

1980

COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PETROLEUM RETAIL MARKETING FRANCHISE BILL 1980

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Business and Consumer  
Affairs, the Honourable R.V. Garland, M.P.)

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OUTLINE

The Bill will apply to relationships between a corporation (the franchisor) and a person (the franchisee) who are parties to an agreement under which the franchisor grants the franchisee rights to possess, occupy or use premises and to use a brand or mark commonly associated with the franchisor, and either agrees to supply motor fuel to the franchisee in connection with the retail sale of motor fuel, or requires the franchisee to purchase such fuel from another person.

The Bill seeks to provide certain rights for the franchisee : disclosure of relevant information by the franchisor to the franchisee prior to entry into a franchise agreement, a minimum term for franchise agreements, franchise agreements not to be terminated except on specified grounds and rights of assignment and of renewal of franchises.

Certain price discrimination in the sale of motor fuel to franchisees will be prohibited.

Remedies for contravention of the Bill include rights of action for damages and for orders, including orders in the nature of injunctions.

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

1. Clauses 1 and 2 are normal machinery provisions.
2. Clause 3 sets out definitions for the purposes of the Bill. The more important definitions are to the following effect:

franchise agreement : an agreement containing one or other of three elements -

- . a provision by which a corporation (the franchisor) permits another party (the franchisee) to use in connection with the retail sale of motor fuel a mark or symbol identifying, commonly associated with, or controlled by the corporation or a related corporation;
- . a provision by which the franchisor permits the franchisee to possess, occupy or use premises for the retail sale of motor fuel;

either a provision by which the franchisor agrees to supply motor fuel to the franchisee for retail sale by the franchisee at the premises, or a provision under which the franchisee agrees to acquire motor fuel for that purpose from another person.

motor fuel : petrol or diesel fuel used in propelling road vehicles.

person with prescribed experience : a person who for a period of not less than one year in the aggregate, in the preceding 6 years has been a franchisee, and no franchise agreement to which he was a party was terminated on certain specified grounds (briefly, those involving some incapacity or fault on the part of the franchisee).

Clause 4 : Related bodies corporate

3. For the purposes of the Bill a related body corporate is deemed to be related to another body corporate if it is the holding company of the other or a subsidiary of the other, or they are both subsidiaries of the one holding company. Certain tests relating to control are provided to determine whether a body corporate is a subsidiary of another.

Clause 5 : Associates

4. This clause defines for the purposes of the Bill those persons who will be associates of another person. Persons will be associated where they are partners, related bodies corporate, bodies corporate where certain control or influence tests apply or where a substantial interest in the body corporate is held by the other person. A substantial interest is provided by sub-clause 5(3) to be a 15% shareholding. Parties may also be associated by virtue of their acting in concert with another person.

5. Sub-clause 5(2) exempts from the application of the clause certain professional relationships and associations arising out of a franchise agreement or a sale or lease agreement.

Clause 6 : Application of Act

6. The Bill will apply to agreements that contain all the elements of the definition of 'franchise agreement' including 2 or more agreements that together contain these elements, where the franchisor in each agreement is the same or related corporations and the franchisee is the same person or are connected persons (as defined).

7. Clauses 10, 17, 20, 22(1)(2) and (5), and 23 to 27 but not the other provisions of Parts II, III and IV will apply to agreements in effect prior to commencement of the Act.

8. An agreement between a franchisee party to an agreement subject to the Bill and the franchisor or a related corporation under which the latter party agrees to supply goods other than motor fuel to the franchisee is made subject to the Bill as if it were a franchise agreement.

Clause 7 : Act to have effect notwithstanding agreement

9. The Bill is to apply notwithstanding any agreement to the contrary, including an agreement attempting to substitute the law of some other country as the proper law of the agreement.

Clause 8 : Operation of State and Territory Laws

10. State and Territory laws are preserved to the extent that they are capable of operating consistently with the Bill.

Clause 9 : Franchisor not to impose impossible or  
unreasonable obligations

11. A franchisor is not to enter into a franchise agreement that contains a provision imposing an obligation on the franchisee that is likely to be impossible or unreasonably onerous to perform at the time when it is required to be performed.

12. Sub-clause 9(2) renders such a provision, if contained in a franchise agreement void.

13. This clause is not to affect the operation of the existing common law on frustration of contract.

Clause 10 : Supply of motor fuel

14. Subject to the operation of any emergency law, the franchisor is to be required to supply the franchisee with his reasonable requirements of motor fuel. This obligation is subject to the franchisee complying with the provisions of the agreement with respect to payment for fuel supplied. If he wishes, the franchisee may rely on a rebuttable evidentiary presumption that his reasonable requirements are equal to the amount he received in the corresponding month of the previous year.

15. The franchisor will be relieved from this obligation where he is unable to comply by reason of shortage of supplies, an industrial dispute or circumstances beyond his control. In such a case the franchisor will be required to use its best endeavours to allocate available supplies fairly as between franchisees, and between franchisees and other customers.

Clause 11 : Assignment of rights, etc., of franchisee

16. A corporation may not enforce or rely on any provision of a franchise agreement or a related agreement which has the effect of prohibiting the franchisee from assigning the whole or a part of his interest in the franchise agreement or of requiring the franchisee to offer to surrender the whole or part of that interest to the franchisor. This prohibition does not apply to a provision which has the effect of prohibiting assignment without the consent of the franchisor, the consent of the franchisor not to be unreasonably withheld.

17. Where a franchisor unreasonably withholds consent, consent is deemed to be granted.



18. Consent is deemed to be reasonably withheld where the proposed assignee is not - a person with prescribed experience (defined in sub-clause 3(1)); a member of the franchisee's immediate family (defined in sub-clause 3(6)); or a company controlled by the franchisee (defined in sub-clause 3(7)). The consent of the franchisor is also deemed to be reasonably withheld where the franchisee makes an assignment without first having served the notice required by sub-clause 11(5) (noted below) on the franchisor, or where having served such a notice, within 30 days of service he makes an assignment to a person other than a person nominated by the franchisor.

19. Consent is deemed to be unreasonably withheld where the franchisor requires payment for its consent to the assignment. However, a franchisor may seek payment in respect of reasonable administrative and other legal costs incurred in the giving of consent.

20. The clause does not operate to limit the grounds upon which consent to an assignment may be withheld.

21. Where a franchisee proposes to make an assignment of the whole of his interest under a franchise agreement containing a lease or licence and which requires the consent of the franchisor then, by sub-clause 11(5), he must make an offer to the franchisor to terminate the franchise agreement for an amount of

consideration equal to the consideration for the proposed assignment or to make an assignment, on terms no less favourable than those of the proposed assignment, to a person nominated by the franchisor.

22. Where a franchisee duly assigns the whole or part of his interest under an agreement containing a lease or licence then by virtue of sub-clause 11(9) in relation to obligations not transferred by the assignment the agreement has effect as if the franchisor, the franchisee and the assignee had agreed, in the case of an assignment of the whole of the franchisee's interest, to the immediate assignment to the assignee of all obligations imposed on the franchisee by the provisions of the agreement, and where part only of the franchisee's interest is assigned, to the franchisee and the assignee immediately becoming jointly and severally bound by all those obligations.

23. Where an assignment is duly made of the whole or part of the franchisee's interest under a franchise agreement including a lease or licence that is one of two or more related agreements, and at or after that assignment the franchisee under a related agreement assigns the whole or part of his interest under the related agreement, the related agreement has effect by virtue of sub-clause 11(10) as if the franchisor under that related agreement, the assignor and the assignee in respect of that agreement had agreed, in the case of an assignment of the whole of the interest under

the related agreement, to the immediate assignment to the assignee of all obligations imposed on the assignor by the related agreement and, in the case of an assignment of a part of the interest, to the assignor and assignee immediately becoming jointly and severally bound by all those obligations.

24. An interest that would otherwise not be capable of assignment by reason of the agreement being of a personal nature may be assigned under this clause.

25. Rights accrued prior to an assignment are not affected.

26. This clause does not affect any right of a franchisee or any provision of a franchise agreement relating to granting a lesser interest under such an agreement or to assignment of an interest by way of mortgage or charge.

27. Where there is an assignment, clauses 13, 15 and 17 apply on the basis that the assigned agreement is not taken to be a new franchise agreement.

Clause 12 : Addition of further franchisees by novation

28. This clause provides a procedure for a person to be joined as a franchisee, as in the creation or variation of a partnership.

29. Where the only purpose of a novation - a new agreement between the parties - is the joining of an additional franchisee, a franchisor may not unreasonably withhold its consent, and where consent is unreasonably withheld, consent will be deemed to have been granted.

30. A franchisor may not require payment for giving consent, other than reasonable costs incurred in giving consent.

31. Without limiting the grounds on which consent may be withheld, consent may be withheld where the prospective franchisee is not a person with prescribed experience, a member of the franchisee's immediate family, or a company controlled by the franchisee.

32. Where there is a novation of a franchise agreement, clauses 13, 15 and 17 apply as if the new agreement were a continuation, without interruption, of the original agreement.

Clause 13 : Duration of franchise agreements

33. Where a franchise agreement is entered into

(a) by way of renewal; or

(b) with a franchisee who produces evidence of being a person with prescribed experience.

the franchisor may not enter into an agreement for less than three years and any agreement for a shorter period shall be deemed to be for a term of three years. "Person with prescribed experience" is defined in clause 3.

34. If the agreement is not a renewal and not with a person with prescribed experience the franchisor may enter into an interim franchise to be of not more than one year's duration.

35. A franchise agreement by way of renewal may be for a period less than three years where it, together with the original term and any previous renewals amount to not less than nine years. Periods prior to the commencement of the Act are not to be taken into account for this purpose.

36. Where the franchisor or a related corporation holds the premises under a lease which will expire in less than three years the franchisor is to be able to enter into a franchise agreement for the remaining period of the lease. However, where the franchisor or related corporation holds the premises beyond the term of the original lease or acquires the reversion the franchisor will be deemed to consent to an extension of the term of the franchise agreement up to the expiration of the (extended) period for which the franchisor or related corporation holds the premises, or to three years from the original commencement date of the agreement, whichever is the sooner.

37. Where the term of the franchise is extended the amounts payable by the franchisee in respect of occupation of the premises shall be increased pro rata to cover the additional term. They may also be increased where the rent payable by the franchisor is increased under a new head-lease. In the absence of agreement, the amount of any increase is to be determined by a court.

38. The franchisee may choose not to accept an extension of the term of the agreement.

Clause 14 : Application of Bill in relation to interim franchise agreements

39. This clause provides that clauses 11 (assignment), 12 (novation), 16 (termination), 17 (renewal) and 19 (grant of new franchise after destruction of or damage to premises) do not apply to interim franchise agreements.

Clause 15 : Disclosure of information by franchisor

40. A franchisor, is required, not less than 3 business days prior to entering into a franchise agreement, to provide the prospective franchisee with a statement of all the information in the possession of the franchisor and related corporations

which relates to the operation of the marketing premises and which would be reasonably likely to influence the franchisee's decision to enter into the agreement. The statement is to be in such form as is prescribed or, if no form is prescribed, such form as the Minister approves.

41. For the purposes of this obligation, the statement shall include information relating to -

- . all amounts payable, or the manner of calculation of amounts payable, by the franchisee under the agreement;
- . all goods and services required to be accepted by the franchisee;
- . particulars of any finance offered to, or required to be accepted by, the franchisee;
- . any limitations on the goods or services the franchisee may provide or the persons to whom the franchisee may provide goods or services;

- . the extent to which specified persons are required to be personally involved in the operation of the business;
- . any provisions of the agreement relating to training;
- . the rights of the franchisee under the agreement and under the Act relating to termination and renewal;
- . the franchisee's rights under the Act with respect to novation, and if there is a restriction within sub-clause 11(3) on his rights of assignment, also with respect to those rights;
- . if the site has been operated for the retail sale of motor fuel by a person other than the franchisee during the immediately preceding 3 years, particulars relating to that operation, including the profitability of that operation;



- . the name, location and type of operation of any premises situated within two kilometres of the franchisee's site that were, during the preceding year, operated by a person other than the franchisee for the retail sale of motor fuel supplied by the franchisor or a related corporation;
- . the number of franchise agreements to which the franchisor and related corporations were parties that were avoided, terminated or not renewed by franchisees in a period of 12 months expiring not more than 4 months prior to the giving of the statement.
- . the number of franchise agreements terminated or not renewed by the franchisor and related corporations in a period of 12 months expiring not more than 4 months prior to the giving of the statement, and the reasons for those terminations or non-renewals.
- . any plan or scheme under consideration, or negotiations entered into, by the franchisor or a related corporation for the operation of premises for the retail sale of motor fuel during the term of the franchise agreement that could adversely affect, to a material extent, the profitability of the marketing premises.

- any town planning decision or proposal that could adversely affect, to a material extent, the profitability of the marketing premises.

42. Once information has been provided, in the case of subsequent renewals the franchisor need only provide information where it differs materially from that given previously.

43. Where the franchisor fails to provide the requisite information correctly, if the information was material to the operation, including the profitability of the operation of the marketing premises, and if the franchisee would not have entered into the agreement if the information had been disclosed, the franchisee may avoid the agreement.

44. A right of a franchisee to avoid an agreement under this provision passes to an assignee on assignment of the franchise.

45. The clause does not require the franchisor to supply information to a person on his becoming a franchisee by assignment or novation.

Clause 16 : Termination of franchise agreements

46. A franchisor may terminate a franchise agreement only in accordance with this clause.

47. Termination may be with the written consent of the franchisee given after the commencement of the agreement. Otherwise, the franchisor must establish one of the following grounds (set out in sub-clause 16(2)):

- (a) physical or mental incapacity of the franchisee to control the operation of the marketing premises;
- (b) the franchisee makes a fraudulent misrepresentation in connection with the operation of the premises;
- (c) the franchisee commits an offence punishable by imprisonment (or if a corporation, by a fine of \$500 or more) which, where the franchisee is a natural person, tends to show dishonesty or lack of good character;
- (d) in connection with the operation of the marketing premises the franchisee commits a serious contravention of any law;
- (e) the franchisee misrepresents the octane rating of, or adulterates, motor fuel supplied to him under the franchise agreement;

- (f) the franchisee without the consent of the franchisor wilfully passes off motor fuel of another person as fuel of the franchisor;
- (g) other than by reason of an industrial dispute, shortage of supplies, or compliance with an emergency law the franchisee fails to operate the premises for more than 7 consecutive days, or a lesser period, if so to do is unreasonable in the circumstances;
- (h) the franchisee operates the premises in a manner likely to cause injury to persons or property;
- (j) the franchisee commits a breach of a condition of the franchise agreement;
- (k) the whole or a substantial part of the marketing premises is destroyed or so damaged as to render operation impracticable, except where the franchisor or a related corporation is responsible for the destruction or damage.

48. A franchisor is required to give the franchisee at least 30 days written notice of termination and of the grounds for that termination. A court may reduce this period if it is satisfied that continued possession, occupation, use or operation of the premises by the franchisee is likely to cause substantial damage to the business, property or reputation of the franchisor.

49. A court may not declare a purported termination effective unless the franchisor establishes a ground for termination and that the termination is just and equitable having regard to all the circumstances, including the conduct of the parties after the franchisor became aware of the existence of the ground.

Clause 17 : Renewal of franchise agreements

50. A franchisor is required to renew a franchise agreement, except where non-renewal is with the written consent of the franchisee given after commencement of the agreement and the commencement of the Act, unless:

- (a) there exists a ground for termination as provided in sub-clause 16(2);

(b) the franchisee does not consent to a variation of the agreement, where such variation is proposed by the franchisor in good faith and in the normal course of business, or, in the case of a variation increasing an amount payable under the agreement, if the amount of the increase is reasonable having regard to market values; or

(c) the franchisor has, in good faith and in the normal course of business, entered into an agreement, or negotiations for an agreement, to sell the premises (other than an agreement prohibiting the use of the premises for the retail sale of motor fuel) or to lease them for a use other than the retail sale of motor fuel, (in each case other than to an associate of the franchisor).

51. A franchisor may not sell its interest in a site without first offering that interest to the franchisee on terms no less favourable than those offered to the buyer. Alternatively, the franchisor may sell its interest by auction, provided it has given the franchisee 30 days notice of the auction, and the interest is sold, other than to an associate of the franchisor, at the auction, or by private treaty after the auction to the highest bidder for a price not lower than the bid and on other terms substantially the same as those offered at the auction.

52. A franchisor may not, prior to the transfer of the premises pursuant to an agreement of sale, render fixtures which it has not removed from the premises unfit for use.

53. Where the franchisor has begun negotiations to sell the site but has not reached an agreement at the expiration of the franchise agreement the franchisor may, instead of renewing the franchise agreement, extend it for a period of up to six months. If no agreement is reached within six months after the expiration of the franchise agreement (disregarding any extension) the franchisor must renew the franchise agreement.

54. The franchisor is required to give 90 days written notice of a decision not to renew and to state the grounds for non-renewal in the notice. If notice is given less than 90 days prior to expiration of the agreement the franchise agreement is automatically extended to 90 days from the date of service of the notice.

55. A court shall, on application of a franchisee, order renewal of the agreement unless the franchisor establishes service of the required notice, a ground for non-renewal, and, except in the case of ground (c) above (sale or lease of the premises), that non-renewal is just and equitable.

56. The court may make orders determining amounts payable under, and provisions of, the renewed agreement.

57. If the franchisor, no later than 30 days before expiration of the agreement, makes a written offer to renew the franchise, and the franchisee fails to accept the offer within 90 days of the expiration of the current agreement or 30 days after service of the offer (whichever is the later), the franchisor is not required to renew the agreement.

58. A related corporation may be substituted as franchisor if the original franchisor agrees to indemnify the franchisee for any loss caused by a breach of obligation by the new franchisor.

59. There is no obligation on the franchisor to renew the agreement where the term of the franchise agreement, together with previous renewals, totals not less than 9 years. Where the franchisor does renew the agreement after that period the clause operates as if the agreement so entered into were a new franchise agreement.

Clause 18 : Application of sections 15, 16 and 17 to  
associated agreements

60. Where a franchise agreement is one of two or more related agreements, avoidance, termination or non-renewal of that agreement is effective to avoid, terminate or not renew the other related agreements.



61. Avoidance, termination or non-renewal of a franchise agreement also operates to avoid, terminate or not renew an agreement between the franchisee and the franchisor or a related corporation for the supply of goods other than motor fuel, and which by virtue of sub-clause 6(5) is subject to the Bill as if it were a franchise agreement.

Clause 19 : Franchisee to be offered new franchise after  
destruction, &c., of premises

62. Where a franchisor terminates or fails to renew a franchise on the ground that the whole or a substantial part of the retail marketing premises is destroyed, or is damaged to such an extent as to render the operation of the premises impracticable, and the premises are rebuilt or restored so as to be suitable for the retail sale of motor fuel, then the franchisor must not enter an agreement with a person other than the former franchisee for the use of the premises for that purpose without first offering to enter into a franchise agreement with the former franchisee on terms no less favourable than those which it offers to the other person. The offer to the former franchisee must remain open for at least thirty days.

63. A corporation does not contravene this provision if a court is satisfied that during the franchise agreement another ground of termination (i.e. other than destruction of, or damage to, the premises) arose, that it would have been just and equitable to terminate the agreement on that ground, and that the franchisor served notice in accordance with the clause.

Clause 20 : Price discrimination in sales of motor fuel to franchisees

64. A franchisor is not to discriminate between its franchisees in the price of motor fuel which it supplies to them, or in any discounts, allowances, rebates or credits given or allowed to franchisees in respect of such fuel.

65. The prohibition will not apply where the discrimination -

- . makes only reasonable allowances for differences in cost of raw materials, refining, distribution, sale or delivery;
- . is done in good faith to meet a price or benefit offered by a competitor of the franchisor; or

is done in good faith to assist a franchisee to meet a price or benefit offered by a competitor of the franchisee.

66. Where a person seeks to rely on one of the exceptions the onus of establishing that the prohibition does not apply is on that person.

#### Clause 21 : Orders

67. A court will be able to make orders to prevent a franchisor contravening a provision of the Act or the regulations, to set aside or restrain the making of any instrument prejudicial to a right of a franchisee and to make such ancillary orders as may be necessary. The interests of bona fide third parties are protected.

68. Interim orders may be made and orders may be varied or rescinded.

#### Clause 22 : Compensation

69. A franchisee is to be entitled to compensation from the franchisor for loss or damage which he suffers resulting from a contravention by the franchisor of the Bill or the regulations. In assessing any compensation the court is to make allowance for any goodwill in respect of the marketing premises which is attributable to the franchisee.

70. Where a franchisee avoids a franchise agreement under sub-clause 15(5) (franchisor has failed to disclose required information) the compensation recoverable is to be such amount as is necessary to put the franchisee in the same position as he would have been if he had not entered into the agreement. The amount payable is also to include, if the franchisee gives the necessary notice, repayment of amounts paid in respect of motor fuel or other goods purchased from the franchisor and left on the premises by the franchisee.

71. An action for compensation must be commenced within six years of the cause of action arising.

Clause 23 : Compensation for acquisition of property

72. Where the operation of the Bill would result in the acquisition of property from a person by another person otherwise than on just terms, a reasonable amount of compensation shall be payable to that person by the other person. In the absence of agreement, the court is to determine the amount payable.

73. "Acquisition of property" and "just terms" have the same meanings as in paragraph 51(xxxi) of the Constitution.

Clause 24: Savings of other rights and remedies

74. The Bill does not seek to affect any right of action or other remedy, civil or criminal, instituted otherwise than under the Bill. However, compensation recovered or remedies granted under the Bill must be taken into account in granting a remedy or assessing compensation other than under the Bill arising out of the same event or transaction (and vice-versa).

Clause 25 : Degree of proof

75. The degree of proof required of a ground for termination or non-renewal which consists of a criminal offence is the normal degree of proof required in civil proceedings.

Clause 26 : Jurisdiction of courts

76. The Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Federal Court of Australia and so far as the Constitution permits, on the Supreme Court of each Territory, with respect to all matters under the Bill. Certain rights of appeal to the Federal and High Court, in the latter case by special leave, are also provided.

77. In addition the inferior courts of each State and Territory are within the limits, other than limits as to subject matter, of their respective jurisdictions given jurisdiction over matters arising under clause 22 (compensation for loss or damage arising out of contravention) and clause 23 (compensation for acquisition of property).

78. Inferior courts, within the limits as to locality, but notwithstanding any other limits of their jurisdiction, are also given jurisdiction over matters arising under sub-clause 10(3) (price of motor fuel to be supplied in excess of contractual requirements) and sub-clause 13(8) (assessment of increased amount payable under extended franchise agreement where rent payable by franchisor under a head lease is increased).

Clause 27 : Service

79. Service of documents may be effected on a natural person by giving it to him personally, or by leaving it at, or posting it to, his last known place of business or residence. Service may be effected on a corporation by leaving the document at, or posting it to, the registered office or a principal office of the corporation.

80. The regulations may provide further means of service on a corporation. A court may authorize service by means other than those mentioned above.

Clause 28 : Regulations

81. Regulations, not inconsistent with the Bill, may prescribe matters required or permitted to be prescribed or necessary or convenient for giving effect to the Bill.