

1982

COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PETROLEUM RETAIL MARKETING FRANCHISE AMENDMENT BILL 1982

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Business and
Consumer Affairs, the Honourable John Moore, M.P.)

PETROLEUM RETAIL MARKETING FRANCHISE AMENDMENT BILL 1982

EXPLANATORY MEMORANDUM

OUTLINE

This Bill seeks to amend the Petroleum Retail Marketing Franchise Act 1980 to clarify the extent of the Act's application to outlets, including depots, at which sales are made at both the retail and wholesale level or at which a franchisee effects some sales or his own account and some sales as agent of the franchisor.

2. The Bill also clarifies the application of the price discrimination provisions of the Principal Act and makes other amendments of a technical nature.

Clauses 1, 2 and 3 : Short Title, Commencement and Interpretation

1. Clause 1 is a normal machinery clause.
2. Clause 2 provides for the Act to come into effect concurrently with companion legislation - the Petroleum Retail Marketing Sites Amendment Act 1982.
3. Clause 3 sets out definitions for the purposes of the Bill. The more important definitions are to the following effect -

- . gross sales of petrol and diesel fuel effected during a particular period through marketing premises : refers to the total quantity of petrol and diesel fuel that was sold by retail or wholesale by any persons;

- at the premises; or
- at a place or places other than the premises by way of sales having the prescribed connection with the premises.

prescribed connection with marketing premises : a sale of petrol or diesel fuel has a prescribed connection with marketing premises if the sale is not made at any other marketing premises and;

- the petrol or diesel fuel was, before the sale, delivered to the premises; or
- the sale is, in accordance with accounting principles generally applied in commercial practice, appropriate to be recorded in the accounts of a business carried on at those premises and not in the account of a business carried on at any other marketing premises.

- . motor fuel sold by retail at marketing premises : motor fuel is to be taken to be sold by retail for road vehicles at the marketing premises if, and only if, it is delivered at those premises into the supply tanks of road vehicles.

Application of The Act

3. Clause 4 substitutes new provisions for the existing sub-section 6(1) which provides for the type of franchise agreements to which the Act applies.
4. The operation of the amended section 6 is postponed for 30 days after the commencement of the amending Act.
5. After the initial 30 days the Act will only apply, except as regards section 10 and 15, to franchise agreements including agreements entered into prior to that date where
 - (as is now the case) the agreement contains the three elements (of the definition of 'franchise agreement') of supply, use of trade mark and occupation of premises; and
 - neither of the potential exemption provisions of sub-section 6(1B) or 6(1E) are brought into operation.

6. Section 10 which imposes obligations on a franchisor in relation to the supply of motor fuel and to equitable apportionment of available stocks in times of shortage will now apply to all agreements for the supply of motor fuel (by a trading corporation) for resale. This section now applies only to franchise agreements subject to the Act.

7. Franchisors by operation of sub-section 6(1A) will be required to furnish a disclosure statement under section 15 in the case of all franchise agreements having the three elements. This section will apply whether or not the agreement is subsequently taken outside the application of the Act by sub-sections 6(1B) or 6(1E).

8. The new provisions provide a more refined test for the application of the Act where not all sales effected through a site are sales made by a franchisee. The Act may not apply where more than 85% of the gross sales of petrol and diesel fuel supplied by a prescribed person (defined in sub-clause 4(2)(c)) are sales other than retail sales for road vehicles at the marketing premises made by the franchisee on his own behalf (see paragraph 3 above) - i.e. broadly the Act is not applied where the "service station" sales of a franchisee on his own account are less than 15% of the total sales (of product supplied by franchisor) of the site.

9. The 85% exclusion test may be applied to take agreements out of the scope of the Act on two grounds. However, the Act applies to all agreements, having the requisite three elements of the definition of a "franchise agreement", unless the franchisor prior to entering into the agreement serves a statement, and such supporting material as is prescribed, on the franchisee stating that it wishes to rely on one of the grounds.

10. The first ground is provided for in new sub-section 6(1E). In the case of a new agreement entered into after the commencement of the amended provisions otherwise than by way of a renewal the franchisor may avail itself of sub-section 6(1E) to take a franchise agreement outside the scope of the Act. The ground is available if the franchisor expects, on reasonable grounds, relating to the nature of the proposed operation of the premises and the sales, if any, at the premises in the preceding 12 months, that more than the requisite 85% will be sold in the specified manner (new sub-section 6(1E)).

11. Sub-section 6(1E) where available must be utilised in the first 12 month period (new sub-section 6(1D)).

12. If the ground provided in sub-section 6(1E) is utilised by the franchisor but subsequently, in the six month period immediately following the entering into of the agreement, the sales are less than the specified 85% then the Act (except for section 20) is deemed to have applied to the agreement at all times (new sub-section 6(1F)).

13. The second ground is provided by new sub-section 6(1B). This provision applies to existing agreements and renewed agreements. It can be utilised by a franchisor where in the period of 12 months expiring 30 days before the anniversary of entering into the agreement (new - sub-section 6(9)) more than the requisite 85% was sold in the specified manner.

14. Where this second ground operates to take an agreement outside the scope of the Act it only continues to operate if;

- the franchisor seeks, on an annual basis, to continue to avail itself of the exemption by serving a statement to that effect on the franchisee; and
- in each subsequent period of twelve months more than the specified 85% is sold in the specified manner.

15. Once the Act applies to an agreement it continues to do so for the term of the agreement and all renewals the franchisee may be entitled to under section 17 of the Principal Act (new sub-section 6(1G)).

16. As a transitional measure the original Act will continue to apply to all franchise agreements which contain the three elements of the definition of "franchise agreement", irrespective of whether or not sales exceed the specified 85%, for a period of 30 days after the commencement of the Act.

17. Also as a transitional measure sub-section 6(1C) provides that agreements in existence prior to the commencement of the sub-section which by virtue of sub-section 6(1B) can be brought outside the scope of the Act can be taken outside the Act without waiting for the prescribed day (the anniversary of the date of the agreement or the original agreement - new sub-section 6(9)). The relevant period for application of the 85% test in these cases is the 12 months period prior to commencement of the Act. Sub-section 6(1C) also provides that the period for the next possible application of the 85% test is from the thirtieth day after commencement of the sub-section until the next 'prescribed day' as defined by sub-section 6(9). Where, however, that prescribed day would fall within a period of 3 months from the thirtieth day after commencement of the sub-section that day is disregarded.

18. Clause 4 also amends sub-sections 6(2) and 6(7) and substitutes new sub-sections 6(8) and 6(9) for the original 6(8). These are consequential to the amendments to sub-section 6(1).

Disclosure of information by franchisor

19. Clause 5 amends section 15 of the Principal Act to clarify the requirements of the section and to reflect the changes made by clause 4. It also enables the requirements for disclosure to be supplemented by Regulation.

Renewal of Franchise agreements

20. Clause 6 adds a new sub-section (6A) to section 17 of the Principal Act so as to enable a franchisor on renewal to vary a term of the agreement relating to the manner of calculating or determining the price of amount payable for motor fuel or other stock in trade.

21. Sub-section 17(7) of the Principal Act is also amended to remove the possibility of a franchisor avoiding provisions which protect a franchisee from unreasonable rent increases or variation of terms other than in good faith.

Price Discrimination in sales of motor fuel to franchisees

22. Clause 7 amends section 20 of the Principal Act to clarify the intention that it only applies to franchisees who are parties to franchise agreements to which the Act applies, and to provide that

- a franchisor is not liable for compensation for discrimination falling within sub-section 20(1) where he had reasonable grounds for believing the motor fuel concerned was acquired for a purpose other than retail sale for road vehicles at the premises to which the franchise agreement relates; and
- the onus of establishing that the franchisor had reasonable grounds for so believing is on the person asserting that fact.

