Liquid Fuel Supply (Minimum Biobased Petrol Content) Amendment Bill 2022

Explanatory Notes

Short title

The short title of the bill is the *Liquid Fuel Supply (Minimum Biobased Petrol Content) Amendment Bill 2022*.

Policy objectives and the reasons for them

The objectives of the Bill are to expand on the provisions enacted by the *Liquid Fuel Supply (Ethanol and Other Biofuels Mandate) Amendment Bill 2015*, by further amending the *Liquid Fuel Supply Act 1984* (the Act) for the following purposes:

1) To increase two-fold all penalties for non-compliance by liable fuel retailers liable with the State's bio-based petrol mandate, which presently sits at four (4) per cent of the total volume of all petrol sold; and

2) To require that fuel retailers take reasonable action (on a continuing basis) to ensure that the bio-based petrol blended fuels (referred commonly to as E10) they sell contains a minimum of nine (9) per cent ethanol and is advertised as such.

The Bill seeks to address issues that exist with the operation of Queensland's bio-based petrol mandate which, despite being in operation since 2017, has failed to adequately deliver on its aspirations to drive the uptake of cleaner and cheaper locally produced fuel.

The bio-based petrol blended fuels mandate (ethanol mandate) was enacted following the passing of the *Liquid Fuel Supply (Ethanol and Other Biofuels Mandate) Amendment Bill 2015*.

Queensland is one of only two Australian states that has an ethanol mandate in place, with the other being New South Wales where a six (6) per cent mandate has operated since 2011.

At the time of its commencement, Queensland's ethanol mandate imposed a requirement on certain fuel sellers (namely those who own and operate 10 or more service stations or sell more than 500,000 litres of petrol within a quarter period) to meet a sales target for biobased petrol, starting at three (3) per cent of total sales of regular unleaded (RULP) and a regular petrol blend (such as E10). This mandated rate was increased to four (4) per cent on July 1, 2018.

To date the ethanol mandate has never been reached, with compliance rates peaking at three (3) per cent in the October to December 2019 quarter.

During the January to March 2016 quarter (prior to the commencement of the mandate), ethanol only accounted for 1.5 per cent of total RULP and regular petrol blends sold in Queensland. In comparison, during the recent October to December 2021 quarter the ethanol sale rate was 2.9 per cent which, despite being lower than the ethanol mandate's set target of four (4) per cent, indicates clear efficacy of the mandate as a policy tool to drive the availability and uptake of E10. This two-fold increase in the sale of ethanol between 2016 and 2021 correlates directly with the existence of the mandate and paints a positive picture for its continuation and further extension into the future.

Approximately 570ML of ethanol blended petrol (not including E85) was sold in Queensland in 2021, equating to around 57ML of pure ethanol (if a maximum potency rate of 10 per cent ethanol is assumed).

In 2015 when the original ethanol mandate was passed, total production capacity of Queensland's two ethanol producers (Wilmar in Sarina and United in Dalby) was estimated to be around 140ML per year. It was determined, as this time, this rate of production rate would be capable of meeting a mandate of between 2.8 and 4.7 per cent depending on Queensland's future fuel sales.

In 2020, the Dalby plant was closed however the Sarina plant continues to produce ethanol at a rate of 60ML per annum, the majority of which is provided to the Australian market.[1] A myriad of other ethanol production projects has been slated for construction in Queensland, including at Ingham, Pentland and Ayr in North Queensland. This signifies vast but unrealised regional opportunities for value-adding in some contexts to pre-existing industries such as cane farming, as well as creating regional jobs and stimulating local, and state-wide, economies. Analysis conducted by the Australian Sugar Milling Council in 2020 demonstrated that under the right commercial and policy settings, Queensland's ethanol production could increase from the 60ML it is today to 216.25ML per annum.[2] This rate of production could easily ensure the local supply needed to support an ethanol mandate of up to 10 per cent.

In spite of this potential, the lack of Governmental enforcement of Queensland's current ethanol mandate remains a major impediment to the growth of the local biofuels sector and, subsequently, the benefits that would result from its expansion. These benefits are vast, and include employment opportunities, economic stimulation at the local, regional, and state-wide levels, improved health outcomes, environmental impacts including emissions reduction and enhanced national fuel and energy security.[3]

Since the introduction of the mandate up to June 2021, there were 164 time-limited exemptions granted to fuel retailers, with the average percentage of liable fuel retailers holding an exemption in each quarter sitting at 47 per cent. This represents that, at any given time, more than half of the fuel retailers liable to comply with the mandate are not. Despite this, in that same period, no fuel seller has been prosecuted in court for offences under the Act relating to sustainable biofuels.

Under the *Act*, a liable fuel seller is given the opportunity to demonstrate the steps they are taking to meet the mandated volume. The Government has advised that exemptions are granted for variable timeframes, and take into consideration the fuel seller's unique circumstances, as well as actions being undertaken to work towards meeting the mandated sale volumes. Presently, meeting the requirements of the mandate can be determined through either compliance or the statutory tool of conditional exemptions.

When the mandate was introduced, it was acknowledged that fuel retailers needed time to investigate retail site infrastructure compatibility with ethanol, potential infrastructure upgrades and costs, and E10 availability at each site. As a result, the dominant grounds for exemptions included: 1) Unreasonable cost of compliance to upgrade infrastructure, 2) Incompatible infrastructure with compliance plans (such as infrastructure upgrade programs to convert sites to sell E10), and 3) E10 was not available from their fuel supplier.

The grounds for exemption reflect different challenges now that the number of sites selling E10 has more than doubled (from 343 in early 2016 to 824 in late 2021). Currently, the dominant grounds for exemptions are: 1) Extraordinary and unreasonable costs to change infrastructure, 2) Compliance plans

[1] 'Ethanol for fuel', Wilmar Sugar (Web Page) <https://www.wilmarsugar-anz.com/what-we-do/ethanol-for-fuel>.
[2] Australian Sugar Milling Council, Submission to Australian Renewable Energy Agency, *Australia's Bioenergy Roadmap Report* (June 2020) 5. See, <https://asmc.com.au/wp-content/uploads/2020/06/ASMC-Submission-ARENA-Bioenergy-Roadmap-FINAL_10-June-2020.pdf>.
[3] Ian M O'Hara, Karen Robins and Bas Melssen, *Biofuels to bioproducts: a growth industry for Australia* (Queensland University of Technology (QUT), 2018) 17. See, < http://www.manildra.com.au/ebooks/biofuels/#p=1>.

including infrastructure upgrade programs, and 3) That the fuel retailer is taking all reasonable steps but are unable to sell at least four (4) per cent ethanol.

There are no provisions for the issuing of fines by penalty infringement notices for offences under the *Act* and, instead, offences under the *Act* are enforced by court-ordered penalties. Prosecution of a fuel seller would follow other steps seeking compliance, including education and formal warnings.

In its paper titled the "Review of the Queensland Biofuels Mandate", published in May 2019, the Department of Natural Resources, Mines and Energy outlined that analysis had identified that a major barrier to improving mandate compliance rates was the insufficient enforcement options available to the Department (other than taking a matter to Court), and the relatively low penalties under the Act.

In response to this, and in the interest of encouraging growth of the biofuels sector, this Bill proposes increased penalties in response to the ongoing failure of around half of all liable fuel retailers to meet their obligations under the ethanol mandate at any given time since its introduction.

A number of the current accepted categories of exemption, including the 1) Extraordinary and unreasonable costs to change infrastructure, and 2) Compliance plans including infrastructure upgrade programs, are becoming less valid and less defensible as the period of time following the introduction of the mandate increases. In the case of ethanol, where there is a sufficient production capacity across Queensland and New South Wales to provide the local supply needed by fuel wholesalers and retailers, there is a reasonable expectation that the Queensland's ethanol mandate be complied with by all those to which it applies. This includes the upgrading, and where necessary fast-tracking, of the infrastructure needed to supply this fuel type to consumers at the bowser.

The third most prominent category of exemption for complying with the mandate is 3) That the fuel retailer is taking all reasonable steps but are unable to sell at least four (4) per cent ethanol. It is at this point that consumer demand for ethanol blended petrol must be considered. It is estimated that at least 85 per cent of Queensland's vehicle fleet is compatible with E10, which is the most common type of ethanol blended petrol and contains at least nine (9) but not more than 10 per cent pure ethanol.[4]

When the ethanol mandate was introduced, the Government launched the E10 OK campaign to improve the uptake of ethanol blended fuels. It is acknowledged that the campaign had a noticeable impact on awareness and consumer demand for E10, but that ongoing education and awareness of biofuels are important for consumers and also for those who influence consumer attitudes.

In the 2019 Review, the Department of Natural Resources, Mines and Energy outlined the significant influence automotive industry professionals often exert over their customers. This is particularly true of the mechanics who service customer vehicles and the dealers and manufacturers from which people purchase their vehicles. A number of stakeholders who contributed to the Review indicated that mechanics in particular, continue to hold out-dated or incorrect perceptions of biobased petrol compatibility and anecdotally continue to advise consumers not to use E10 in their vehicles, despite manufacturers' specifications indicating that vehicles are E10 compatible.

While it is the case 85 per cent of Queensland's vehicle fleet is E10 compatible, this is not necessarily the case for blends containing lower ethanol content amounts that are currently legally allowable – if labelled accurately – by Australia's national fuel standards.

In July 2003, following consultation with the states and territories, the Commonwealth Government introduced standards for regular unleaded petrol and ethanol-blended petrol, which capped the amount

[4] RACQ, Submission to Department of Energy and Water Supply, *Towards a clean energy economy: achieving a biofuel mandate for Queensland* (2015). See, <https://www.epw.qld.gov.au/__data/assets/pdf_file/0024/15990/racq-biofuel-submission.pdf>.

of ethanol that could be added to petrol at 10 per cent.[5] It made no determination with regards to a minimum content of these blends, requiring only that the legal ethanol content for ethanol-blended fuel/E10 be at least one (1) per cent.

It should be noted that the standards deal separately with the more potent ethanol petrol blend known as E85, which is largely reserved for use in high-performance vehicles, and specifically requires that this fuel blend consist of 70–85 per cent ethanol and 15–30 per cent petrol.

On 1 March 2005, the Fuel Quality Information Standard (Ethanol) Determination 2003 was introduced nationally, setting a standard for the labelling of ethanol-blended fuel. This standard, which was updated in 2019, requires that information relating to ethanol potency be provided with the supply of ethanol blended petrol from a service station in one of the following ways:

> (a) the words "Contains up to x% ethanol", where ***x*** is no less than the percentage of ethanol in the ethanol blend;
>
> (b) the words "Contains y% ethanol", where ***y*** is the percentage of ethanol in the ethanol blend.[6]

In practice these standards mean regular ethanol-blended fuel (which most consumers, sometimes incorrectly, assume is the E10 blend) in Australia can contain a little as one (1) per cent of ethanol, or as much as 10 per cent. In New South Wales, the *Biofuels Act 2007* defines E10 as containing between nine (9) per cent and 10 per cent ethanol by volume. Other states, including Queensland, do not prescribe the minimum requirement. This Bill seeks to address this shortcoming, in the aim of improving consumer confidence in not only the suitability of ethanol-blended fuels for their vehicles but also in the composition of the blends available to them at the bowser.

Achievement of policy objectives

This Bill achieves its policy objectives in the following ways:

Mechanism 1 – Fine increases for non-compliance

Amendment of s 35B (Sustainable biobased petrol requirement)

This Bill provides two-fold increases to the fines for non-compliance by liable fuel sellers with the ethanol mandate, increasing the maximum penalty for a first offence from 200 penalty points ($27,570 as at 2022) to 400 penalty points ($55,140 as at 2022). It increases the maximum penalty points for a second or later offence from 2,000 penalty points ($275,700 as at 2022) to 4,000 penalty points ($551,400 as at 2022).

These increases seek to mitigate issues with unsatisfactory levels of compliance which have been, as previously outlined, casually linked to a reduced willingness by the Government to enforce the mandate due to low fine amounts. These increased fine amounts bring Queensland in line with the penalties for the equivalent offences currently in place in New South Wales, where a maximum fine of $55,000 (as at 2022) can be issued for a first offence and a maximum fine of $550,000 (as at 2022) can be issued in the case of second and subsequent offences.

Mechanism 2 – Minimum ethanol volume requirements in bio-based petrol blended fuels

Insertion of new pt 5A, div 1, sdiv 2A

[5] 'E10 history', *NSW Government* (Web Page), < https://www.nsw.gov.au/topics/e10-fuel/history>.
[6] *Fuel Quality Standards (Ethanol) Information Standard 2019* (Cth) s 6. See <https://www.legislation.gov.au/Details/F2019L01280>.

This Bill creates a new requirement that all fuel sellers, not just those liable to comply with the ethanol mandate, must not sell a petrol-biobased petrol blend that contains less than nine (9) per cent biobased petrol (ethanol) in the blend. The maximum penalty for failing to comply with this requirement is, for a first offence, 400 penalty points ($55,140 as at 2022) and, for a second and later offence, 4,000 penalty points ($551,400 as at 2022).

In a proceeding for an offence against this requirement, the Bill outlines that it is a defence for the fuel seller to prove that the person did not know, and could not reasonably have known, that the petrol-biobased petrol blend contained less than nine (9) per cent biobased petrol.

This section deals only with the setting of a 'floor value' in ethanol blends. That is opposed to a 'floor' and a ceiling', as per the Commonwealth's Fuel Quality Standards (Petrol) Determination 2019, which provides that petrol may contain a 'maximum 10 per cent ethanol'. This effectively allows the Commonwealth legislation to set the upper limit, which is the most reasonable way to ensure that when purchasing ethanol-blended petrol/E10 consumers can be confident they are being provided a blend that includes an ethanol potency with the nine (9)-10 per cent range.

Insertion of new s 35T

This section applies to fuel wholesalers that supply a biobased petrol blend to a fuel retailer, and requires that wholesaler to provide the fuel retailer a document at the time of supply that states the minimum percentage of biobased petrol in the petrol-biobased petrol blend. The maximum penalty for failing to comply with this requirement is 100 penalty points ($13,785 as at 2022).

Insertion of new pt 9

This section is transitional only, and provides a 12-month grace period to fuel retailers liable to comply with s 35DA. This section outlines that Section 35DA does not apply to the fuel retailer until the day that is 12 months after the commencement of the section.

This section also provides the same 12-month grace period to fuel wholesalers liable to comply with sections 35DA and 35T, and provides that these sections do not apply to a fuel wholesaler until the day that is 12 months after the commencement of the new sections.

Alternative ways of achieving policy objectives

The current ethanol mandate in Queensland has proven to be inadequate in facilitating the Queensland Government's aspiration to drive the uptake of cleaner and cheaper locally produced fuel. Addressing the shortcomings of the present mandate, through increased fines for non-compliance and the setting of a minimum biobased petrol content, is considered the most appropriate way to ensure the four (4) per cent ethanol mandate is achieved annually and to subsequently provide the policy certainty needed by Queensland's biofuel industry to enable it to plan, invest and develop accordingly.

Estimated cost for government implementation

It is not anticipated that this Bill will draw significantly on any additional funds from the Queensland Government's consolidated revenue.

Consistency with fundamental legislative principles

The Bill is mostly consistent with the fundamental legislative principles as defined in Section 4 of the *Legislative Standards Act 1992*. The following provisions of the Bill may not be consistent with or may breach the fundamental legislative principles:

Amendment of s 35B (Sustainable biobased petrol requirement)

This amendment involves an increase to penalties for non-compliance by liable fuel sellers with the State's ethanol mandate. The increase has been drafted with reference to the equivalent offences and penalties in the New South Wales legislation, and maximum penalties have been increased to be directly comparable with that of New South Wales.

Currently, the Queensland penalties are much lower which has been indicated as an impediment to enforcement action and subsequently to the success of the mandate. The increases seek to mitigate these issues, whilst maintaining a fair and reasonable defence for a fuel seller – in any prosecution against them for non-compliance with s 35B or 35C – to prove they took all reasonable steps to prevent the offence.

It is acknowledged that the increase to the penalties provided by the amended s 35B also makes the penalties between this section and s 35C (which relates to compliance by liable fuel sellers with the State's biodiesel mandate) inconsistent. This is considered fair and reasonable because of the lack of local supply of biodiesel in the Australian market, and therefore the limited benefits that would be provided to the people of Queensland by greater uptake of biodiesel as an alternative fuel source.

Insertion of new s 35DA (Minimum biobased petrol content in petrol-biobased petrol blends)

This amendment involves the introduction of a new offence and penalties for non-compliance by fuel sellers with a new minimum ethanol content of at least nine (9) per cent of bio-based blends. The maximum penalties align with those applicable to liable fuel sellers for failing to comply with the ethanol mandate. This is because the success of the State's ethanol mandate, and the growth of the local biofuels industry, is directly related to the willingness of consumers to purchase ethanol-blended fuel. As most consumers demand – and vehicle manufacturers require – E10 blends, there is an onus on all fuel sellers to provide this product with certainty at the bowser.

A defence for failing to comply with the new s 35DA is provided for a fuel seller in any prosecution against them, being that it is a defence for the fuel seller to prove that they did not know, and could not reasonably have known, that the petrol-biobased petrol blend contained less than nine (9) per cent biobased petrol.

The new section must also be considered in the context of the Commonwealth's Fuel Quality Standards Act 2000 (Cwlth), s 9 and, in particular, to assess whether the legislation is constitutional. The amendment is considered to be constitutional as it does not directly relate to, or contradict, the standards that are already prescribed by the Commonwealth. The amendment determines only a new minimum biobased petrol content for biobased petrol blends (other than E85) which, as outlined above, is not currently determined by Commonwealth regulation.

Insertion of new s 35T (Supporting information for supply of petrol-biobased petrol blends to retailers)

This amendment involves the introduction of a new offence and penalties for non-compliance by fuel wholesalers who supply a biobased petrol blend to a fuel retailer. The new s 35T requires that the wholesaler must give the fuel retailer a document at the time of supply that states the minimum percentage of biobased petrol in the petrol-biobased petrol blend. Non-compliance with this requirement is punishable by 100 penalty units ($13,785 as at 2022), which is low in comparison to other offences in the Act but comparable to the Commonwealth's penalties for non-compliance with a fuel information standard.

Consultation

Consultation has occurred over a period of months with a key stakeholder group representing major fuel wholesalers, small, medium and independent fuel retailers, the biofuels and agricultural industries, local government organisations, consumers and the motoring public.

Consistency with legislation of other jurisdictions

The Bill is not part of national scheme legislation and, except for some shared elements with New South Wales where an ethanol mandate also exists, is unique to the Queensland jurisdiction.