



New South Wales

Biofuel (Ethanol Content) Act 2007 No 23

Contents

	Page
Part 1	Preliminary
1	Name of Act 2
2	Commencement 2
3	Definitions 2
4	Primary wholesalers 2
5	Act applies only to sales to person in NSW or for delivery in NSW 3
Part 2	Required ethanol content for petrol sales
6	Minimum 2% ethanol requirement for primary wholesalers 4
7	Returns by primary wholesalers 4
8	Keeping of records by primary wholesalers 4

	Page
Part 3 Compliance	
9 Offence—failure to comply with minimum 2% ethanol requirement	6
10 Offence—failure to furnish returns or keep records	6
11 Compliance reporting by Minister	7
12 Exemption from ethanol mandate	7
13 Suspension of ethanol mandate	8
Part 4 Enforcement	
14 Appointment of investigators	9
15 Power of investigator to obtain information, records and evidence	9
16 Powers of investigators	9
17 Interference with investigator	10
18 Seizure of records	11
19 Registration of primary wholesalers	11
Part 5 Miscellaneous	
20 Expert Panel	12
21 Secrecy	12
22 Liability	13
23 Offences	14
24 Authority to prosecute	14
25 Penalty notices	14
26 Regulations	15
27 Amendment of Fines Act 1996 No 99	15
28 Review of Act	16



New South Wales

Biofuel (Ethanol Content) Act 2007 No 23

Act No 23, 2007

An Act to provide for a minimum ethanol content requirement in respect of the total volume of petrol sales in the State. [Assented to 4 July 2007]

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Biofuel (Ethanol Content) Act 2007*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

Director-General means the Director-General of the Department of State and Regional Development.

exercise a function includes perform a duty.

Expert Panel means the Expert Panel established by section 20.

function includes a power, authority or duty.

petrol means a petroleum based fuel (whether or not containing ethanol) for spark-ignition internal combustion engines that is sold as petrol or as petrol-ethanol blend, but does not include diesel fuel, aviation fuel, liquid petroleum gas and such other fuels as may be prescribed by the regulations.

petrol-ethanol blend means petrol that contains ethanol (such as the fuel known as E10).

petrol wholesaler means a person engaged in a business of selling petrol for resale (whether or not that business also involves the sale of petrol by retail).

primary wholesaler is defined in section 4.

relevant period is defined in section 6.

(2) Notes included in this Act do not form part of this Act.

4 Primary wholesalers

(1) In this Act:

primary wholesaler means a petrol wholesaler who operates or supplies petrol from any of the following facilities (whether or not in New South Wales) in connection with petrol wholesaling:

- (a) an oil refinery,
- (b) a shipping facility,
- (c) a facility to which petrol is supplied by pipeline from an oil refinery or a shipping facility,

- (d) a facility to which petrol is supplied by pipeline from a facility referred to in paragraph (c).
- (2) The regulations may include any other petrol wholesaler or class of petrol wholesalers in the definition of *primary wholesaler*.
- (3) The regulations may exclude a person or class of persons from the definition of *primary wholesaler*.

5 Act applies only to sales to person in NSW or for delivery in NSW

- (1) This Act applies to the sale of petrol by a primary wholesaler to a person in New South Wales or for delivery in New South Wales (whether or not the sale is made in New South Wales).
- (2) This Act does not apply to a sale of petrol by one primary wholesaler to another primary wholesaler.
- (3) A sale of petrol is considered to be a sale for delivery in New South Wales if the terms (whether express or implied) of the sale or any contract for the sale:
 - (a) require either party to the sale to deliver, or arrange delivery of, the petrol into or within New South Wales, or
 - (b) contemplate delivery of the petrol into or within New South Wales.
- (4) The regulations may exclude any sale or class of sales from the application of all or specified provisions of this Act.

Part 2 Required ethanol content for petrol sales

6 Minimum 2% ethanol requirement for primary wholesalers

- (1) A primary wholesaler must ensure that the volume of ethanol sold by the wholesaler (in petrol-ethanol blend) during a relevant period is not less than 2% of the total volume of all petrol (including petrol-ethanol blend) sold by the wholesaler during the relevant period.

Note. Section 5 limits the sales of petrol to which this Act applies.

- (2) Each of the 3-month periods that starts at the beginning of October, January, April and July in each year is a *relevant period* for the purposes of this Act. The regulations can change what is a *relevant period* for the purposes of this Act.
- (3) For the purpose of determining the volume of petrol sold by a primary wholesaler, the volume of petrol that is petrol-ethanol blend is to be determined as the combined volume of petrol and ethanol in the petrol-ethanol blend (that is, by including the volume of the ethanol).
- (4) The regulations may provide for the way in which the volume of petrol and the volume of ethanol is to be determined for the purposes of this Act.

7 Returns by primary wholesalers

- (1) A primary wholesaler must furnish a return to the Director-General within 1 month after the end of each relevant period.
- (2) The return is to specify the following information in respect of sales of petrol by the primary wholesaler during the relevant period:
 - (a) the total volume of petrol sold (including petrol-ethanol blend),
 - (b) the total volume of ethanol sold (in the form of petrol-ethanol blend),
 - (c) such other information as may be prescribed by the regulations.
- (3) The return is to be in such form as the Director-General may from time to time require and notify to primary wholesalers.
- (4) The first relevant period to which this section applies is the first relevant period to start on or after the commencement of this section.

8 Keeping of records by primary wholesalers

- (1) A primary wholesaler must keep such records in respect of sales of petrol by the primary wholesaler as may be necessary to enable the primary wholesaler to furnish the returns required by section 7.

- (2) Those records are to include records of such transactions and other matters in connection with petrol sales as the regulations may require.
- (3) The regulations may prescribe the form and manner in which records are to be kept and the period for which records are to be retained.

Part 3 Compliance

9 Offence—failure to comply with minimum 2% ethanol requirement

- (1) A primary wholesaler who fails to comply with section 6 is guilty of an offence.
Maximum penalty:
 - (a) in the case of a first offence—100 penalty units, or
 - (b) in the case of a second or subsequent offence—1,000 penalty units.
- (2) It is a defence to a prosecution for a failure to comply with section 6 if the defendant proves that the defendant took all reasonable steps to comply with the section.
- (3) The regulations may make provision for or with respect to prescribing actions the taking of which by a primary wholesaler will constitute the taking of reasonable steps to comply with section 6.
- (4) The regulations do not prevent a primary wholesaler from proving that other actions taken by the primary wholesaler constitute the taking of reasonable steps to comply with section 6.

10 Offence—failure to furnish returns or keep records

- (1) A person who fails to furnish a return in compliance with section 7 or who in purported compliance with that section furnishes a return containing information that the person knows (or ought reasonably to know) is false or misleading in a material particular is guilty of an offence.
Maximum penalty:
 - (a) in the case of a first offence—100 penalty units, or
 - (b) in the case of a second or subsequent offence—1,000 penalty units.
- (2) A person who fails to keep and retain records in compliance with section 8 or who in purported compliance with that section makes a record containing information that the person knows (or ought reasonably to know) is false or misleading in a material particular is guilty of an offence.
Maximum penalty:
 - (a) in the case of a first offence—100 penalty units, or
 - (b) in the case of a second or subsequent offence—1,000 penalty units.

- (3) It is a defence to a prosecution for a failure to keep and retain records in compliance with section 8 if the defendant proves that the defendant had a reasonable excuse for the failure.

11 Compliance reporting by Minister

- (1) The Minister may from time to time publish information about compliance with the requirements of this Act by primary wholesalers.
- (2) Without limiting this section, the Minister may publish the names of primary wholesalers who fail to comply with section 6 or any other provision of this Act, together with information about the nature and extent of any such failure.
- (3) Information published under this section can include a copy of any return furnished under this Act by a primary wholesaler.
- (4) The regulations can prohibit the publication under this section of specified information or information of a specified kind, for the purpose of protecting the confidentiality of the information.

12 Exemption from ethanol mandate

- (1) The Minister may by order in writing exempt a specified primary wholesaler from compliance with section 6 if the Minister is satisfied that:
- (a) compliance by the primary wholesaler with that section is uneconomic because of the price at which the primary wholesaler is reasonably able to obtain ethanol, or
 - (b) circumstances exist that are prescribed by the regulations as justifying exempting the primary wholesaler from compliance with that section.
- (2) The Minister is not to grant an exemption without first referring the proposed exemption to the Expert Panel for advice and considering the advice of the Expert Panel on the proposed exemption.
- (3) An exemption can be granted subject to conditions.
- (4) An exemption can be granted as a partial exemption specifying a minimum ethanol percentage of less than 2% (with the result that section 6 then applies to require that the volume of ethanol sold by the primary wholesaler during a relevant period covered by the exemption is not less than that specified percentage of the total volume of all petrol sold by the primary wholesaler during the relevant period).
- (5) An exemption that is granted for a specified period remains in force for that period.

- (6) An exemption that is not granted for a specified period remains in force until it is revoked. The Minister may revoke such an exemption at any time by notice in writing to the wholesaler concerned.

Note. An exemption from compliance with section 6 does not affect the obligation to comply with section 7 (Returns by primary wholesalers) or 8 (Keeping of records by primary wholesalers).

13 Suspension of ethanol mandate

- (1) The Minister may by order published in the Gazette suspend the operation of section 6 if satisfied that compliance with that section:
- (a) is uneconomic as a result of the price at which primary wholesalers are reasonably able to obtain ethanol or industry-wide ethanol shortages, or
 - (b) may result in a risk to public health or safety, or
 - (c) may have an adverse effect on the retail price of petrol for motorists, or
 - (d) should be suspended for some other extraordinary reason.
- (2) The Minister is not to suspend the operation of section 6 without first referring the proposed suspension to the Expert Panel for advice and considering the advice of the Expert Panel on the proposed suspension.
- (3) A suspension can be granted as a partial suspension specifying a minimum ethanol percentage of less than 2% (with the result that section 6 then applies to require that the volume of ethanol sold by a primary wholesaler during a relevant period covered by the suspension is not less than that specified percentage of the total volume of all petrol sold by the primary wholesaler during the relevant period).
- (4) A suspension granted for a specified period remains in force for that period.
- (5) A suspension that is not granted for a specified period (an *indefinite suspension*) remains in force until it is revoked.
- (6) The Minister must keep an indefinite suspension under periodic review and must revoke the suspension when satisfied that grounds for the suspension no longer exist. The Minister revokes an indefinite suspension by notice in writing published in the Gazette.

Note. The suspension of operation of section 6 does not affect the obligation to comply with section 7 (Returns by primary wholesalers) or 8 (Keeping of records by primary wholesalers).

Part 4 Enforcement

14 Appointment of investigators

- (1) The Director-General may appoint any member of staff of the Department of State and Regional Development as an investigator for the purposes of this Act.
- (2) The Director-General is to provide an investigator with a certificate of authority.

15 Power of investigator to obtain information, records and evidence

- (1) If an investigator believes on reasonable grounds that a person is capable of giving information, producing records or giving evidence in relation to a matter that constitutes, or may constitute, an offence against this Act or the regulations or that may assist in ascertaining whether the provisions of this Act or the regulations are being complied with or have been contravened, the investigator may, by notice in writing given to the person, require the person:
 - (a) to provide an investigator, in writing signed by the person (or, in the case of a corporation, by a competent officer of the corporation) and given to the investigator within the time and in the manner specified in the notice, with any such information, or
 - (b) to produce to an investigator, in accordance with the notice, any such records, or
 - (c) to appear before an investigator at a time and place specified in the notice and give any such evidence, either orally or in writing, and produce any such records.
- (2) The powers conferred by this section may only be exercised to impose a requirement on the following persons:
 - (a) any primary wholesaler,
 - (b) any person whom the investigator reasonably believes has been supplied with petrol by a primary wholesaler.

16 Powers of investigators

- (1) An investigator may exercise the powers conferred by this section for the purpose of:
 - (a) ascertaining whether the provisions of this Act or the regulations are being complied with or have been contravened, or
 - (b) obtaining evidence, records or information in relation to a matter that constitutes or may constitute a contravention of this Act or the regulations.

- (2) An investigator may enter and inspect at any reasonable time any premises that the investigator believes on reasonable grounds are premises:
 - (a) used for the conduct of any aspect of the business of a primary wholesaler, or
 - (b) used for the conduct of a business by a person whom the investigator reasonably believes has been supplied with petrol by a primary wholesaler.
- (3) While on premises entered under this section, an investigator may do any one or more of the following:
 - (a) require any person on those premises to produce any records in the possession or under the control of that person relating to the sale or purchase of petrol,
 - (b) inspect and take copies of, or extracts or notes from, any such records and, if the investigator considers it necessary to do so for the purpose of obtaining evidence, seize any such records,
 - (c) require any person on those premises to answer questions or otherwise furnish information in relation to the sale or purchase of petrol,
 - (d) require the owner or occupier of those premises to provide the investigator with such assistance and facilities as is or are reasonably necessary to enable the investigator to exercise the functions of an investigator under this section.
- (4) An investigator is not entitled to enter a part of premises used for residential purposes, except with the consent of the occupier of the part.
- (5) An investigator must, when exercising on any premises any function of the investigator under this Part, produce the investigator's certificate of authority to any person apparently in charge of the premises who requests its production.

17 Interference with investigator

A person must not:

- (a) without reasonable excuse, refuse or fail to comply with any notice given or requirement made, or to answer any question asked, by an investigator under this Part, or
- (b) wilfully delay, hinder or obstruct an investigator in the exercise of the investigator's powers under this Part, or

- (c) furnish an investigator with information that the person knows (or ought reasonably to know) is false or misleading in a material particular.

Maximum penalty: 50 penalty units.

18 Seizure of records

- (1) If an investigator seizes any records under this Part, they may be retained by the investigator until the completion of any proceedings (including proceedings on appeal) in which they may be evidence but only if the person from whom the records were seized is provided, within a reasonable time after the seizure, with a copy of the records certified by an investigator as a true copy.
- (2) A copy of records provided under this section is, as evidence, of equal validity to the records of which it is certified to be a copy.

19 Registration of primary wholesalers

- (1) The regulations may make provision for or with respect to requiring primary wholesalers to be registered for the purposes of this Act.
- (2) In particular, the regulations may make provision for or with respect to any of the following matters in connection with the registration of primary wholesalers:
 - (a) applications for registration,
 - (b) the keeping and administration of a register, and the regulation of access to the register,
 - (c) the imposition of conditions on registration,
 - (d) the cancellation or suspension of registration (for example, for a contravention of a provision of this Act),
 - (e) prohibiting a person from engaging in the business of a primary wholesaler unless registered in accordance with the regulations,
 - (f) the review by the Administrative Decisions Tribunal of decisions made in respect of registration.

Part 5 Miscellaneous

20 Expert Panel

- (1) An Expert Panel is established consisting of the Department heads of the Department of State and Regional Development, the Department of Primary Industries, the Department of Environment and Climate Change and the Department of Commerce, or their nominees, as members of the Expert Panel.
- (2) The Director-General of the Department of State and Regional Development or that Director-General's nominee is to chair the Expert Panel.
- (3) The function of the Expert Panel is to provide advice to the Minister on:
 - (a) any proposal referred to the Panel by the Minister for the granting of an exemption from, or the suspension of, the operation of section 6, and
 - (b) such other matters in connection with the operation of this Act as may be referred to the Expert Panel by the Minister.
- (4) The Minister can issue guidelines to the Expert Panel from time to time as to the matters that are relevant for the purpose of determining whether grounds exist for the grant of an exemption from or suspension of the operation of section 6.

21 Secrecy

- (1) This section applies to the following persons:
 - (a) the Minister,
 - (b) the Director-General and a person who is or was a member of staff of the Department of State and Regional Development,
 - (c) a person who is or was a member of the Expert Panel.
- (2) A person to whom this section applies must not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act:
 - (a) make a record of any information, acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act, or
 - (b) divulge or communicate to any person any such information.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

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- (3) A person to whom this section applies cannot be required:
- (a) to produce to any person or body any document or other thing that has come into the person's possession, custody or control by reason of, or in the course of, the exercise of the person's functions under this Act, or
 - (b) to divulge or communicate to any person or body any matter or thing that has come to the person's notice in the exercise of the person's functions under this Act.
- (4) Despite this section, a person to whom this section applies may divulge any such information:
- (a) for the purposes of and in accordance with this Act, or
 - (b) for the purposes of a prosecution under this Act, or
 - (c) in accordance with a direction of the Director-General, if the Director-General certifies that it is necessary to do so in the public interest, or
 - (d) to any person or body prescribed by the regulations.
- (5) A person or body to whom information is divulged under subsection (4), and any person or employee under the control of that person or body, is subject to the same rights, privileges, obligations and liabilities under subsections (2) and (3) in respect of that information as if he or she were a person to whom this section applies and had acquired the information in the exercise of functions under this Act.
- (6) In this section:
- body* includes any court, tribunal, authority or body having power to require the production of documents or the answering of questions.
- produce* includes permit access to.

22 Liability

- (1) The State does not incur any liability, and compensation is not payable by or on behalf of the State, arising directly or indirectly from any of the following matters occurring before or after the commencement of this section:
- (a) the enactment or operation of this Act,
 - (b) the exercise by any person of a function under this Act or a failure to exercise any such function,
 - (c) any statement or conduct relating to the regulation of the ethanol content of petrol supplied by petrol suppliers.

- (2) In this section:
- compensation** includes damages or any other form of monetary compensation.
- conduct** includes any act or omission, whether unconscionable, misleading, deceptive or otherwise.
- statement** includes a representation of any kind:
- (a) whether made verbally or in writing, and
 - (b) whether negligent, false or misleading or otherwise.
- the State** means the Crown within the meaning of the *Crown Proceedings Act 1988*, and includes an officer, employee or agent of the Crown and an investigator appointed under section 14.
- this Act** includes any regulation made under this Act and any suspension or exemption under this Act.

23 Offences

- (1) Proceedings for an offence against this Act or the regulations are to be disposed of summarily before:
 - (a) a Local Court, or
 - (b) the Supreme Court in its summary jurisdiction.
- (2) If proceedings are brought before a Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units, despite any higher maximum monetary penalty provided in respect of the offence.

24 Authority to prosecute

Proceedings for an offence against this Act or the regulations may be instituted only with the written consent of the Minister.

25 Penalty notices

- (1) An authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence against this Act or the regulations, being an offence prescribed by the regulations as a penalty notice offence.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice may be served personally or by post.

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- (4) If the amount of penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.
 - (5) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
 - (6) The regulations may:
 - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
 - (b) prescribe the amount of penalty payable for the offence if dealt with under this section, and
 - (c) prescribe different amounts of penalties for different offences or classes of offences.
 - (7) The amount of a penalty prescribed under this section for an offence is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.
 - (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
 - (9) In this section, *authorised officer* means a member of staff of the Department of State and Regional Development authorised in writing by the Director-General as an authorised officer for the purposes of this section.

26 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may create an offence punishable by a penalty not exceeding 100 penalty units.

27 Amendment of Fines Act 1996 No 99

Insert in alphabetical order in Schedule 1 to the *Fines Act 1996*:
Biofuel (Ethanol Content) Act 2007, section 25

Section 28 Biofuel (Ethanol Content) Act 2007 No 23

Part 5 Miscellaneous

28 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

[Agreement in principle speech made in Legislative Assembly on 20 June 2007
Second reading speech made in Legislative Council on 27 June 2007]

BY AUTHORITY