EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 259

Issued by Authority of the Parliamentary Secretary for Sustainability and Urban Water

Fuel Quality Standards Act 2000

Fuel Quality Standards Amendment Regulation 2012 (No. 1)

Section 73 of the *Fuel Quality Standards Act 2000* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

National fuel quality standards have been progressively introduced for petrol, automotive diesel, biodiesel, autogas and ethanol E85. Fuel quality information standards have also been made for ethanol in petrol introduced in 2003 and E85 fuel to be introduced November 2012. The standards are set by the Minister in Determinations under the Act.

The *Fuel Quality Standards Regulations 2001* (the Principal Regulations) provide the detail for the requirements prescribed under the Act in relation to compliance with fuel quality standards including record keeping, documentation requirements, handling of fuel samples by inspectors and application fees for approvals to vary fuel standards.

The amendments to the Principal Regulations are required as a consequence of amendments to the Act that were implemented to address recommendations from the first statutory review of the Act. They clarify that financial hardship is not the only basis for exempting or reducing application fees for approvals and remove references to provisions relating to expert advisers which have been removed from the Act. They also include provisions relating to administration of infringement notices the issue of which is a new enforcement mechanism in the Act. They specify a timeframe for providing documents that must accompany fuel supplies as a result of a new civil penalty provision in the Act.

Details of the amended regulation are provided in Attachment A.

The amendments arose from the first statutory review of the Act. Industry and key stakeholders were consulted as part of the process for the review. The Fuel Standards Consultative Committee was also consulted on the amendments. The Committee consists of representatives from all state and territory governments, fuel producers and importers, non-government bodies and consumers.

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is at Attachment B.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2004* and commenced on the day after registration on the Federal Register of Legislative Instruments.

ATTACHMENT A

Details of the *Fuel Quality Standards Amendment Regulation 2012 (No. 1)*

Section 1 - Name of Regulations

The regulation is named the *Fuel Quality Standards Amendment Regulation 2012 (No. 1).*

Section 2 - Commencement

This section provides that the regulation commence on the day after they are registered on the Federal Register of Legislative Instruments.

Section 3 - Amendment of *Fuel Quality Standards Regulations 2001*

This section provides that Schedule 1 to the regulation amend the *Fuel Quality Standards Regulations 2001* (the Principal Regulations).

Schedule 1 Amendments

Item [1]: Subregulation 3(1)

This item amends the definitions in subregulation 3(1) by inserting definitions for an Australian Business Number (ABN) and Australian Company Number (ACN). This item provides that 'ABN' has the same meaning as in the *A New Tax System (Australian Business Number) Act 1999* and that 'ACN' has the same meaning as in the *Corporations Act 2001*.

Item [2]: Subregulation 3(1)

This item inserts definitions for: 'engage in conduct', which means to do an act; or omit to do an act; and 'infringement notice penalty', which means the penalty mentioned in an infringement notice as payable under the notice. These definitions are used in the new Division 5.3 which is inserted by item 16.

Item [3]: Paragraphs 4(1)(a) and (b)

This item inserts a requirement for applications for a section 13 approval to include the applicant's ABN or ACN if applicable. An agent who is applying on behalf of another person is also required to include, in the application, the other person's ABN or ACN.

The inclusion of the ABN or ACN of the person to whom the approval will apply, if granted by the Minister, will assist with the approvals process, as well as with monitoring compliance with the approval and any associated conditions.

Item [4]: Paragraph 4(1)(g)

This item amends the paragraph from '(if possible) where' to 'where (if possible)' to clarify to applicants that when providing information on the circumstances of the supply of fuel to which the approval application applies, information on where the fuel is to be supplied is required, if the information is known by the applicant at the time of application and is able to be disclosed. It is understood that an applicant may not know where the fuel is going to be supplied at the time of submitting an application or that due to commercial sensitivities they are unable to disclose the information.

Item [5] Subregulation 4(1)(i)

This item amends the paragraph by replacing the phrase 'relevant in' with 'necessary for'. This sets a higher bar for the type of information that may be required to be included in an application. This

takes into account personal information concerns. As such, the type of information that may be required as part of an application is limited to that information that is necessary for the making of a decision whether to grant an approval, rather than being merely relevant to the making of the decision. This is a consequential amendment of the amendment to subregulation 4(3) (see item 6) to ensure consistency in relation to information provided.

Item [6] Subregulation 4(3)

Division 3 of Part 2 of the Act provides that the Minister may grant an approval in writing that varies the standard with respect to specified supplies of fuel. It also specifies that an application for such an approval must be made in accordance with the Regulations.

Regulation 4 of the Principal Regulations sets out conditions for such applications. Specifically:

- subregulation 4(1) specifies the information required in an application;
- subregulation 4(2) states that the applicant may withdraw an application at any time before the Minister decides whether or not to grant an approval; and
- subregulation 4(3) provides that the Minister may request any other information further to that specified in subregulation 4(1) relevant (see item 5) to the application.

This item amends subregulation 4(3) to allow Senior Executive Staff within the department, in addition to the Minister, the authority to request further information from an applicant. Additional information may be requested from an applicant who has not provided adequate information as required by subregulation 4(1), such as: details of why the applicant wants the standard varied; the circumstances in which the specified fuel will be supplied; and appropriate contact details for any regulated persons listed on the application.

At present, the Minister can authorise Senior Executive Staff to seek information from an applicant; however this authorisation is required every time there is a change of Minister. This amendment will remove the need for an authorisation if there were to be a change in Minister, and increase the efficiency in processing approvals in circumstances where adequate information was not provided by the applicant in the first instance.

This item also updates that paragraph to reflect a higher test that must be satisfied before information can be requested to be provided by replacing the words ‘relevant’ with ‘necessary’ (see item 5).

Item [7]: Regulation 5

This item removes subregulation 5(2), which stated that the Minister may waive or reduce the application fee for an applicant if the Minister thinks the fee would cause financial hardship to an applicant.

These amendments will insert a new provision (subregulation 6(3A)), which states that financial hardship is not the sole reason for which the Minister would exempt the applicant from the whole or part of an application fee. Details of this amendment are at item 9.

An example of an applicant being made exempt from payment of the application fee is in the case of approvals granted for the supply of diesel biodiesel blends where the biodiesel content exceeds the five per cent limit allowed in the Fuel Standard (Automotive Diesel) Determination 2001. The applicant can be made exempt from payment of the application fee for these approvals on the basis that it is unreasonable to impose a financial cost on the industry as a result of a decision to deal with diesel biodiesel blends higher than five per cent until such time as a standard for these blends can be developed and implemented.

As there are situations in which an applicant can be made exempt from payment of the application fee but where no financial hardship would be imposed by payment of the fee, subregulation 5(2) is no longer relevant and has been deleted.

Item [8]: Regulation 6

This item amends the heading of regulation 6 from 'Waiver or reduction of application fee' to read 'Exemption from paying application fee'.

Division 3 of Part 2 of the Act provides that an application for an approval must be made in accordance with the regulations and accompanied by an application fee that is prescribed to be payable by the regulations. Regulation 6 sets out the process for the applicant to follow when requesting the Minister 'waive or reduce' an application fee.

This item, by replacing the term 'waive or reduce' with 'exemption from paying', clarifies that the intention of this provision is to enable the Department to exercise its discretion not to impose a fee on an applicant in certain circumstances, rather than waiving its right to recover a debt. This amendment reflects current drafting practices and more accurately reflects the intent of this regulation. It does not affect the original intent of this regulation, which was to provide an applicant with an opportunity to apply for an exemption, whether in whole or in part, from paying the relevant application fee.

Item [9]: Subregulation 6(1),(2) and (3)

This item removes the reference to 'waive or reduce a fee' from subregulations 6(1) and (3) and substitutes with 'exempt the applicant from the payment of whole or part of the application fee' (see item 8).

This item also removes the reference to 'under subregulation (1)' from subregulation 6(2) as the request to which the subregulation refers is implicit and does not need further clarification.

Item [10]: Subregulation 6(3A)

This item removes the reference to 'waive or reduce the fee' and substitutes with 'to exempt the applicant from the payment of whole or part of the application fee' (see item 8).

Item [11]: After subregulation 6(3A)

Subregulation 6(3A) provides, "If the request is on the basis that payment of the application fee would cause financial hardship to the applicant, the Minister must, in deciding whether to waive or reduce the fee, have regard to the following: …". The word "If" at the beginning of the paragraph suggests that financial hardship need not necessarily be the only ground on which an applicant could be made exempt from payment of an application fee.

This item inserts a subregulation 6(3B) that provides the Minister with some discretion in deciding the circumstances that warrant exempting or reducing an application fee for an approval to vary fuel standards and guides the Minister on what must be taken into account.

This item clarifies that a request to exempt or reduce an application fee under regulation 6 can relate to reasons other than that payment of the application fee would cause financial hardship to the applicant. It includes a number of considerations that the Minister must have regard to in deciding whether or not to exempt or reduce the fee in these other circumstances. These considerations include:

- whether granting the approval would give the applicant a commercial advantage;

- whether the approval is required to address potential issues with the operation of an engine arising from climatic conditions;
- whether the applicant is a not-for-profit organisation;
- whether the fee would impose an unreasonable cost on industry; and
- any other relevant matters.

Approvals granted for the supply of diesel biodiesel blends where the biodiesel content exceeds the five per cent limit allowed in the Fuel Standard (Automotive Diesel) Determination 2001 is an example of where an exemption was made on the basis of circumstances other than financial hardship. The application fee can be exempt for these approvals on the basis that it is unreasonable to impose a financial cost on the industry as a result of a decision to deal with diesel biodiesel blends higher than five per cent until such time as a standard for these blends can be developed and implemented.

Item [12]: Subregulation 6(6)

This item removes the reference to 'waive or reduce a fee' and substitutes with 'exempt the applicant from the payment of whole or part of the application fee' (see item 8).

Item [13]: Subregulation 7A(1)

Subregulation 7A(1) states that the supplier must provide the documents required under section 19 of the Act within 72 hours after the fuel is supplied and then specifies other requirements in relation to fuel documentation. The timeframe and requirements specified under regulation 7A also need to be applied to the new section 19A of the Act, which introduces a civil penalty relating to failure to supply fuel documentation as prescribed by the regulations.

Under subsection 19A(2) of the Act a supplier will contravene the civil penalty provision if the person does not provide particular documentation to a person 'within the period prescribed by the regulations'. If no period is prescribed then there can be no contravention of subsection 19A(2).

Item [14]: Subregulation 7A(3)

This item includes a reference to the new civil penalty provision at subregulation 19A(2)(b) in relation to who must supply the fuel documentation mentioned in subregulation 19A(2) (see item 13).

Item [15]: Paragraphs 7A(4)(a) and (b)

This item provides that, the person required to supply the information under regulation 7A need only supply an ABN or ACN if applicable**.** For paragraph (b), the requirement to supply an ABN or ACN is included but, also, only if applicable.

Item [16]: After Division 5.2

Division 5.3 Infringement notices

This item inserts a new Division 5.3 on infringement notices in Part 5 of the Regulations that deals with enforcement. Proposed regulation 23A to 23G provide for additional requirements and processes in relation to the administration of infringement notices, a new enforcement mechanism that has now been included in the Act. An infringement notice may be given to a person that has committed an offence against the Act or contravened a civil penalty provision of the Act.

Regulations 23A to 23G outline additional administrative provisions for the enforcement of infringement notices as follows:

- regulations 23A and 23C provide for the payment of penalties in instalments and specify that:
    - a statement in relation to payment by instalments must be included in an infringement notice. This requirement is in addition to the matters specified in section 65M of the Act, which must be included in an infringement notice;
    - if a person wants to use the instalment payment option, they must apply to the Secretary of the department within 28 days after the notice is given. The Secretary must then decide whether or not to make the arrangement, and the applicant will be provided with a written notice of the decision (including reasons, if the arrangement has been refused);
    - the payment of the infringement notice penalty is determined in accordance with arrangement that has been made or, if the application was refused, the end of the latest of: 28 days after the notice was given; an extended period as decided by the Secretary; or seven days after receiving notice of the refusal. The period in which to pay the penalty may be extended under section 65N of the Act by application to the Secretary; and
    - the instalment provisions have been included to enable persons who have committed an offence or contravened a civil penalty provision the flexibility of paying the notice in instalments rather than in one lump sum.
- proposed regulation 23B provides for the service of infringement notices (given by post, or personally by leaving the notice at the last known address and with a person, who appears to be over 16 years of age, and appears to live or work at the place);
- proposed regulation 23D provides that any evidence of an admission made in a representation under section 65P of the Act seeking the withdrawal of an infringement notice is inadmissible in criminal or civil proceedings that may occur in relation to the conduct of the person to which the infringement notice relates;
- proposed regulation 23E provides for certain certificates to be evidence of certain facts in relation to the conduct to which an infringement notice relates. This evidence may then be relied on in criminal or civil proceedings.
- proposed regulation 23F determines that the fact that a person has not chosen to pay the infringement notice penalty must not be a matter to be taken into account in determining the penalty that is to be imposed by a court; and
- proposed regulation 23G determines that payment of the infringement notice penalty may be by cheque and that payment is considered to be taken when the cheque is honoured. Persons paying their infringement notice by cheque must factor in the time for it to be cleared within the specified period for payment.

Item [17]: Subregulation 24(1)

This item includes a reference to the new civil penalty provision at section 66A(2) of the Act, which introduces a civil penalty relating to the failure to keep and maintain records in relation to such supplies (as outlined in 66A(1) of the Act) in accordance with the Regulation.

Item [18]: Paragraph 27(2)(a) and Item [19]: Paragraph 28(1)(a)

These items include a reference to the new civil penalty provision at section 19A of the Act, which introduces a civil penalty relating to failure to supply fuel documentation as prescribed by the regulation.

Item [20]: After Part 6

Part 7 Other matters

Section 67A of the Act enables the Secretary to disclose, or authorise the disclosure of information obtained under the Act if the Secretary reasonably believes:

- that it is necessary or appropriate to do so in the course of performing functions or exercising powers under the Act; and
- that the disclosure is likely to assist in the administration or enforcement of a taxation law (paragraph 67A(b)(i)), a consumer protection law (paragraph 67A(b)(ii)) or any other prescribed Act (paragraph 67A(b)(iii)).

Whilst paragraph 67A(b)(iii) of the Act provides the Secretary with the authority to disclose information that is likely to assist in the administration or enforcement of 'any other prescribed Act', thus far no Acts have been prescribed for the purposes of the provision.

This item inserts a new regulation 30 under Part 7 that prescribes the *Australian Crime Commission Act 2002* for the purpose of paragraph 67A(b)(iii) of the Act. This will allow the Secretary to disclose, or authorise the disclosure of, information obtained under the Act to the Australian Crime Commission where the disclosure is likely to assist in the administration or enforcement of the *Australian Crime Commission Act 2002*.

Item [21]: Further amendments

This item removes all references to expert advisers from the Regulations.

The Act was amended in 2009 to remove the provision for appointment of expert advisers, so references to expert advisers in the Regulations are no longer required.

ATTACHMENT B

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Fuel Quality Standards Amendment Regulation 2012 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

1. The background to this legislative instrument is set out above in this explanatory statement. For the purposes of assessing its compatibility with human rights, the pertinent amendments are:

— to reg 4 allowing an SES employee of the Department to require an approval applicant to vary a fuel standard or fuel quality information standard to provide certain further information

— the insertion of Division 5.3 concerning infringement notices, and in particular the provision concerning service of such notices

— new reg 30 prescribing the *Australian Crime Commission Act 2002* (ACC Act) for the purposes of s 67A(b)(iii) of the Act which concerns information disclosure.

Human rights implications

Right to freedom from interference with privacy

2. Art 17 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to freedom from unlawful or arbitrary interference with privacy. This right needs to be considered in the context of the amendment to reg 4 and new reg 30.

Amendments to reg 4

3. Regulation 4, as amended, will allow an SES employee of the Department to require an applicant to provide information that they reasonably consider to be relevant to the application. There is potential for this to involve personal information (which is protected by art 17), though the probability of this is low. This is because the relevant provisions of the Act apply to corporations and persons supplying fuel in the course of interstate or international trade or commerce. Information concerning legal persons other than individuals, such as corporations, is not protected by art 17.

4. To the extent that the amendments to reg 4 could be said to interfere with privacy, it would not be unlawful nor arbitrary. It would not be an 'unlawful' interference because collection will be provided for and circumscribed by the Act and the Regulations. Also relevant to this point is that the management of personal information will be subject to the requirements of the *Privacy Act 1988*.

5. Any interference with privacy would also not be arbitrary. The amendment does not impose a blanket requirement for the provision of information. Rather, in each case, it will only permit an SES employee to require the production of information which they 'reasonably consider' to

be 'necessary' to the application to vary a fuel standard or fuel quality information standard. This will require a case-by-case assessment of what information is relevant to the application before the power to require production could be used.

New reg 30

6. Section 67A of the Act allows the Secretary to disclose, or authorise the disclosure of, information obtained under the Act if the Secretary reasonably believes that the disclosure is likely to assist in the administration or enforcement of certain prescribed Acts. New reg 30 prescribes the ACC Act for this purpose.

7. As noted above, to the extent this would authorise the disclosure of information relating to legal persons other than individuals, such as corporations, art 17 is not engaged. To the extent that new reg 30 amounts to or authorises interference with privacy on the basis that it would permit the disclosure of personal information, it is not unlawful nor arbitrary.

8. It is not 'unlawful' because disclosure will be provided for and circumscribed by the Act and the Regulations. Further, and importantly, the ACC Act already contains a number of safeguards against the disclosure of information which would include personal information (e.g. ss 51, 59AA and 59AB of the ACC Act). It also would not be an 'arbitrary' interference because to the extent personal information is involved, information will only be provided where the Secretary has formed the requisite 'reasonable belief'. This will require a case-by-case assessment of what information is likely to assist before disclosure would be permitted or could be authorised.

9. Prescribing the ACC Act will allow the disclosure of information obtained under the *Fuel Quality Standards Act 2000* (FQS Act) to be provided to the Australian Crime Commission if the Secretary believes that it is reasonably necessary for the investigation of civil and criminal offences related to alleged breaches of the FQS Act. It will also allow the department to alert relevant public safety authorities, via a faster secure network, when public safety issues are detected, and allow access to information that is essential for fuel inspector safety.

Right to a fair trial and minimum guarantees in criminal proceedings

10. New reg 23B provides sets out how an infringement notice may be served. This includes leaving it at the person's last-known place of residence or business, or with a person, apparently over 16, who appears to live or work at the place. The effect of these provisions is that there is a risk an infringement notice would not actually come to the attention of the person to whom it was directed. It is therefore necessary to consider the procedural guarantees in criminal proceedings set out in art 14 of the ICCPR. The following are specifically relevant:

— the right to be informed promptly of a charge (art 14(3)(a), ICCPR) and

— the right to be tried in person (art 14(3)(d).

11. However, the infringement notice regime in Division 12 of Part 3 of the Act is an alternative to, and not a substitute for, civil penalty proceedings or criminal proceedings in a court. The decision to give an infringement notice is discretionary, that is, there is no right to have a matter dealt with by the infringement notice regime. It is an opportunity for a person to have a matter dealt with, generally for a less severe penalty. Even if an infringement notice does not come to a person's attention, the only effect is that the matter will not be dealt with by the infringement notice regime. If the matter proceeds to court, the person will be notified of the charge and be present at the hearing of the charge by a court. These amendments are therefore

not incompatible with the minimum guarantees set out in arts 14(3)(a) and 14(3)(d) of the ICCPR.

Conclusion

12. The Legislative Instrument is compatible with human rights. It does not derogate from the right to freedom from interference with privacy or to minimum guarantees in criminal proceedings.

Parliamentary Secretary for Sustainability and Urban Water