

1995

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY**

**FAIR TRADING (PETROLEUM RETAIL MARKETING) BILL**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of  
Gary Humphries MLA  
Minister for Consumer Affairs**

## OVERVIEW

The *Fair Trading (Petroleum Retail Marketing) Bill 1995* is intended to maintain competition in the ACT retail petrol market by imposing a moratorium on the making of new multi-site franchise agreements in the ACT. Franchise agreements, which are regulated by the *Petroleum Retail Marketing (Franchise) Act 1980* (Cth), have usually involved one person who is permitted to sell petrol at one retail site by the oil company. The introduction of multiple-site franchising would mean that one person would hold franchises for a number of retail sites.

The Bill is to intended to operate until the Government has evaluated the outcome of a Trade Practices Commission inquiry into multiple-site franchise agreements. Existing franchises will not be affected, but existing franchises will not be able to be converted into commissioned agent sites.

## FINANCIAL CONSIDERATIONS

There are no financial implications arising from the Bill.

## FAIR TRADING (PETROLEUM RETAIL MARKETING) BILL 1995

### EXPLANATION OF PROVISIONS

#### Formal Clauses

Clauses 1 and 2 are formal requirements. They refer to the short title of the Bill, and to the date on which it takes effect. This Bill commences on 17 August 1995, however also see clause 5.

#### Definitions

Clause 3 sets out a number of definitions which are used in the Act. Some of these refer to Commonwealth legislation, namely, the *Petroleum Retail Marketing (Franchise) Act 1980* (Cth) (which is abbreviated to "the Franchise Act" in this Bill) and the *Petroleum Retail Marketing Site Act 1980* (Cth) (which is abbreviated to "the Sites Act").

The following definitions are relevant:

- "franchise agreement": this means a franchise agreement which the Franchise Act applies to, and to determine whether an agreement falls within this category, regard must be had to sections 3 and 6 of the Franchise Act.

Section 3 provides:

"franchise agreement" means an agreement (other than an agreement between bodies corporate that are related to each other) containing:

- (a) provisions, whether express or implied, under or by virtue of which a corporation (in this Act referred to as the "franchisor") authorizes, permits or requires a person, being another party to the agreement (in this Act referred to as the "franchisee"), to use, in connection with the retail sale of motor fuel by that person at the premises to which the agreement relates, a mark identifying, commonly associated with, or controlled by, that corporation or a related corporation;
- (b) provisions, whether express or implied, under or by virtue of which a corporation (in this Act referred to as the "franchisor") grants a right to, or otherwise authorizes or permits, a person, being another party to the agreement (in this Act referred to as the "franchisee"), to possess, occupy or use the premises to which the agreement relates in connection with the retail sale of motor fuel by that person at those premises; or

- (c) provisions, whether express or implied, under or by virtue of which:
  - (i) a corporation (in this Act referred to as the "franchisor") is accustomed, entitled or required to supply motor fuel to a person, being another party to the agreement (in this Act referred to as the "franchisee"), for retail sale by that person at the premises to which the agreement relates; or
  - (ii) a person (in this Act referred to as the "franchisee") agrees with a corporation (in this Act referred to as the "franchisor") to acquire motor fuel from another person (whether a party to the agreement or not) for retail sale by the first-mentioned person at the premises to which the agreement relates.'

Section 6 provides:

- '6.(1) This Act does not apply in relation to a franchise agreement unless the agreement:
  - (a) contains provisions of the kinds referred to in paragraphs (a) and (b), and of the kind referred to in subparagraph (c) (i) or (ii), of the definition of "franchise agreement" in subsection 3 (1); or
  - (b) is one of 2 or more franchise agreements that together contain provisions of the kinds referred to in paragraphs (a) and (b), and of the kind referred to in subparagraph (c) (i) or (ii), of that definition, where:
    - (i) the franchisees in relation to those agreements are the same person or are connected with each other;
    - (ii) the franchisors in relation to those agreements are the same corporation or are related to each other; and
    - (iii) those agreements relate to the same marketing premises.'
- "marketing premises" has the same meaning as in the Franchise Act. "Marketing premises" are defined in Section 3 of that Act as:
  - "premises to which a franchise agreement relates, being the premises referred to in paragraph (a) or (b) or subparagraph (c) (i) or (ii), as the case may be, of the definition of "franchise agreement";'
- "prescribed corporation" has the same meaning as in paragraphs (a), (b) and (c) of the Sites Act definition. Section 3 of the Sites Act defines "prescribed corporation" as:
  - "prescribed corporation" means-
    - (a) a prescribed oil company;

- (b) any other corporation that refines petroleum; or
- (c) a corporation that is related to a corporation referred to in paragraph (a) or (b)."

- "prescribed oil company" also has the same meaning as in the Sites Act:

- "prescribed oil company" means a corporation that-
  - (a) deals in petroleum products in liquid form; and
  - (b) is specified in the regulations for the purposes of this definition.

The oil companies prescribed by regulation 3 of the Sites Regulations are at present: Australian Petroleum Ltd, BP Australia Holdings Ltd, Mobil Oil Australia Ltd and Shell Australia Ltd.

- "retail site" has the same meaning as in the Sites Act. Section 3 of the Sites Act defines a "retail site" as:

'...premises at which motor fuel is sold by retail;'

#### **Entry into franchise agreements restricted**

Clause 4 is intended to prevent any new franchise agreements relating to ACT sites being signed after 17 August 1995 by people who already have franchise agreements (whether in the ACT or elsewhere). It is intended to prevent the practice of what is known as multi-site franchising from continuing from that date.

New franchise agreements for marketing premises in the ACT are illegal where there is an existing franchise agreement, whether it relates to premises inside or outside the Territory, and

- the franchisor (usually an oil company) is the franchisor under that agreement or a company related to the franchisor and
- the franchisee is either:
  - the franchisee under that agreement;
  - a company controlled by that person or by a member of his or her immediate family;
  - a body corporate related to that person;
  - an associate of that person; or
  - a consortium, joint venture or partnership where the franchisee has an interest.

In this clause, two bodies corporate are related to each other if they are related to each other under the requirements set out in the Franchise Act. Section 4 of the Franchise Act provides for these requirements as follows:

- 4.(1) Where a body corporate:
- (a) is the holding company of another body corporate;
  - (b) is a subsidiary of another body corporate; or
  - (c) is a subsidiary of the holding company of another body corporate; that first-mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.
- (2) For the purposes of this section, a body corporate shall, subject to subsection (4), be deemed to be a subsidiary of another body corporate if:
- (a) that other body corporate:
    - (i) controls the composition of the board of directors of the first-mentioned body corporate;
    - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first-mentioned body corporate; or
    - (iii) holds more than one-half of the issued share capital of the first-mentioned body corporate (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
  - (b) the first-mentioned body corporate is a subsidiary of any body corporate that is that other body corporate's subsidiary (including a body corporate that is that other body corporate's subsidiary by another application or other applications of this paragraph).
- (3) Without limiting by implication the circumstances in which the composition of a body corporate's board of directors is to be taken to be controlled by another body corporate, the composition of a body corporate's board of directors shall be taken to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it with or without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make such an appointment if:
- (a) a person cannot be appointed as a director without the exercise in his favour by that other body corporate of such a power; or
  - (b) a person's appointment as a director follows necessarily from his being an officer of that other body corporate.
- (4) In determining whether a body corporate is a subsidiary of another body corporate:
- (a) any shares held or power exercisable by that other body corporate in a fiduciary capacity shall be treated as not held or exercisable by it;
  - (b) subject to paragraphs (c) and (d), any shares held or power exercisable:

- (i) by a nominee for that other body corporate (except where that other body corporate is concerned only in a fiduciary capacity); or
    - (ii) by, or by a nominee for, a subsidiary of that other body corporate, not being a subsidiary that is concerned only in a fiduciary capacity; shall be treated as held or exercisable by that other body corporate;
  - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned body corporate, or of a trust deed for securing any issue of such debentures, shall be disregarded; and
  - (d) any shares held or power exercisable by, or by a nominee for, that other body corporate or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other body corporate if the ordinary business of that other body corporate or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable only by way of security given for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money, not being a transaction entered into with an associate of the other body corporate or its subsidiary.
- (5) A reference in this section to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.
- (6) In this section, "debenture" includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a body corporate in respect of money that is or may be deposited with or lent to the body corporate, whether constituting a charge on property of the body corporate or not.'

A person is the associate of another person under this Bill if they fall within the requirements of section 5 of the Franchise Act which provides:

- '5.(1) For the purpose of this Act, the following persons are associates of a person:
- (a) a partner of the person;
  - (b) where the person is a body corporate:
    - (i) an officer of the body corporate;
    - (ii) a body corporate that is related to the first-mentioned body corporate; or
    - (iii) an officer of a body corporate that is related to the first-mentioned body corporate;
  - (c) an officer of a body corporate of which the person is an officer;
  - (d) a body corporate whose directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the

- person or, where the person is a body corporate, of the directors of the person;
- (e) a body corporate in accordance with the directions, instructions or wishes of which, or of the directors of which, the person is accustomed or under an obligation, whether formal or informal, to act;
  - (f) a body corporate in which the person holds a substantial interest;
  - (g) a person in concert with whom the person is acting, or proposes to act, in respect of the matter to which the relevant provision of this Act relates;
  - (h) a person with whom the person is, or proposes to be, associated, whether formally or informally, in any other way in respect of the matter to which the relevant provision of this Act applies;
  - (i) if the person has entered into, or proposes to enter into, a transaction or has done, or proposes to do, any other act or thing, with a view to becoming an associate of a person as mentioned in paragraph (g) or (h) - that last-mentioned person;
  - (k) a person who is, by virtue of paragraph (g), (h) or (i), an associate of any other person who is an associate of the person by virtue of any of those paragraphs or by virtue of another application or other applications of this paragraph.
- (2) A person shall not be taken to be an associate of another person by virtue of a paragraph (1) (g), (h) or (i) by reason only that the person:
- (a) furnishes advice to, or acts on behalf of, that other person in a professional capacity;
  - (b) is a party to a franchise agreement to which that other person is a party; or
  - (c) is a party to an agreement under which that other person, being a franchisor, sells its interest in, or grants a lease of, the marketing premises to the person.
- (3) For the purposes of this section, a person shall be taken to hold a substantial interest in a body corporate if the person, alone or together with any associate or associates of the person, is in a position to control not less than 15% of the voting power in the body corporate or holds interests in not less than 15% of the issued shares in the body corporate.
- (4) Where:
- (a) a person holds a substantial interest in a body corporate (including a substantial interest held by that person by another application or other applications of this subsection); and
  - (b) that body corporate is in a position to control all or any of the voting power in another body corporate or holds interest in all or any of the issued shares in another body corporate;
  - (c) that person shall be taken to be in a position to control so much of the voting power in the other body corporate as the first-mentioned body corporate is in a position to control or to hold the interests in the issued shares in the other body corporate that the first-mentioned body corporate holds, as the case may be.

- (5) A reference in this section to control of the voting power in a body corporate shall be read as a reference to control that is direct or indirect, including control that is exercisable as a result of, by means of, in breach of, or by revocation of, trusts, agreements or practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.'

### **Operation of retail sites restricted**

Clause 5 prevents an oil company or a member of a group of prescribed corporations from operating any more sites in the ACT than the number they are operating in the ACT on the day this Bill is notified in the Territory Gazette. An oil company operates a site for the purposes of this Bill if it does so for the purposes of the Sites Act. Section 7 of the Sites Act relevantly provides:

- 7.(1) For the purposes of this Act, a retail site shall, subject to sub-sections (2) and (3), be taken to be operated by a prescribed corporation during a particular month if-
- (a) on any day of days during that month, the corporation owns, or is a lessee or licensee in respect of, that site; and
  - (b) on that day or any of those days, motor fuel is, at that site-
    - (i) sold by retail by or on behalf of the corporation; or
    - (ii) sold by retail by a person (as servant or agent of another person) under an agreement to which the corporation is a party, where, under that agreement or any other agreement to which the corporation is a party, the corporation receives or is entitled to receive any payments in respect of any such sale or sales, other than payments in respect of the purchase of that motor fuel by that person from the corporation.
- (2) Except for the purposes of paragraph 8 (2) (b), a retail site shall not be taken to be operated during a particular month by a prescribed corporation if the quantity of motor fuel that was sold by retail at the site during that month-
- (a) by or on behalf of the corporation; or
  - (b) by a person under an agreement referred to in sub-paragraph (1) (b) (ii), (otherwise than by way of exempt retail sales) was less than 30,000 litres or such other number of litres as is prescribed.
- (3) A retail site shall not be taken to be operated by a prescribed corporation during a month if a franchise agreement relating to the site is in effect at any time during that month.
- (4) In this section-
- "authority of the Commonwealth" means-
    - (a) a body, whether incorporated or unincorporated, established for a public purpose by or under a law of Commonwealth or of a Territory; or
    - (b) any other body, being-

- (i) a body, whether incorporated or unincorporated, established by the Governor-General or by a Minister; or
- (ii) an incorporated company in which the Commonwealth or a body corporate falling within paragraph (a) or sub-paragraph (i) of this paragraph has a controlling interest;

"authority of a State" means-

- (a) an authority, whether incorporated or unincorporated, established for a public purpose by or under a law of a State; or
- (b) a local governing body established under a law of a State;

"exempt retail sale" means a sale by retail to the Commonwealth or a State or an authority of the Commonwealth or of a State;

"State" includes the ACT and Northern Territory.'

(5) In subsection (4), a reference to:

- (a) an enactment within the meaning of the *Australian Capital Territory Self-Government Act 1988* or
- (b) the *Canberra Water Supply (Googong Dam) Act 1974*; or
- (c) Part IV, sections 29 and 30, subsection 63(2), section 66 or Division 5 of Part X of the *Australian Capital Territory (Planning and Land Management) Act 1988*;

is not a reference to a law of the Commonwealth or Territory but is a reference to a law of a State.'

In this Bill, a "prescribed corporation" will be treated as a member of a group of prescribed corporations if it is so treated under the Sites Act. Sections 4 and 6 of the Sites Act provide:

- '6. Where 2 or more prescribed corporations are related to each other, those corporations shall, for the purposes of this Act, be deemed to be members of a group of prescribed corporation.'

#### **Related bodies corporate**

'4.(1) Where a body corporate-

- (a) is the holding company of another body corporate;
- (b) is a subsidiary of another body corporate; or
- (c) is a subsidiary of the holding company of another body corporate, that first-mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.

(2) For the purposes of this section, a body corporate shall, subject to sub-section (4), be deemed to be a subsidiary of another body corporate if-

- (a) that other body corporate-
  - (i) controls the composition of the board of directors of the first-mentioned body corporate;
  - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first-mentioned body corporate; or
- (b) the first-mentioned body corporate is a subsidiary of any body corporate that is that other body corporate's

subsidiary (including a body corporate that is that other body corporate's subsidiary by another application or other applications of this paragraph).

- (3) Without limiting by implication the circumstances in which the composition of a body corporate's board of directors is to be taken to be controlled by another body corporate, the composition of a body corporate's board of directors shall be taken to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it with or without the consent of concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make such an appointment if-
- (a) a person cannot be appointed as a director without the exercise in his favour by that other body corporate of such a power; or
  - (b) a person's appointment as a director follows necessarily from his being a director or other officer of that other body corporate.
- (4) In determining whether a body corporate is a subsidiary of another body corporate-
- (a) any shares held or power exercisable by that other body corporate in a fiduciary capacity shall be treated as not held or exercisable by it;
  - (b) subject to paragraphs (c) and (d), any shares held or power exercisable-
    - (i) by a nominee for that other body corporate (except where that other body corporate is concerned only in fiduciary capacity); or
    - (ii) by, or by a nominee for, a subsidiary of that other body corporate, not being a subsidiary that is concerned only in a fiduciary capacity, shall be treated as held or exercisable by that other body corporate;
  - (c) any shares held or power exercisable by any other person by virtue of the provisions of any debentures of the first-mentioned body corporate, or of a trust deed for securing any issues of such debentures, shall be disregarded; and
  - (d) any shares held or power exercisable by, or by a nominee for, that other body corporate or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other body corporate if the ordinary business of that other body corporate or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable only by way of security given for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money, not being a transaction entered into with an associate of the other body corporate or its subsidiary.
- (5) A reference in this section to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.

- (6) In this section, "debenture" includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a body corporate in respect of money that is or may be deposited with or lent to the body corporate, whether constituting a charge on property of the body corporate or not.'

### **Minister may lift restrictions**

Clause 6 gives the Minister the power to lift the restrictions set out in clauses 4 and 5 of this Bill by making a declaration to that effect by notice in the *Gazette*. By virtue of s27 (2) of the *Interpretation Act 1967*, the Minister may lift the restrictions on a single agreement under clause 4, on a class of such agreements, or he or she may lift all restrictions in clause 4 entirely. Similarly, the Minister may lift the restrictions in clause 5 on individual corporations, on a group of prescribed corporations, or entirely.

### **Injunctions**

Clause 7 provides that the Minister or any other person may apply to the ACT Supreme Court for an injunction where:

- a franchisor or a franchisee is giving effect to a contract which is illegal under clause 4; or
- one of the prescribed corporations is operating a petrol station site or sites in contravention of clause 5.

If appropriate, the Court can grant an interim injunction, and it can revoke, change or stop the operation of an injunction or interim injunction. Clause 7 also provides that the Court can grant an injunction whether or not a person has done the act which is the subject of the injunction before, or is likely to do so again. The Court can also grant an injunction whether or not the action is likely to cause substantial damage to anyone.

### **Return to pre-contractual position**

Clause 8 sets out what will happen to franchise agreements made in contravention of clause 4 between 17 August 1995 and the day this Bill is notified in the ACT Gazette. If such an agreement is made, all the parties to it are entitled to be in the same position they would have been in if the agreement had never existed.

### **Pecuniary Penalties**

Clause 9 states that the ACT Supreme Court may impose appropriate financial penalties on corporations if they operate or attempt to operate petrol station sites in contravention of clause 5. In deciding the appropriate size of the penalty, the Court can look at the circumstances in which the contravention took place, and at whether the corporation has breached clause

5 before. The maximum penalty payable by a prescribed corporation or group of prescribed corporations under this clause is \$10,000 for each retail site a corporation or group of corporations operates which is above the number of sites it operates on the day this Bill is notified in the Gazette.

Any penalty payable under clause 9 is a debt due to the Australian Capital Territory and must be paid to the Territory. If a corporation contravenes clause 5, no criminal proceedings will lie as a result of this.

### **Power to obtain information**

Clause 10 gives the Minister the power to obtain information in connection with the operation of this Bill. If the Minister believes on reasonable grounds that a person who either supplies petrol or is a party to any agreement this Act applies to, can give the Minister information, the Minister can serve a notice on that person or company requiring that the information be supplied by a certain date and in a particular manner. Clause 10 sets out penalties for persons or corporations who do not comply with requests for information.

### **Use of information**

Clause 11 requires that information which is given to the Minister in accordance with a notice under clause 10 be used only for the purposes of the Bill. This is to ensure that information which is confidential or commercially sensitive is only used to determine whether the provision of the Bill are being complied with, and not for any other purpose, unless there is reasonable cause for doing so. Clause 11 states that any person who uses information wrongly may be fined a maximum of \$5,000, and corporation may be fined a maximum of \$25,000.

This clause does not apply to information or documents given to a court for the purpose of determining whether a person has infringed clause 10.

### **Regulations**

Clause 12 gives the ACT Executive the power to make regulations for the purposes of this Bill.