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No. 30 2003–04

## Fuel Quality Standards Amendment Bill 2003



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Fuel Quality Standards Amendment Bill 2003

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# Fuel Quality Standards Amendment Bill 2003

**Date Introduced:** 26 June 2003

**House:** House of Representatives

**Portfolio:** Environment and Heritage

**Commencement:** Royal Assent

## Purpose

To amend the *Fuel Quality Standards Act 2000* in order to:

- establish a regulatory framework for fuel labelling in Australia
- permit State and Territory laws to be overridden where the Commonwealth has made fuel quality information standards, and
- create strict liability offences for the key offence provisions of the Act.

## Background

The *Fuel Quality Standards Act 2000* (the Act) established a legal framework for the setting of national fuel quality standards. The object of the Act is to 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
- facilitate the adoption of better engine technology and emission control technology, and
- allow engines to operate more effectively.<sup>1</sup>

The Act does not exclude the operation of State and Territory laws, provided that these laws are capable of concurrent operation with the Act. However, where spelt out in regulations, the Act does override State and Territory laws relating to fuel standards.<sup>2</sup>

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The Act is administered by the Minister for the Environment and Heritage. Under the Act, the Minister may determine a base fuel standard.<sup>3</sup> Provision is also made for the Minister to determine for 'more stringent parameters to apply' to that fuel in specific areas of Australia, having regard to written guidelines.<sup>4</sup> The guidelines are disallowable by either House of Parliament under section 46A of the *Acts Interpretation Act 1901*. Guidelines relating to the issues to be considered in applying more stringent parameters have not yet been tabled.

The Act was assented to on 21 December 2000. Most sections commenced on 23 March 2001 and the remainder on 1 January 2002. Section 71 of the Act requires the Secretary to prepare and give the Minister a report on the operation of the Act as soon as practicable after the end of each financial year and the Minister to table the report within 15 days of receipt. The first report on the operation of the Act is expected to be tabled on 14 October 2003.<sup>5</sup>

### Public concern about ethanol blended fuels

The issue of blending ethanol with petrol has attracted a lot of press and public comment since late 2002. The negative publicity has concentrated on reports that ethanol levels higher than ten per cent may accelerate wear on engine components and fuel lines, and reduce fuel economy. A number of vehicle makers have advised that ethanol concentrations above ten per cent may limit or void warranties. Some petrol suppliers have placed stickers on bowsers advising motorists that their petrol 'contains no ethanol'.

Prior to 2002 fuel ethanol had also been promoted positively as an octane enhancer and as reducing greenhouse emissions. More recently some farming groups have promoted ethanol as a potential saviour of Queensland's sugar industry and as a benefit to rural development in general. In 2001 the Government announced a policy to expand local ethanol production. The Government's target is reported to be 350 million litres a year of domestically produced ethanol by 2010, up from around 135 million litres now. The increased figure would represent about two per cent of Australia's fuel use. For more information on fuel ethanol, see the Parliamentary Library publication *Fuel Ethanol – Background and Policy Issues*, by Mike Roarty and Richard Webb (Current Issues Brief No. 12, 2002-03), 10 February 2003.<sup>6</sup>

In a move which the press reported as an attempt to rebuild public confidence in fuel ethanol,<sup>7</sup> the Minister for the Environment and Heritage, Hon Dr David Kemp, announced on 11 April 2003 that the Government would set a 10 per cent limit on the volume of ethanol blended with petrol, and require the mandatory labelling of ethanol blended fuels.<sup>8</sup> Only some State and Territory Governments have used their own power to require labelling of ethanol blends sold to motorists.<sup>9</sup> On 7 May 2003, the Fuel Standard (Petrol) Amendment Determination 2003 (No. 1), made by the Minister under section 21 of the Act, was gazetted.<sup>10</sup> This Determination caps the volume of ethanol that can be blended with petrol at 10 per cent. It commenced on 1 July 2003.

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This Bill, which was introduced on 26 June 2003, addresses the second of the Government's policy commitments on fuel ethanol. The Bill itself does not actually introduce ethanol labelling. Its purpose is to establish an enforceable national labelling system for fuels so that motorists are made aware of the nature of the fuel they are purchasing before they buy. The proposed amendments will allow the Minister to set a fuel quality information standard for a particular supply of a particular fuel. Specific labelling standards will be introduced through the gazettal of a (disallowable) determination after the amendments have been passed. In April 2003 the Government announced that, in the first instance, these powers are expected to be used to institute a national labelling requirement for the supply of ethanol-petrol blends to the end user (that is, at the bowser).<sup>11</sup> However, the powers could also be used for fuels other than ethanol, if labelling was found to be in the public interest.

On 20 August 2003 the Senate accepted the recommendation of the Selection of Bills Committee and referred the provisions of the Bill immediately to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry. The principal issues that the Committee is to consider are:

- the provisions of the Bill particularly in relation to the development of fuel quality information standards, and
- the effectiveness of the Bill to deliver an enforceable labelling regime for fuels that achieves both informed consumer choice in fuel purchases, and increased likelihood of the key provisions of the Act being enforceable.<sup>12</sup>

The Committee is to report on 28 October 2003.

## Strict Liability Offences

This Bill amends the Act to create strict liability offences for the key offence provisions. Where strict liability applies to an offence, the prosecution does not need to prove any fault on the part of the defendant, for example, recklessness, negligence, or in the case of this Bill, that the defendant had the required knowledge of the applicable fuel standard as determined by the Minister. Strict liability offences are those which do not require guilty intent for their commission, but for which there is a defence if the wrongful action was based on a reasonable mistake of fact.<sup>13</sup> The *Explanatory Memorandum* for this Bill states that 'Without strict liability ..., the prosecution would have to prove beyond reasonable doubt that the defendant had the required knowledge of the relevant fuel quality standards under the Act. If a person is ignorant of, or mistaken about, those requirements then that person could not have the requisite intent to commit an offence. Experience in administering the Act suggests that it is likely to be very difficult to provide (prove?) such an awareness on the part of the defendant and that, as with many other regulatory offences, it is appropriate to create offences of strict liability'.<sup>14</sup>

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In 2002 the Senate Standing Committee on the Scrutiny of Bills conducted an enquiry into the application of absolute and strict liability offences in Commonwealth legislation. The Attorney-General's Department advised the Committee that it has issued guidelines for the application of strict liability. The main points were that:

- Commonwealth offences should generally require proof of fault, but there are circumstances where strict liability may be appropriate
- Commonwealth policy in the *Criminal Code* reflects the common law position that fault must be proven for each element of an offence, the only exceptions being where there is express legislative provision that an offence or element of an offence carries strict liability
- the appropriateness of strict liability must be considered in relation to each element of every offence to which it is proposed to be applied
- strict liability has been applied in the following cases:
  - to regulatory offences, particularly those which relate to the environment or public health
  - where it is difficult for the prosecution to prove a fault element because a matter is peculiarly within the knowledge of the defendant
- if strict liability is applied:
  - the penalty should not include imprisonment
  - the maximum penalty should in general be no more than 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate).<sup>15</sup>

The Senate Standing Committee on the Scrutiny of Bills concluded that the supposed merits of strict liability and the criteria for its application should be subject to strong safeguards and protections for those affected. The Committee's report, dated June 2002, includes lists of principles to apply to the application and administration of strict liability so as to provide maximum protection for those affected.<sup>16</sup>

## Main Provisions

### Fuel labelling provisions

**Item 1 of Schedule 1** amends the objects of the Act to include a specific objective relating to the proposed fuel labelling provisions. These are enabling provisions for fuel labelling

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in general, rather than specific provisions requiring the labelling of ethanol blended fuels. The amendments in this Bill enable the Minister to make a determination about specific fuel quality information standards. The Minister's Determinations are tabled in both Houses of Parliament and published in the Commonwealth of Australia *Gazette*.

**Item 2** inserts a definition of a fuel quality information standard.

**Item 4** amends section 9 of the Act. Section 9 provides that, in general, the Act is not intended to exclude the operation of State and Territory laws, providing these laws are capable of concurrent operation with the Act. Currently, an exception is provided where fuel standards are spelt out in Commonwealth regulations. **Item 4** provides another exception. Where specific fuel quality information standards are spelt out in regulations, the Act is intended to override State and Territory laws relating to the same characteristics. The *Explanatory Memorandum* gives the following example: 'should the Commonwealth introduce point-of-sale labelling for ethanol blends, the Commonwealth's label would override any State point-of-sale ethanol labelling requirements'.<sup>17</sup> The purpose of this requirement is to impose a uniform, national fuel labelling scheme.

**Item 25** inserts provisions that allow the Minister to determine fuel quality information standards. The information standards must deal with a specified supply (for example, to the motorist; or by a wholesaler to a retailer) of a specified kind of fuel. According to the *Explanatory Memorandum*, these requirements are designed to recognise that labelling and information requirements are likely to be different at different points along the supply chain. The information standard must specify the information about the fuel that the Minister is satisfied should be provided in the public interest, and the way in which that information is to be provided. For example, 'information' might include the composition or attributes of the fuel, the uses for which the fuel is not suitable, likely effects on the operation of an engine, environmental impacts of the fuel, warnings or cautions around the fuel.<sup>18</sup> References to the way in which the information is to be provided would allow for requirements concerning, for example, location, position, size and colour of labels.<sup>19</sup>

**Proposed subsection 22A(3)** makes it clear that the Minister's determination 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 part thereof'. The main issue in determining whether the application of a different labelling standard to different geographic locations would be consistent with section 99, would likely be whether the variation would provide some sort of tangible commercial advantage to some individuals or companies connected with the fuel sector over their counterparts in other regions or States.<sup>20</sup>

**Proposed subsection 22A(4)** provides that the Minister's determination of a fuel quality information standard is disallowable by either House of Parliament under section 46A of the *Acts Interpretation Act 1901*.

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In determining a fuel quality information standard the Minister is required to have regard to the objects of the Act (in section 3), that is reducing the levels of pollutants and emissions that can cause environmental and health problems, facilitating the adoption of better engine technology and emission control technology, and enabling the efficient operation of motor vehicle engines.

**Item 26** provides that, in determining a fuel quality information standard, the Minister must consult with the Fuel Standards Consultative Committee (FSCC). The FSCC is established by section 24 of the Act. Its membership consists of one representative of each State and Territory, one or more representatives of the Commonwealth, one or more people representing fuel producers, one person representing a non-government body with an interest in the protection of the environment, and one person representing the interests of consumers. The Minister must have regard to any recommendations of the FSCC arising out of the consultations.

**Item 43** provides that the Minister may not delegate his or her powers to set fuel quality information standards.

### Strict liability offences and penalties

Amendments proposed by this Bill will create a number of strict liability offences under the Act. A summary of the proposed changes is as follows:

- **item 10** amends section 12 (supply of fuel)
- **item 19** amends section 19 (supplies of fuel to be accompanied by documentation)
- **item 22** amends section 20 (alteration of fuel that is covered by a fuel standard)
- **item 29** amends section 30 (supply of a fuel additive), and
- **item 32** amends section 31 (importation of a fuel additive).

The purpose of these amendments is to make it easier to enforce key offences under the Act. Where strict liability applies to an offence, the prosecution does not need to prove any guilty intent on the part of the defendant, but a defence of ‘reasonable mistake’ is available to an accused person.

**Item 8** reduces the maximum penalty for a strict liability offence from 1000 penalty units to 500 penalty units (that is, from \$110,000 to \$55,000). According to the *Explanatory Memorandum*, it is Government policy that strict liability offences should have lower penalties than would apply if a corresponding offence was not one of strict liability.<sup>21</sup> Subsection 4B(3) of the *Crimes Act 1914* provides that a corporation found guilty of the same offence may be liable to a penalty up to five times the amount potentially applying to an individual. **Item 8** also provides that the maximum penalty for a corporation convicted

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of the same offence is 2500 penalty units (\$275,000). The *Explanatory Memorandum* comments that this penalty is significantly higher than that which is usually applied to strict liability offences. According to the *Explanatory Memorandum*, this reflects the seriousness of the offence, the direct costs to the community that can arise from non-compliant fuel, and the large profits that can potentially be made from fuel adulteration and tax evasion. The penalty is also designed to serve as a disincentive in its own right to fuel tampering.<sup>22</sup> This ‘five times’ financial penalty for corporations applies to all the amendments to offences under this Bill. Similar amendments to the maximum penalties for other strict liability offences in the Act are made by **item 20** (which amends subsection 20(1)), **item 27** (amending section 30), and **item 30** (amending section 31).

## Concluding Comments

State and Territory Ministers for Consumer Affairs have urged the Commonwealth Government to introduce a uniform national labelling regime for ethanol blended fuels by 31 October 2003.<sup>23</sup> It seems unlikely that this date can be met, given that the Bill has been referred to a Senate Committee for inquiry. The Senate Environment, Communications, Information Technology and the Arts Legislation Committee has been asked to report by 28 October 2003. The fuel quality information standards which the proposed amendments give the Minister the power to determine, are disallowable instruments under section 46A of the *Acts Interpretation Act 1901*. Such instruments must be notified in the Commonwealth of Australia *Gazette* and may take effect from either a specified date, or the date of notification. The Minister’s determination of fuel quality information standards must also be tabled in each House of Parliament within 15 days of making the determination.

## Endnotes

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- 1 *Fuel Quality Standards Act 2000*, section 3.
  - 2 *ibid.*, section 9.
  - 3 *ibid.*, section 21.
  - 4 *ibid.*, section 22.
  - 5 Advice from the Department of Environment and Heritage, 3 September 2003. The report on the operation of the Act will be tabled as part of the Department’s annual report for 2002-2003.

Section 72 of the Act provides for an independent review of the operation of the Act to be undertaken as soon as possible after the second anniversary of the commencement of Part 2 of

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- the Act (that is, two years after 1 January 2002). The Minister is required to table the report of the independent review in each House of Parliament within 15 sitting days of its receipt.
- 6 <http://www.aph.gov.au/library/pubs/CIB/2002-03/03Cib12.htm> For the situation with fuel ethanol in the United States, see the Library of Congress publication entitled *Fuel ethanol: background and public policy issues*, by Brent D. Yacobucci and Jasper Womach, Congressional Research Service, 2002. Web resource available at <http://dpl/Books/2002/CRS/FuelEthanol.pdf> The United States Congress has recently debated the *Energy Policy Act of 2003*, a wide-ranging bill which contains an 'ethanol amendment' (Senate Amendment 850). The amendment passed the U.S. Senate on 5 June 2003 with a vote of 67 to 29.
  - 7 'A fresh start for ethanol' (Editorial) *Sydney Morning Herald*, 24 July 2003.
  - 8 Hon Dr David Kemp, 'Federal Government to set 10 per cent ethanol limit', *Media Release*, K0076, 11 April 2003.
  - 9 At the beginning of May 2003, Victoria introduced laws requiring service stations to display labels revealing the ethanol content of fuel ('Labels warn of ethanol', by Ian Haberfield, *Sunday Herald Sun*, 27 April 2003, p. 24). According to press reports, New South Wales was preparing its own draft labelling legislation when the Commonwealth announced that it would legislate to cap the amount of ethanol in petrol ('Deadline set for ethanol content labelling', by Megan Saunders, *Weekend Australian*, 2 August 2003, p. 7).
  - 10 Commonwealth of Australia Gazette, No. GN18, 17 May 2003. The Determination was tabled in both Houses of Parliament on 13 May 2003.
  - 11 Hon Dr David Kemp, 'Federal Government to set 10 per cent ethanol limit', *Media Release*, K0076, 11 April 2003.
  - 12 Senate Selection of Bills Committee, 'Ninth Report of 2003', Appendix 2 and 3, *Senate Hansard*, 20 August 2003, p. 13742.
  - 13 Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Sixth Report of 2002, 26 June 2002, p. 258.
  - 14 *Explanatory Memorandum*, p. 4.
  - 15 Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 259.
  - 16 *ibid.*, p. 285-288.
  - 17 *Explanatory Memorandum*, p. 3.
  - 18 *ibid.*, p. 8.
  - 19 *ibid.*, p. 8.
  - 20 See Dixon J in *Crowe v Commonwealth* (1935) 54 CLR 69 at 92.
  - 21 *Explanatory Memorandum*, p. 3.
  - 22 *Explanatory Memorandum*, p. 3.
  - 23 Ministerial Council on Consumer Affairs Meeting Friday 1 August 2003, *Communique*, at [http://www.consumer.gov.au/html/mcca\\_meeting.htm](http://www.consumer.gov.au/html/mcca_meeting.htm) (The decision on Ethanol is under

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Strategy 3 – Education). This decision was also reported in the press as ‘Deadline set for ethanol content labelling’, by Megan Saunders, *Weekend Australian*, 2 August 2003, p. 7; ‘Ethanol to be labelled’, by Lorna Edwards, *Age*, 2 August 2003, p. 9.

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