

1984

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

PETROLEUM RETAIL MARKETING SITES AMENDMENT BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Industry and
Commerce, Senator the Honourable John N. Button)

Outline

This Bill proposes to amend the Petroleum Retail Marketing Sites Act 1980, which restricts the direct retailing activities of the major oil companies (referred to in the Act as prescribed corporations) through a quota allocation scheme. Under this scheme, prescribed corporations are permitted to operate directly a limited number of retail sites. The prescribed corporations subject to the Act, and the number of retail sites allocated to each are listed in the Schedule to the Act.

The Bill aims to simplify the administration of the Act and clarify its application to retail sites operated by prescribed corporations, principally by:

- replacing the current percentage-based application test for determining whether a particular site is subject to the Act, with a more precise volume-based test;
- removing current exemptions from quota for market-research and training sites, and clarifying the remaining exemptions for diesel fuel and temporarily operated sites;
- adding new provisions to define which motor fuels and which sales of those motor fuels will be subject to the Act;
- altering the application of the Act from a basis of sales made on a particular day to a basis of sales made during a particular month, to accord more closely with commercial practice and to reduce the administrative requirements on prescribed corporations;
- repealing the section relating to associates to clarify that direct company operation is not restricted where the only link between companies is that they are associates;
- amending the pecuniary penalty provisions to ensure that each site operated in excess of quota, and each contravention of the returns provisions of the Act, constitutes a separate contravention, liable to a separate pecuniary penalty; and
- introducing a new transitional provision to protect incumbent commission agents at sites which a prescribed corporation ceases to operate directly during the eighteen month phasing period (1 January 1985 to 30 June 1986) effected by the new quota allocation scheme.

Notes on Clauses

Short Title, Commencement and Interpretation

Clause 1 is a formal machinery clause.

Clause 2 provides for the Act to come into operation on 1 January 1985, consistent with the commencement of the quota allocation scheme.

Clause 3 amends Section 3 of the Principal Act by:

- . omitting the definition of "business day" which is no longer required as a result of the change in the Act's operation from a daily to a monthly basis;
- . omitting the definition of "diesel fuel site" and introducing two new sub-sections ((5) and (6)), to provide a volume-based test to exempt such a site from the application of the Act. A site is to be regarded as a diesel fuel site if more than 100,000 litres of diesel fuel is sold per month (or more than that average rate over a year), and less than 100,000 litres of petrol is sold by retail per month (or less than that average rate over a year);
- . omitting the definitions of "franchise agreement", "franchisee" and "franchisor", and substituting a new definition of "franchise agreement", which defines such an agreement as one to which the Petroleum Retail Marketing Franchise Act applies. "Franchisee" and "franchisor" are to be construed accordingly;
- . omitting the definitions of "market research site" and "training site", as these categories of sites are no longer to be exempted from quota;
- . amending the definition of "motor fuel" to exclude diesel fuel and liquefied gas, so that these fuels will not be included in the new volume threshold application test which will determine whether particular sites will be subject to the quota restrictions of the Act. Diesel fuel is excluded on the basis that it is mainly a commercial fuel, not normally used by the average retail service station customer. Liquefied gases are excluded on the basis that retail sales of these are comparatively minor, and not likely to experience significant growth in the medium term;
- . amending the definition of "prescribed corporation" by,

- deleting the reference to associates and substituting related bodies corporate (this is a consequence of the repeal of Section 5, relating to associates), and
- prescribing oil companies by Regulation rather than by Schedule to the Act (it is proposed to repeal the Schedule to the Act);
- . omitting the definition of "truck", which is no longer necessary as a result of the amendment to the definition of "diesel fuel site";
- . clarifying what a sale by retail is for the purposes of the Act, by deeming such a sale to be any delivery of motor fuel into the supply tank of a road vehicle by a metered pump, at the time of the contract of sale (proposed sub-sections (2) and (3));
- . adding a new provision which will deem corporations to be prescribed corporations for the purposes of the Act during a month if more than 50 per cent of the refined petroleum acquired by the corporation during the preceding 12 months was imported into Australia by the corporation or a related body corporate (proposed sub-section (4)). This proposed amendment will have the effect of bringing additional oil companies (that is, companies other than the current major refiner/marketers) within the ambit of the Act, where such companies obtain the majority of their refined product from sources other than the majors. It will provide for all competitors possessing the same basic characteristics (independent refining capacity or independent source of refined product, and direct retail marketing presence) to be subject to the Act.

Groups of prescribed corporations

Clause 4 repeals Sections 5 and 6 of the Principal Act;

- . Section 5, concerning associates, is repealed, to clarify that companies will not be deemed to be associated to each other (and thus subject to the same restricted number of retail service station sites) where there is only a substantial holding (15 per cent or more of issued share capital or voting power) by the one company in the other;
- . Section 6, relating to groups of prescribed corporations, is remade consequent upon the repeal of Section 5 to define groups of corporations by reference to related corporations instead of associates. This will have the effect of only restricting groups of prescribed corporations in

their direct retailing activities where the members of the group are related (involving direct control) and not merely associates.

Operation of retail sites and Temporary operation of retail sites

Clause 5 repeals Sections 7 and 8 of the Principal Act and substitutes two new Sections.

New Section 7 :

- . alters the application of the Act from a basis of retail sales made on a particular day to a basis of retail sales made during a particular month;
- . clarifies that retail sales by a person under an agreement to which the corporation is a party do not include retail sales by that person on his own behalf, to ensure that the test for direct company operation will only encompass retail sales made by or on behalf of the company (proposed sub-paragraph (1)(b)(ii));
- . replaces the current percentage test with a volume threshold test as the means for ascertaining which sites are to be taken to be operated by a prescribed corporation. The new test will apply the Act to sites owned or leased by a prescribed corporation where retail sales of motor fuel, made by or on behalf of the corporation, exceed 30,000 litres per month. The change will remove the inconsistencies and uncertainty associated with the current percentage test (proposed sub-section (2));
- . introduces an exemption from the possible application of the Act if at any time during a particular month there is a franchise agreement (defined in the amendments to Section 3 as an agreement to which the Petroleum Retail Marketing Franchise Act applies) relating to the site during that month (proposed sub-section (3));
- . exempts retail sales of motor fuel to the Commonwealth, a State, or the Northern Territory (or any of their authorities) from the new volume threshold test (proposed sub-section (4)).

New Section 8 :

- . continues the current exemption from quota for temporarily operated retail sites, but expands the circumstances in which the exemption can be used to conform more closely with current commercial practice. The new section permits a prescribed corporation to operate a retail site temporarily for a period of up to 4 months, where:

- the site has not previously been operated by either the corporation or a related corporation (proposed sub-section (2) and sub-clause 12(3) of the transitional provision, which has the effect of disregarding company operation prior to 1 January 1985); or
- the site has been rebuilt or restored (proposed sub-sections (3) and (4)); or
- the corporation intends to enter into a fresh franchise agreement in relation to the site, or some other agreement under which motor fuel will be sold on behalf of the corporation (proposed sub-section (5)); or
- the corporation intends, in good faith and in the normal course of business, to sell the site, or lease the site wholly for a use other than the retail sale of motor fuel, or enter as franchisor into a franchise agreement in relation to the site (proposed sub-section (6)).

Restrictions on operation of retail sites

Clause 6 repeals Sections 9 and 10 of the Principal Act and substitutes a new Section 10 which;

- . expressly confers on prescribed corporations a positive right to direct-operate retail sites (proposed sub-section (1)), subject to the quota limitation which might apply to that corporation if it is a prescribed oil company (proposed sub-section (2)). This amendment clarifies the Government's intention of only effecting a partial restriction on direct oil company retailing, and not a complete prohibition on such retailing;
- . clarifies that members of a group of prescribed corporations (defined in proposed Section 6), one of which is a prescribed oil company, are subject to the quota allocated to that prescribed oil company (proposed sub-section (3)). This change is consequent upon the repeal of Sections 5 and 6 and the remade Section 6;
- . disregards for quota purposes any diesel fuel sites or temporarily operated sites (proposed sub-section (4)). This is consistent with the provision in sub-section 10(4) of the current Act.

Returns

Clause 7 amends Section 11 of the Principal Act by omitting sub-sections (1) to (4) and substituting new sub-sections to:

- . reflect the change in the application of the Act from a daily to a monthly basis (proposed sub-sections (1), (1A), (2), (3) and (4));
- . add a new obligation on prescribed oil companies by requiring each prescribed oil company to submit annually a consolidated statement of the retail sites which are subject to the Act and which are operated by it or by the members of its group (proposed sub-sections (1) and (1A)).

Injunctions

Clause 8 amends Section 12 of the Principal Act by:

- . omitting sub-section (1) and substituting a new sub-section (1) which effectively permits a Court to grant injunctions in such terms as the Court determines to be appropriate. This is essentially a result of the High Court decision in Thomson Australian Holdings Pty Ltd v Trade Practices Commission and Ors, which resulted in a similar amendment to sub-section 80(1) of the Trade Practices Act 1974;
- . effecting a technical drafting change to sub-sections (2) and (4) by omitting the word "order" and substituting "injunction";
- . omitting sub-section (3), which is no longer necessary as a result of the proposed new sub-section (1);
- . omitting sub-section (5), and substituting a new sub-section (5) which details the circumstances in which an injunction may be exercised. This is a technical drafting change resulting from the amendment to sub-section (1), and is along similar lines to sub-section 80(4) of the Trade Practices Act 1974.

Pecuniary penalties

Clause 9 amends Section 13 of the Principal Act by:

- . removing the pecuniary penalty for any contravention of Section 16 of the Act (the transitional provision, which has now expired);
- . clarifying that a separate pecuniary penalty will apply to each retail site operated in excess of quota (proposed paragraph 1(a));

- . raising the pecuniary level for contraventions of the returns provisions of the Act (sub-sections 11(1) to 11(4)) from the current \$1,000 maximum to a \$5,000 maximum (proposed paragraph 1(b)). The proposed penalty level is consistent with other corporate pecuniary penalties for similar contraventions;
- . removing the possibility of a double penalty in respect of the returns provisions of the Act where a contravention of sub-section 11(8) might also involve a contravention of sub-sections 11(1) to (4), (proposed sub-section (1A)).

Production of books, etc

Clause 10 amends Section 14 of the Principal Act by omitting sub-section (1) and substituting new sub-sections which relate to situations where there are reasonable grounds for believing books may contain information relevant to retail sales of motor fuel made at particular premises, as follows:

- . the power of authorized officers concerning the production of those books is expanded by making the power relate to any person involved with such sales at those premises (proposed sub-section (1)). This amendment will ensure that relevant information concerning the operation of sites under the Act will be made available to authorized officers and is similar in form to the power of inspectors under sub-section 295(3) of the Companies Act 1981;
- . a new power is added to enable copies or extracts to be made or taken from books which are produced, or, where there is no production, a power to require information as to the whereabouts of the books (proposed sub-section (1A)). This provision is partly similar in form to section 156 of the Trade Practices Act 1974.

Regulations and Repeal of Schedule

Clauses 11 and 12 repeal Sections 15 and 16 of the Principal Act, and the Schedule to the Principal Act:

- . Section 15 (concerning the power to make regulations) is remade consequent upon the repeal of the Schedule to the Act;
- . Section 16 (the original transitional provision) is repealed, as the period to which it relates has now expired;

- . The Schedule to the Act is repealed, consequent upon the amendment to the definition of "prescribed corporation", whereby oil companies will now be prescribed by regulation.

Transitional

Clause 13 is a transitional clause which:

- . preserves the existing requirements for returns in relation to retail sites subject to the Act during the month of December 1984 (sub-clause (5));
- . introduces provisions similar to those in the current Section 16 (which has now expired) to cover the proposed quota phasing period commencing on 1 January 1985 and finishing on 30 June 1986, or such later date as is prescribed by regulation (sub-clauses (6) to (16)).

