



Fuel Quality Standards Amendment Bill 2009

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Fuel Quality Standards Amendment Bill 2009

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Commencement: The Day after Royal Assent

Links: The *relevant links* to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Fuel Quality Standards Amendment Bill 2009 (the Bill) implements a small number of recommendations of the first statutory review of the *Fuel Quality Standards Act 2000*, which took place in 2004-05. In particular, it:

- allows for the process to grant an ‘emergency approval’ to vary a fuel standard or fuel quality information standard
- expands the range of conditions that the Minister may attach to a grant of approval to vary fuel standards
- supplements existing criminal offences by adding a range of enforcement measures such as civil penalties, infringement notices, and enforceable undertakings, and¹
- enhances monitoring powers.

Background

Fuel Quality Standards Act 2000

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, as originally passed, was to regulate the quality of fuel supplied in Australia in order to:

1. Explanatory Memorandum, Fuel Quality Standards Amendment Bill 2009, p. 2.

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- 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.²

Fuel quality standards have been made for:

- [Petrol](#)³
- [Diesel](#)⁴
- [Biodiesel](#)⁵
- [Autogas](#)⁶

The Act is intended to work alongside relevant State and Territory laws, provided that these laws are capable of concurrent operation with the Act. The Act does however allow for regulations to be made to effectively override State and Territory laws relating to fuel standards, although it appears no such regulations have been made.

The Act also established the [Fuel Standards Consultative Committee](#), as an advisory body to the Government.⁷

More information about the origin of the Act can be found in the relevant [Bills Digest](#).⁸ Information on more current developments can be found on the relevant part of the Department of Environment, Water, Heritage and the Arts (DEWHA) [website](#).

2. See: paragraph 3(a) of the Act.

3. See: <http://www.environment.gov.au/atmosphere/fuelquality/standards/petrol/index.html>, accessed 28 April 2009.

4. See: <http://www.environment.gov.au/atmosphere/fuelquality/standards/diesel/index.html>, accessed 28 April 2009.

5. See: <http://www.environment.gov.au/atmosphere/fuelquality/standards/biodiesel/index.html>, accessed 28 April 2009.

6. See: <http://www.environment.gov.au/atmosphere/fuelquality/standards/lpg/index.html>, accessed 28 April 2009.

7. See: <http://www.environment.gov.au/atmosphere/fuelquality/standards/fsc/index.html>, accessed 28 April 2009.

8. A Martyn and R Panter, 'Fuel Quality Standards Bill 2000', [Bills Digest no.47, 2000-01](#), Parliamentary Library, Canberra, 2000.

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The Act was amended by the *Fuel Quality Standards Amendment Act 2003*, mainly in order to:

- establish a regulatory framework for fuel labelling in Australia, and
- create strict liability offences to supplement existing fault-based offence provisions of the Act.

The impetus for the provision of fuel labelling, and associated setting of fuel quality information standards, appears to be the increased blending of ethanol with petrol during the early 2000's, and particularly concern about whether consumers were being fully informed about this at the point of sale. Again, more information on the 2003 amending legislation can be found in the relevant [Bills Digest](#).⁹

The 2005 statutory review into the operation of the Act

Section 72 of the Act requires that an independent review on the operation of the Act must be undertaken 'as soon as possible' after the second anniversary of Part 2 of the Act coming into force,¹⁰ with further reviews at intervals of not more than every five years.

The report of the review (the [2005 report](#)) was released to the Minister in April 2005.¹¹ There was no formal government response to the report at the time, although some of the recommendations only required administrative responses, and others have been implemented through the Fuel Quality Standards Amendment Regulations 2008 (No. 1).

The executive summary of the 2005 report stated:

The review found that there is a need both for ongoing review of resources for fuel sampling and for improved cost-effectiveness in monitoring and enforcement procedures.

The review concludes that the overall policy objectives of the Act are being met and should not be altered, but that the following issues should be addressed:

- Nationally consistent fuel standards and their application to unincorporated suppliers have not been achieved in all respects; there is thus a need for complementary state and territory legislation.

9. R Bell, 'Fuel Quality Standards Amendment Bill 2003', [Bills Digest no.30, 2003-04](#), Parliamentary Library, Canberra, 2003.

10. This was 1 January 2002.

11. Independent Statutory Review of the *Fuel Quality Standards Act 2000*, Final report April 2005, Canberra. See <http://www.environment.gov.au/atmosphere/fuelquality/publications/pubs/fqs-review.pdf>, accessed 28 April 2009.

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- In order to reinforce the monitoring and enforcement function of the Act, consideration should be given to an ongoing review of resources for fuel sampling and testing, coupled with cost-effective approaches such as the inclusion of penalty notices.
- In order to ensure fuel supply in an emergency, a procedure and an emergency provision for off-specification fuel should be developed.
- To ensure that the administrative effort required is in keeping with the objects of the Act, the approvals systems need to be streamlined; and procedures such as the delegation of duties to [the Department of Environment and Heritage], notification obligations for Regulated Persons, and the provision of geographical and seasonal variation to standards need to be refined.
- In order to address stakeholder concerns and ensure continued compliance, industry and community communication and education need to be improved.

Chapter 5 also highlights a range of suggested options to improve current administration and procedures, such as revising sampling methods. These options will require further investigation and review by DEH.¹²

The recommendations are listed in full in Appendix 1 of this Digest.

Committee consideration

At its meeting of 19 March 2009, the Senate Selection of Bills Committee decided not to refer the Bill for review.

Position of significant interest groups/press commentary

There appears to have been no commentary on the Bill by interest groups or the press.

Coalition /Greens/Family First/Independent policy position/commitments

There appears to have been no public commentary on the Bill by the non-government parties or independents.

Financial implications

The Explanatory Memorandum for the Bill states that the Bill will have no financial impact.¹³

12. *ibid.*, p. vii.

13. At p. 2.

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Main provisions

Schedule 1 – Part 1: approvals

A key aspect of the Bill relates to the process by which approvals to vary fuel standards and / or fuel quality information standards for specified fuel supplies are granted. In particular, the Bill creates a process for ‘urgent’ approvals where there is a threat of a fuel supply shortfall. This measure, which is discussed below, is in response to recommendation 1 of the 2005 report.

Item 6 replaces existing subsection 13(2) with **new subsections 13(2)-(6)**.

The Minister may grant an ‘emergency approval’ if satisfied that a number of circumstances exist: **new subsection 13(2)**. Notably, these include that the anticipated fuel shortfall will occur within two weeks, will be due to exceptional circumstances¹⁴, and will have a serious impact on either the interests of consumers or economic or regional development. However, no approval may be granted if the Minister has ‘previously granted an emergency approval in respect of that shortfall’: **new subsection 13(3)**.¹⁵ The approval is not a legislative instrument under the *Legislative Instruments Act 2003* and hence not disallowable: **new subsection 13(6)**.

Emergency approvals are for a maximum of 14 days: **item 7, new section 13A**. However, the Minister may extend an existing approval if the shortfall will otherwise continue after the original approval expires and the Minister is satisfied that the circumstances mentioned above in new subsection 13(2) exist: **item 11, new subsection 17F(1)**. In addition, under **new subsection 17F(3)** the Minister must have regard to existing 15(1), which sets out the matters that he or she must take into account of when considering whether to approve a fuel standard. These are:

- the protection of the environment
- the protection of occupational and public health and safety
- the interests of consumers, and
- the impact on economic and regional development.

When approving an extension, the Minister may also impose new conditions, or vary or remove conditions: **new subsection 17F(4)**.

14. This term is not defined.

15. The Explanatory Memorandum comments, at page 4, that ‘this is intended to avoid the situation whereby persons continually apply to the Minister for an emergency approval, particularly in light of the fact that the Minister is not required to consult with the Fuel Standards Consultative Committee in relation to the grant of such an approval’.

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The Minister cannot grant a new section 17F extension unless he or she consults the Fuel Standards Consultative Committee: **item 15, new subsection 24B(1)**. No process or minimum time for such consultation is set out by the Bill. However, the Minister must have regard to any recommendations made by the committee on the potential extension: **new subsection 24B(2)**. An extension may also impose new conditions, or vary or remove any conditions applying to the original subsection 13(2) emergency approval: **new subsection 17F(4)**. The extension is for a maximum of 14 days: **new subsection 13A(4)**. The Bill is silent on whether an extension is a legislative instrument under the *Legislative Instruments Act 2003*, although the Minister's decision must be published in the gazette as soon as practical, along with the reasons for it.

Existing paragraph 16(b) makes an approval to vary a standard relating to supply of specified fuel subject to, amongst other matters, conditions contained in the approval. **Item 10**, which inserts **new subsection 16(2)**, will enable such conditions not to be restricted just to the 'supply of fuel'. The Explanatory Memorandum comments that this:

... will provide the Minister with the power to set conditions necessary to offset the adverse impacts of an approval on the environment. For example, this amendment will enable the Minister to require a company supplying sub-standard fuel under an approval to fund an air quality monitoring program to monitor air pollutants which may result from vehicle emissions. While this is not directly linked to the supply of the fuel, the air quality impacts arise from the use of the fuel in vehicles.¹⁶

The above amendment does not seem to have been the subject of the 2005 report.

Schedule 1 – Part 2: enforcement

Amongst other things, Part 2 supplements existing criminal offences in the Act by adding a range of enforcement measures such as civil penalties, infringement notices, and enforceable undertakings.¹⁷ As such, these measures relate to recommendation 11 of the 2005 report, although they go beyond the suggestion for 'on-the-spot' fines for 'minor offences'.

Civil penalties are imposed by courts, but are not criminal offences, and hence only require the court to be satisfied on the 'balance of probabilities' (rather than the criminal standard of 'beyond reasonable doubt') that the relevant contravention occurred. From this perspective, it may make an alleged contravention easier to prosecute.

Item 34, new section 12AA creates a civil penalty for the supply of fuel that does not comply with a fuel standard. The elements that have to be proven (on the balance of probabilities) are essentially the same as the existing criminal offence in section 12, and

16. *ibid.*, p. 5

17. Such non-criminal sanctions are increasingly common as enforcement mechanisms in Commonwealth legislation.

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the maximum penalty for a contravention is the same (500 penalty units (\$55 000) for an individual, and 2,500 penalty units (\$275,000) for a corporation.

Similar civil penalty provisions are introduced to ‘mirror’ existing criminal offences for other aspects of the fuel quality standards regime. These provisions cover:

- Supplying fuel that does not comply with fuel quality information standards (**item 37, new section 12B**)
- Contravention of conditions of approval (**item 40, new section 18A**)
- Supplying fuel without documentation (**item 42, new section 19A**)
- Altering fuel the subject of a fuel standard (**item 45, item section 20A**)
- Supplying a fuel additive covered by the Register of Prohibited Fuel Additives (**item 47, new section 30A**)
- Importing a fuel additive covered by the Register of Prohibited Fuel Additives (**item 49, new section 31A**)

The mechanics of the civil penalty scheme are inserted by **item 106, new Division 11**. They appear to be standard in form, and the points below touch on a few key points:

- Civil penalties are ordered by a court upon application by the Minister. Applications may be made up to six years after the actual contravention of the relevant civil penalty provision.
- Persons who aid, abet, counsel, induce, procure a civil penalty convention, or conspire to contravene one, are taken to have contravened it and are thus themselves subject to penalty.
- No civil penalty order can be made if the person has already been convicted of a criminal offence for substantially the same conduct, nor can criminal proceedings be instituted if a civil penalty order has been made. If any criminal proceedings are underway, civil proceedings must be stayed. They can be resumed if the criminal proceedings are unsuccessful.
- Evidence given by a person in civil proceedings against them is not admissible in criminal proceedings against them where the proceedings are in relation to substantially the same conduct. However, evidence is admissible if the criminal proceedings are in relation to giving false evidence. Presumably, evidence given in (unsuccessful) criminal proceedings is admissible in subsequent civil proceedings.
- Where the (DEHWA) Secretary suspects on reasonable grounds a person can give information relevant to an application for a civil penalty order, they can require that person (other than the wrongdoer) to give ‘all reasonable assistance in connection with such an application’. A Court may enforce compliance with such a request and the penalty for failing to give assistance is a maximum of 30 penalty units.

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New Division 12 (item 106) inserts an infringement notice scheme. A person that is alleged to have either committed an offence, or contravened a civil penalty provision, may pay an infringement notice penalty to the Commonwealth as an alternative to criminal or civil prosecution. The penalty must not exceed one-fifth of the maximum fine that a court could impose following a successful prosecution of the criminal offence or civil penalty provision, as the case maybe.

Infringement notices are issued by inspectors appointed under the Act. Their payment is voluntary, rather than being imposed by a court. Payment discharges any liability for the criminal offence or civil penalty provision, as the case maybe. Payment is not regarded as admission of guilt.

New Division 13 (item 106) inserts the option of enforceable undertakings as a further enforcement measure. If the Secretary considers a person has committed an offence against the Act or has contravened a civil penalty provision, they may enter into an undertaking with the relevant person. Such undertakings may be cancelled by the Secretary, or the person may withdraw from them or have them varied, although only with the consent of the Secretary. In cases where the Secretary considers the person has breached an undertaking, they may seek a variety of court orders, including an order to comply, or payment of some form of financial penalty or compensation.

Inspectors appointed under the Act currently have certain powers under section 41 for the purpose of monitoring compliance with the Act. Existing subsection 40(2) only allows inspectors to enter 'premises' (in order to exercise monitoring powers) with either the permission of the occupier or enter under warrant. **Items 54-59** amend the Act to make a differentiation between exercising section 41 monitoring powers at premises in general, and exercising **new section 41A** monitoring powers in the '*public area of business premises* when the premises are open to the public' [emphasis added]. Under these amendments, inspectors can enter and exercise new section 41A monitoring powers in public area of business premises without having a warrant or seeking the permission of the occupier. However, the occupier may refuse permission for the inspectors to enter or remain in the public area of business premises: **item 56, new subsection 40(3)**. The Explanatory Memorandum comments:

The rights of the occupier in relation to inspectors in these circumstances are consistent with the rights of the occupier to refuse entry to any member of the public.¹⁸

Notably, the inspector's new section 41A monitoring powers include the taking of samples of fuel or fuel additives. Entry into non-business premises and the non-public area of business premises continues to be only with permission of the occupier or under warrant. The issue of inspectors exercising monitoring powers on business premises was dealt with by recommendation 10 of the 2005 report.

18. At p. 14.

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Appendix 1 – Recommendations of the 2005 report of the Independent Statutory Review of the Fuel Quality Standards Act 2000

Recommendation 1

The review panel recommends that fuel emergencies which potentially affect fuel quality should, as far as possible, be dealt with under purpose-designed provisions under the *Fuel Quality Standards Act 2000*. An emergency provision should be included to allow the Minister to grant an approval if satisfied that the following criteria are met:

- There is an emergency potentially affecting fuel quality and it is appropriate to deal with it under this law rather than another.
- The Fuel Standards Consultative Committee and the National Oil Supply Emergency Committee have been consulted to the extent practicable give the nature of the emergency.
- The overall balance of public interest lies in granting an approval.

Appropriate disincentives, such as cost penalties, should be developed to ensure that the potential for a relaxation of fuel quality standards is not abused by fuel companies.

Once the review of *Liquid Fuel Emergency Act* is finalised, DEH will develop appropriate policy and procedures for approvals related to fuel emergencies. This will ensure that provisions of the *Liquid Fuel Emergency Act* and the *Fuel Quality Standards Act* are consistent and are cross-referenced. These procedures would be revised should the recommendation above be implemented.

Recommendation 2

The review panel recommends that there be no change to the current operation of the Act (regarding external territories: section 7).

Recommendation 3

The review panel recommends that discussions be instituted with the states and territories on regulation of Reid Vapour Pressure, with a view to introducing a national standard that takes into account climatic and seasonal factors as appropriate.

Recommendation 4

The review panel recommends that approvals of a minor nature be delegated.

Recommendation 5

The review panel recommends that the Regulated Persons provision be simplified.

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Recommendation 6

The review panel recommends no change to the current operation of the Act (regarding test methods: regulation 21).

Recommendation 7

The review panel recommends non-statutory consultations before the making of information standards.

Recommendation 8

The review panel recommends that the section on expert advisers be repealed.

Recommendation 9

The review panel recommends that the Act be amended to empower contractors to collect samples of fuel.

Recommendation 10

The review panel recommends that the Act be amended to remove the requirement for an inspector to first obtain the occupier's permission before exercising monitoring powers.

Recommendation 11

The review panel recommends that the Act be amended to allow for provision of 'on-the-spot' fines for minor offences.

Recommendation 12

The review panel recommends that the Act be amended by broadening section 67A to include matters in relation to the *Excise Act 1901*.

Recommendation 13

The review panel recommends that regulation 17 covering the method of collecting a fuel sample include provisions on practicability and that a new section 58C be inserted in the Act, providing for an evidentiary certificate of sampling procedures.

Recommendation 14

The review panel recommends that the definition of fuel be amended to allow the Minister to make a determination excluding certain fuels in special circumstances, for example, fuel used in defence vehicles, from the Act.

Recommendation 15

The review panel recommends that regulations 5 and 6 be redrafted to allow the waiver of applications for an approval to be solely on the basis of financial hardship and that the fee exemption for Commonwealth, state and territory entities be removed.

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Recommendation 16

The review panel recommends that regulation 24(2) be amended to include an additional requirement that a record must be available for access and copying by an inspector at the location of the supply of fuel.

Recommendation 17

The review panel recommends no change to the legislation (regarding synchronisation of fuel and emission standards).

Recommendation 18

The review panel recommends that the Department of the Environment and Heritage approach the states and territories with a view to them passing complementary legislation to achieve national harmonisation of fuel standards.

Recommendation 19

The review panel recommends that, resources permitting, an education campaign be undertaken to fully inform suppliers and retailers of their responsibilities under the Act. The general public needs to be advised of the existence of fuel quality standards and the operation of the Act.

Recommendation 20

The review panel recommends that the Department of the Environment and Heritage's database be finalised as soon as practicable, and the location of retail sites be kept up to date. The sampling and procedure manual should continue to be updated as required and should be complemented by workshops. The method for sampling at depots should be included, when available.

Recommendation 21

The review panel recommends that the level of resources for fuel sampling and testing be kept under review to ensure that adequate resourcing is maintained in order to continue to achieve the objects of the Act.

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