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Fuel Quality Standards Bill 2000

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No. 47 2000–01

Fuel Quality Standards Bill 2000

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25 October 2000

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# Fuel Quality Standards Bill 2000

**Date Introduced:** 7 September 2000

**House:** Senate

**Portfolio:** Environment and Heritage

**Commencement:** On a day or days to be fixed by Proclamation.

## Purpose

To establish a legal framework for the setting of national fuel quality standards.

## Background

Transport and ambient air quality in Australia

The thrust of improving transport fuel quality on a national basis is partly to do with better engine efficiency but mostly is aimed at reducing air pollution. As a largely urbanised nation, Australia experiences about the same levels of air pollution as would be expected for a developed country. However, as measured against World Health Organisation and national guidelines for ambient air quality, air pollution in Australia can exceed desirable levels. Of particular concern are emissions of particulates from diesel engines and the photochemical formation of ozone from hydrocarbon and nitrogen oxide (NO<sub>x</sub>) emissions. A 1997 report by the Australian Academy of Technological Sciences and Engineering entitled *Urban Air Pollution in Australia*<sup>1</sup> stated that ‘overall increase in vehicle use may mean that the air quality gains already made, mainly through improved vehicles and unleaded fuel (from 1986), will not be sustained’. Under a ‘business as usual’ scenario, the report stated that models and forecasts suggest that there will be ‘an upward swing in some gaseous pollutant levels in the next decade or so; and fine particulate emissions may rise from current levels, and could accelerate if diesel vehicles become more prevalent’.

Diesel exhaust particulates were once considered relatively benign compared with gaseous emissions such as NO<sub>x</sub> and carbon monoxide. However, particulates are now blamed for much of the health impact of air pollution. Diesel exhaust is held responsible for lodging very fine airborne particles in the lungs of city dwellers. On days when particulates are

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known to be at a high level, there is a recorded increase in mortality rates. More specifically, long and short-term exposure to ultra-fine particles from diesel exhaust is associated with increased deaths from heart and lung disease. Diesel vehicles are believed to contribute about four-fifths of all vehicle-sourced fine airborne particles in cities. In 1998 the California Air Resources Board proposed that diesel exhaust be declared a toxic substance.

## Recent Policy Development on fuel quality standards<sup>2</sup>

Australia's national emission standards for new vehicles, the Australian Design Rules or ADRs, have tended to lag behind overseas standards. Thus, the ADRs presently in force for petrol vehicles are equivalent to those pertaining to the US 1981-1982 car model years. Our current ADR standard for diesel vehicles is also behind the times, being equivalent to the US 1991 standard. In November 1997, in association with the Kyoto global warming conference, the Prime Minister released a statement: *Safeguarding the Future: Australia's Response to Climate Change*<sup>3</sup> which incorporated a far-reaching Environmental Strategy for the Motor Vehicle Industry.

The Strategy announced a total phaseout of leaded petrol in Australia (this will be complete on 1 January 2002), a target of improving national average fuel consumption by 15%, and, most relevant to the Bill, a goal of Australia harmonising with international vehicle emission standards by the year 2006.

For many commentators, Federal Government GST proposals favouring diesel fuel presented a threat to Australian air quality and could arrest a trend towards cleaner alternative fuels. The final deal on GST arrangements went some way towards assuaging these fears, and was set out in the May 1999 Federal Government statement entitled *Measures for a Better Environment*. Among other initiatives, new ADRs were announced which would enable Australia to catch up with the latest European and US emission standards over a period of seven years. Thus:

<u>European Standard</u>	<u>European Timetable</u>	<u>Australian Timetable</u>	<u>for New Vehicles</u>
Euro 2	1996-1997	2002-2003	all new diesel vehicles
		2003-2004	all new petrol vehicles
Euro 3	2000-2001	2002-2003	medium and heavy diesel
		2005-2006	all new petrol vehicles
Euro 4	2005-2006	2006-2007	all new diesel vehicles

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In relation to the ADR proposals (which were enacted in late 1999), the Government commissioned Coffey Geosciences Pty Ltd to develop six scenarios for fuel quality requirements over the next few years.<sup>4</sup> It should be noted that improving the 'quality' of transport fuel does not necessarily imply that the fuel of today is 'dirty' as such. Rather, the sophisticated engine technologies being devised to meet tough international emission standards such as Euro 4 require special fuel with very low sulfur content in particular and, in the case of petrol, with a research octane number (RON) at least as high as the present premium unleaded fuel (about RON 95). In 1986 Australia adopted a low octane unleaded petrol by international standards for most of its new cars (RON 91-92). While this was easier for refineries to produce in the absence of lead, Australian cars do not run at the same efficiency as most European and North American cars. So, increasing the average octane number of Australian petrol will aid new emission control technologies but also lead to fuel conservation through greater efficiency. This in turn is expected to reduce greenhouse gas emissions from the transport sector.

Apart from benzene pollution, the new fuels cannot be expected to have much effect on the emissions from existing vehicles. However, as Euro 3 and 4 standards are adopted and new vehicles are purchased over the next ten years, the Coffey Fuel Quality Review Report was able to anticipate 'substantial reductions' in hydrocarbons, carbon monoxide, NOx, particulates and air toxics including benzene.

Coffey's scenario most closely approximating Government ADR proposals (production of Euro 4 diesel and petrol) was estimated to cost refineries \$185 million on average in capital costs. [However, Government proposals are for adoption of Euro 4 for petrol vehicles some time after 2008]. Operating expenditure was calculated to rise by an average \$17 million per refinery per year. Overall, the added refinery costs were expected to amount to an additional 1.5 cents per litre for Euro 4 diesel and 1.1 cents per litre for Euro 4 petrol.

Whereas Australian State governments can separately control components of fuels such as lead additive, there is no national system of fuel quality control analogous to the national system of ADRs for new vehicles. Since fuel quality and engine technology must work hand in hand, the Government is proposing that a national Commonwealth-controlled system of fuel regulation be established.<sup>5</sup>

The Regulation Impact Statement set out in the Explanatory Memorandum for the Bill argues against alternatives to Commonwealth regulation such as 'business as usual', industry agreements, State regulation, regulation by National Environment Protection Measure (NEPM), wider use of alternative fuels and limiting vehicle travel. The proposal is for the Bill to institute a system of Commonwealth control over fuel quality, with precise limits for certain (but not all) fuel components in harmony with the adoption of Euro emission standards intended to be set in regulations later in the year.

Of course the Australian petroleum refining industry is at the sharp end of this proposed legislation. As discussed in the Library's Current Issues Brief No. 11 of 1999-2000

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(*Petroleum Refining and Marketing in Australia-Changes Ahead?*),<sup>6</sup> Australian refineries are already facing severe competition from imports and claim to have inherently low levels of profitability. One or two refineries may have to close in the face of these pressures. Reduction of sulfur content in diesel from the present average 1300 hundred parts per million (ppm) to a maximum of 50 ppm by 2006 could present economic and infrastructure problems to other refineries, despite the Fuel Quality Review conclusions that only small costs per litre are involved. Likewise, the upgrading of fuel octane for new cars from the present RON 91-92 to RON 95 is no small matter. If octane-boosting aromatics or additives such as MTBE (methyl tertiary butyl ether) are not to be used for environmental reasons, an overall reduction in petrol volume from a barrel of oil would be expected. Since the method of octane boosting has apparently not been decided, it is difficult to be precise on costs and environmental impact.

As suggested above, the greenhouse benefits of the new ADRs are quite modest. Efficiency gains from engines using higher octane fuel would be offset by increased refinery emissions. The Fuel Quality Review concluded that none of its scenarios would prevent greenhouse emissions increasing by less than 20-27% over the years 2000-2010. This can be calculated as an increase over the base year of 1990 between 39% and 43%, much more than the Australian target of an 8% increase for all emitters.

Lastly, various State governments have legislated or intend to legislate for various uncoordinated fuel quality standards. While the Federal Government has stated that it intends to work with the States and Territories for national standards, the Bill is being introduced in the absence of a satisfactory agreement between the Commonwealth and other Australian jurisdictions. For harmonisation to work – and this is a very worthy cause – all new cars will have to use reliable technology-compatible fuel as international emissions standards are phased in.

## Main Provisions

**Clause 2** provides that this Bill is to commence on proclamation, with no further date set within which the Bill must commence in any event. This appears to be a departure from the approach referred to in *Drafting Instruction No. 2 of 1989*, issued by the Office of Parliamentary Counsel. The Explanatory Memorandum states that '[I]t is intended that the offence provisions will commence on the same date the first determination setting out petrol and diesel standards take effect. This date is not specified in the Bill because consultations on the standards will not be finalised until after the Bill is introduced'.

**Clause 3** sets out the main object of this Bill which is regulate the quality of fuel supplied in Australia in order to:

- reduce the level of pollutants and emissions arising from the use of fuel that may cause environmental and health problems

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- facilitate the adoption of better engine technology and emission control technology, and
- allow the more effective operation of engines.

**Clause 6** provides that the Bill binds Commonwealth, State and Territory governments. However, it also provides that these governments cannot be prosecuted for any offence under the Bill.

**Clause 8** provides that the requirements of the Bill are additional to any other Commonwealth laws and are not in substitution for them. For example, where both the Bill, once enacted, and an existing law require records to be kept of similar financial matters, the provisions of the existing law must continue to be adhered to.

**Clause 9** makes it clear that, in general, the Bill is not intend to exclude the operation of State and Territory laws, providing these laws are capable of concurrent operation with the Bill. However, where spelt out in regulations, the Bill is intended to override State and Territory laws relating to fuel standards.

**Clause 10** provides that the Criminal Code applies to offences under the Bill. The practical effect of this is that the requirements to prove criminal responsibility that are set out in Chapter 2 of the Code would apply to any prosecution under the Bill.<sup>7</sup>

**Clause 12** creates an offence of supplying fuel that does not meet the relevant standard under the Bill<sup>8</sup> unless a person holds a **subclause 13(a)** exemption or the supply is a result of an order under an emergency law.<sup>9</sup> An offence is also committed if a person holding a **subclause 13(b)** approval to supply fuel that varies from the relevant standard does in fact supply fuel that does not comply with the approved variation. Maximum penalties are 500 penalty units (\$55 000).<sup>10</sup> An offence could be committed even if the person did not actually know the fuel contravened a relevant standard as the application of the Criminal Code<sup>11</sup> would appear to mean that it would only have to prove that the person was reckless as to whether or not the fuel complied with a relevant standard. **Subclause 12(2)** provides that no offence is committed if a person believes 'on reasonable grounds' that the (non-complying) fuel that they supply is to be processed so as to comply with a standard or approved variation.<sup>12</sup>

**Clause 13** allows the Minister to grant approvals to persons to be either exempt from a relevant standard or supply fuel that varies from the standard in a specified way. The Government may charge a fee (to be specified in regulations) for any application for approval (**clause 14**).

**Clause 15** provides that, in considering a **clause 13** application, the Minister 'must have regard to':<sup>13</sup>

- the protection of the environment
- the protection of occupational and public health and safety

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- the interests of consumers, and
- the impact on economic and regional development.

However, the Minister may also have regard to any other matters he or she considers relevant.

Conditions may be placed on a **clause 13** approval (**subclause 16(b)**). **Clause 17** provides that where an approval authorises a person (a regulated person) other than the approval holder to supply non-standard fuel,<sup>14</sup> the approval holder must inform that regulated person of any conditions attaching to the approval or, if the approval is revoked, of that revocation. Regulations may detail the specifics of how a regulated person is to be informed.

**Clause 18** creates the offence of contravention of approval conditions. For the holder of an approval, an offence is committed if they either intentionally take or omit to take an action with the effect that it contravenes a condition and they know it is a contravention or are reckless about whether it is or not (**subclause 18(1)**). A similar offence applies to regulated persons, except that they must also be aware of the condition alleged to have been contravened: (**subclause 18(2)**). Maximum penalties for breaches of conditions are 100 units (\$11 000).

**Clause 19** requires that in supplying fuel that is the subject of a standard, a supplier must provide a statement to the person receiving the fuel confirming whether or not it conforms to the standard.<sup>15</sup> However, this obligation does not apply where the fuel is supplied to an end-user, eg a motorist filling their tank at a service station. The maximum penalty for a **clause 19** offence is 60 penalty units (\$6 600).

**Clause 20** creates an offence of altering a fuel the subject of a standard except where this is done under a **clause 13** approval. For an offence to occur, the alteration must be done in Australia and for the purpose of 'using it' in Australia. It is not clear what 'using it' means - would it cover merely the supply to another party? Or would it have to be supplied with the intention for the recipient to consume the fuel? The maximum penalty for an offence is 500 penalty units (\$55 000).

**Clause 21** allows the Minister to determine a fuel standard. However, the Minister may determine for 'more stringent parameters to apply' to that fuel in specific areas. The Explanatory Memorandum suggests<sup>16</sup> that this may be appropriate 'to protect the environment and / or public health, or provide for the operability of vehicles in a particular area'. **Subclause 21(3)** makes it clear that any such variation must be consistent with section 99 of the Constitution. Section 99 says that the Commonwealth 'shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.' The main issue in determining whether a more stringent standard would be consistent with section 99 would likely be whether the variation would provide some sort of a tangible commercial advantage<sup>17</sup> to some

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individuals or companies connected with the fuel sector over their counterparts in other regions or States.<sup>18</sup>

**Clause 22** provides that the Minister must develop written guidelines to which he or she must have regard to a determining the application of a more stringent standard. These are disallowable by either House of Parliament under section 46A of the *Acts Interpretation Act 1901*.

**Clauses 24-29** create the Fuel Standards Consultative Committee. While the composition of the committee is 'as the Minister determines' he or she must ensure that it includes<sup>19</sup>

- 1 representative of each State, the Australian Capital Territory and the Northern Territory
- 1 or more representatives of the Commonwealth
- 1 or more persons representing fuel producers
- 1 person representing a non-government body with an interest in the protection of the environment, and
- 1 person representing the interests of consumers.

The Bill does not prescribe the specific functions of the Committee, although **clause 23** says it must be consulted by the Minister before he or she makes any determination on fuel standards, including a variation. Appointment conditions, including disclosure of interests and termination matters, may be prescribed by regulations (**clause 29**).

**Clauses 30-36** cover the issue of fuel additives. According to the Explanatory Memorandum, some fuel additives have been found to be harmful to the environment or human health or may cause damage to engine emission controls.<sup>20</sup> **Clause 32** provides for a Register of prohibited fuel additives to be created. The Register must be available for public inspection at specified times and places (**subclause 33(1)**). An electronic version of the Register must be available on the Internet (**subclause 33(2)**). Before a decision is made by the Minister whether to enter or remove an additive from the Register, a 60 day public consultation period must be held and submissions invited. These must be considered by the Minister. Guidelines are also to be developed to which the Minister must have regard in making a decision on the entering or removal of an additive from the Register (**subclause 36(1)**). These guidelines must be available for inspection on the Internet (**subclause 36(2)**).

Once the Minister has made a decision, the Minister must, in addition to publishing their decision, advise all persons that made submissions of the outcome: **subclause 35(4)**. In this advice, the Minister must inform the person that the decision is reviewable by the (yet to be established)<sup>21</sup> Administrative Review Tribunal (ART) (**subclause 35(4)**). Note that a person making a submission would not necessarily be a 'person whose interests are affected by the decision'<sup>22</sup> and thus would not necessarily have standing to seek a review.

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**Clause 30** creates an offence of supplying a fuel additive in Australia that is on the Register. **Clause 31** creates an offence of importing a fuel additive in Australia that is on the Register. Both offences are subject to a fine of 500 penalty points (\$55 000). Looking at the application of the Criminal Code, it would appear that recklessness as to whether the additive was on the Register would be sufficient to prove the fault element required as part of the offence.

**Clauses 37-65** deal with enforcement issues. These provisions are a relatively standard set of provisions setting out monitoring, search and seizure powers.

The Secretary of the Department of Environment and Heritage has power to appoint Commonwealth or State / Territory public employees as inspectors (**subclause 38(1)**). These persons must have suitable qualifications and experience (**subclause 38(2)**).

Inspectors may enter and search premises, to examine and take measurements, take samples or conduct tests, to inspect records and documents for the purposes of either monitoring compliance with the Bill (**clause 41**) or seeking evidence of a breach of the Bill (**clause 44**). However entry into relevant premises must be under a warrant or by the consent of the occupier to enter premises (**clause 40 and 43**). If seeking the consent of the occupier to enter premises, the inspector must inform them that they may refuse consent: (**subclause 46(1)**). Unless the consent is voluntary, entry is unlawful (**subclause 46(2)**).

When entry and search is done pursuant to warrant, if the occupier or their representative is on the premises, they are entitled to observe the conduct of the search (**clause 52**). They must also provide the inspector(s) 'with all reasonable facilities and assistance for the exercise of their powers' (**clause 53**). When entry and search is done pursuant to monitoring warrant, the inspector may require any person on the premises to answer any questions or produce any records or document requested (**subclause 42(1)**). **Subclause 42(2)** provides that a refusal or failure to do so carries a penalty of 6 months gaol. However, a person does not have to conform to the inspector's request if to do so might tend to incriminate them or otherwise expose them to a penalty (**subclause 42(3)**).

There are two forms of warrants. The first is a monitoring warrant. This type may be issued by a magistrate if satisfied access to premises is required for the purposes of either finding out whether this Bill has been complied with or assessing the correctness of information provided under this Bill (**subclause 59(2)**). The second type, an offence warrant, may be issued if there are reasonable grounds for suspecting that there is, or there may be within the next 72 hours, evidential material<sup>23</sup> in or on the premises (**subclause 60(2)**). **Clause 62** provides that inspectors face penalties of 2 years gaol for making misleading statements for the purposes of obtaining a warrant or for other misuse of a warrant.

Injunctions may be granted by the Federal Court to prevent a person from breaching the Bill, including before the apprehended breach actually occurs. Injunctions may be sought by the Minister or any other aggrieved person (**clause 65**).

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**Clauses 66-67** covers the record keeping and reporting obligations of fuel suppliers, including producers and importers, if they deal in fuel that is the subject of a fuel standard. General record keeping requirements are to be set down in regulations. A breach of these provisions will attract a penalty of 60 penalty units (\$6 600). Producers and importers will also have to provide an annual statement to the Secretary of the Department of Environment and Heritage. The form and content are to be determined by the Secretary. A breach of these provisions will also attract a penalty of 60 penalty units (\$6 600).

**Clauses 68 and 69** allow for the Secretary and Minister respectively to delegate their powers to a senior executive service (SES) officer. This person is still subject to the direction of the Secretary and Minister.

**Clause 70** lists what decisions made under the Bill are reviewable by the Administrative Review Tribunal (ART). Note that the ART does not yet exist as it is the subject of legislation before Parliament,<sup>24</sup> and is unlikely to commence operations before July 2001.<sup>25</sup> The ART is intended to replace the existing Administrative Appeals Tribunal (AAT). It is unknown why the ART, rather than the AAT has been included in the Bill given that there is no guarantee the ART legislation will pass Parliament. If the ART fails to come into existence, or only does so after the Bill comes into force, it appears that there will be no avenue of review for those decisions listed under **clause 70**. These decisions are

- a decision to refuse to grant an approval
- a decision to grant an approval that is different from the approval applied for;
- a decision to specify a condition in an approval
- a decision to vary or revoke an approval
- a decision to enter, or not to enter, a fuel additive, or a class of fuel additives, in the Register, and
- a decision to remove, or not to remove, a fuel additive, or a class of fuel additives, from the Register.

**Clause 71** provides for the Secretary to prepare and give to the Minister an annual report on the operation of the Bill. This must be tabled in both Houses of Parliament within 15 sitting days of receipt by the Minister.

**Clause 72** provides that an independent review on the operation of the Bill must be undertaken within two years of the Bill commencing. Further reviews must occur at least every five years. The review report must be tabled in both Houses of Parliament within 15 sitting days of receipt by the Minister. An 'independent review' is defined in **subclause 72 (4)** as a review 'undertaken by persons who, in the Minister's opinion possess appropriate qualifications to undertake the review and include one or more persons who are not Australian Public Service employees'.

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## Endnotes

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- 1 The report, including a summary and related reports can be found at <http://www.environment.gov.au/epg/airquality/urban-air/index.html>
- 2 Environment Australia has a webpage containing the various reports etc released by it as part of the development of the policy underpinning the Bill: see: <http://www.environment.gov.au/epg/fuel/index.html>
- 3 See <http://www.greenhouse.gov.au/ago/safeguarding.html>
- 4 The report can be found <http://www.environment.gov.au/epg/fuel/transport.html>
- 5 The Commonwealth does not have a plenary power to regulate fuel standards. It can regulate standards indirectly by using other constitutional heads of power. Thus the Bill only creates offences where the supply of non-conforming fuel is by a constitutional corporation or a Commonwealth entity or where the supply is done in the context in interstate or overseas trade or commerce, including the importation of fuel into Australia.
- 6 The Brief can be found at <http://www.aph.gov.au/library/pubs/cib/1999-2000/2000cib11.htm>
- 7 See also footnote 5 regarding constitutional limits on the Commonwealth in relation to offences under the Bill.
- 8 If there is no standard applicable to the fuel in question then obviously no offence occurs.
- 9 This is defined as the *Liquid Fuel Emergency 1984* or any other Commonwealth, State or Territory law specified by the Commonwealth in a written determination by the relevant Minister.
- 10 However due to the operation of subsection 4B(3) of the *Crimes Act 1914* a body corporate found guilty of an offence is liable to a penalty up to five times the penalty potentially applying to an individual. Thus the effective maximum penalty for a company would be \$275 000. This 'five times' financial penalty for companies applies to all offences any under the Bill.
- 11 See Divisions 5.4-5.6 of Part 2 of the Code.
- 12 The Explanatory Memorandum at page 50 at a belief on reasonable grounds may include supplying fuel to a person for further processing where that person has the technical facilities to undertake the relevant processing.
- 13 It is up to the Minister to decide what weight he or she chooses to place on each consideration.
- 14 That is, when an exemption or variation to standard has been granted.
- 15 Regulations may provide that additional information may have to be supplied in this statement.
- 16 Explanatory Memorandum, p 53.
- 17 See Dixon J in *Crowe v Commonwealth* (1935) 54 CLR 69 at 92.

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- 18 Note, however, there has been relatively little examination by the courts of the meaning of 'preference' in section 99 in recent years so it is difficult to determine under what circumstances a variation to a fuel standard might breach section 99.
- 19 Clause 25.
- 20 Explanatory Memorandum, p. 55.
- 21 See discussion under clause 70 of the main provisions section of this Digest.
- 22 Clause 61 of the *Administrative Review Tribunal Bill 2000*.
- 23 'Evidential material' is defined in clause 4.
- 24 *Administrative Review Tribunal Bill 2000*, introduced into the House of Representatives on 28 June 2000.
- 25 The Hon Daryl Williams, *Address to the Government Law Group*, Canberra, 12 September 2000.

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