size of the potential costs and benefits. Sections 4 and 5 of the October 2021 RIS discuss the potential costs and benefits. As discussed, the Hale & Twomey report (referred to in section 2.4) provides further discussion of the potential fuel price impacts of different scenarios. The Hale & Twomey report provides a more current estimate of the costs of the policy to be given effect by this Bill.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The potential costs or benefits are:</p> <p>(a) Highly likely to be affected by the level of effective compliance or non-compliance with applicable obligations or standards. If the obliged persons do not comply with the Sustainable Biofuels Obligation, the expected benefits of greenhouse gas emissions reductions from the transport sector are unlikely to occur. Similarly, the costs associated with the policy (including higher fuel input costs for fuel importers and resellers) are unlikely to occur if there is non-compliance with the obligation.</p> <p>(b) Likely to be affected by the nature and level of regulator effort put into encouraging or securing compliance. The Environmental Protection Authority's role as the regulator provides an effective and well-resourced agency to monitor and enforce compliance which is experienced in regulating similar (but distinct) requirements under the Climate Change Response Act 2002. The civil pecuniary penalty regime provides a strong financial incentive for obliged persons to comply. Therefore, the expected nature and level of regulator effort is likely to be sufficient to secure the predicted or assumed levels of compliance.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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Officials have consulted with the Ministry of Foreign Affairs and Trade (MFAT) to account for New Zealand's international trade obligations during the design of the Bill. MFAT advised that aspects of the regulations are likely to constitute technical regulations and conformity assessment procedures under the World Trade Organisation (WTO) Technical Barriers to Trade (TBT) Agreement. In accordance with MFAT's advice, these policy proposals were notified to the WTO TBT Committee on 13 September 2022.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Officials consulted with Te Arawhiti and Te Puni Kōkiri on the policy to be given effect by the Bill. MBIE and Te Manatū Waka's initial view was that the sustainable biofuels obligation would not affect any Māori rights and interests protected by the Treaty of Waitangi. Both Te Arawhiti and Te Puni Kōkiri agreed with this. Therefore, no particular Treaty of Waitangi provisions have been made.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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The Ministry of Justice's Bill of Rights Act vetting team has provided advice to the Attorney-General.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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The Bill creates offences in the following clauses:

- Clause 21 – if an obliged person fails to keep and retain records;
- Clause 22 - if an obliged person fails to provide administrative information to the EPA;
- Clause 23 – if an obliged person fails to provide an annual report within the required timeframe;
- Clause 25 – if an obliged person fails to: provide information or documents to the EPA or an enforcement officer, or appear before the EPA or an enforcement officer;
- Clause 26 – if a person knowingly provides false or misleading information to the EPA.

Clause 30 allows the High Court to order an obliged person pay a civil pecuniary penalty if they are found to have contravened their sustainable biofuel obligation.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted on these provisions and is comfortable with them.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
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External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>In June and July 2021, public consultation was undertaken on a discussion document. 63 submissions were received. A summary of the feedback from this consultation is provided in Section 2 of the October 2021 RIS.</p> <p>In June 2022, a draft version of the Bill was shared in confidence with four of the five of the obligated parties in order to test the workability of the Bill. The feedback received led to a few minor amendments to improve how the Bill gave effect to the policy proposals.</p> <p>Officials undertook consultation with the Environmental Protection Authority with regards to their role as the regulator.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>As mentioned above, in June 2022, a draft version of the Bill was shared in confidence with four of the five companies who will become obliged persons under the Bill to test its workability. The feedback received led to a few minor amendments to ensure the Bill's effectiveness.</p> <p>Officials obtained advice from the Legislation Advisory Committee and have taken this advice into account when drafting the legislation.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
<p>The offences created under clause 21, 22, 23, and 25 are strict liability offences. They are summarised in Part 3.4. An obliged person does not commit these offences if they have reasonable excuse for non-compliance.</p> <p>It is justifiable that these offences are strict liability because:</p> <ul style="list-style-type: none">• it is easier for the obliged person than the EPA to show why the defendant was not at fault;• the obliged person is voluntarily involved in a regulated activity;• the offence would apply in very limited circumstances; and• the element to be proven is within the knowledge of the obliged person concerned and proof of it would not impose an undue burden on them.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>The Bill creates the following powers to make delegated legislation that are relevant to this section:</p> <ul style="list-style-type: none"> • The Minister must in 2024 and 2029, and may at any other time, review the emissions intensity reduction percentages for 2026 and beyond (clause 11(2)). In conducting the review, the Minister must consult appropriate persons and have regard to a number of factors the emissions percentages would be affecting as set out in clause 11(3)(a)(i-vii). • An Order in Council may alter any emissions intensity reduction percentages for 2026 and beyond. Before recommending such an Order in Council, the Minister must have conducted a review in accordance with clause 11. • Regulations will determine what biofuel is sustainable biofuel (clause 13). Before recommending these regulations, the Minister will have to be satisfied of specified matters relating to the sustainability of the material (or “feedstock”) the biofuel is made from. The Minister also has to have regard to the principles of the waste hierarchy, and the impact of the feedstock on soil carbon. An exception to this requirement is for biofuel made from feedstock that is a class of waste or residual product specified in regulations that Minister has determined is sustainable. • The Minister may also increase an obligated person’s borrowing amount from 10% to up to 20% by notice in the Gazette upon considering an application for increase from that obliged persons (clause 18). 	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill creates the following powers to make delegated legislation:</p> <ul style="list-style-type: none"> • On the recommendation of the Minister, the Governor-General may make regulations by Order in Council to: <ul style="list-style-type: none"> ○ provide for anything the Bill says may or must be provided for by regulations; and (clause 41(1)(a)) ○ provide for anything incidental that is necessary for carrying out, or giving full effect to this Bill (clause 41(1)(b)) • ETS obligation fuel may be any type of fuel prescribed by the regulations under the Climate Change Response Act 2002 for the purposes of owning liquid fossil fuels (clause 5(a) and (b)) • Regulations may prescribe a certification scheme. The biofuels used by an obliged person to meet their obligation must comply with the conditions of this scheme (clause 15) • Regulations may prescribe: <ul style="list-style-type: none"> ○ the kind of identifying information an obliged person must provide to the EPA (clause 22(1)(a)(ii)); ○ the contact details which an obliged person is to provide to the EPA (ibid); ○ the manner in which an obliged person provides annual reports to the EPA (clause 23(1)); ○ further information to be included in the annual reports to the EPA (clause 23(2)(e)); ○ the manner in which the EPA approves an auditor to give a statutory declaration to an obliged person’s annual report (clause 23(3)); ○ the manner in which the EPA is to provide a summary of the information provided in an obliged person’s annual report (clause 24(1)(b)); and ○ other information to be published by the EPA (clause 24(1)(d)). 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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