



Petroleum Retail Legislation Repeal Bill 2006

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Petroleum Retail Legislation Repeal Bill 2006

Date introduced: 30 March 2006

House: House of Representatives

Portfolio: Industry, Tourism and Resources

Commencement: There are two commencement dates. First, sections 1 to 3—and anything not covered elsewhere by the table in clause 2—commence when Royal Assent is given. Second, Schedules 1 and 2 commence on a day to be fixed by proclamation. But if any of the provisions in these Schedules do not commence within the period of six months from Royal Assent, Schedules 1 and 2 commence on the first day after that period ends.

Purpose

To repeal the *Petroleum Retail Marketing Franchise Act 1980* and the *Petroleum Retail Marketing Sites Act 1980*. The Government proposes to replace these Acts with an industry code—to be known as the *Trade Practices (Industry Codes-Oilcode) Regulations 2005* (the [Oilcode](#))—under section 51AE of the *Trade Practices Act 1974*.¹

Background

The petroleum retail industry is partially governed by two Acts: the [Petroleum Retail Marketing Franchise Act 1980](#) (the Franchise Act) and the [Petroleum Retail Marketing Sites Act 1980](#) (the Sites Act). The Acts were passed to address an imbalance in market power between the oil majors (also called the refiner/marketers)—namely BP, Caltex, Mobil and Shell—on the one hand, and their commission agents, on the other hand. The latter alleged that the majors had abused their market power. The ‘solution’ was to require the majors to adopt franchises at most of the sites they owned. To do this, the Sites Act sets a quota for each prescribed major. The Franchise Act, in turn, contains provisions that seek to secure the positions of franchisees:

The aim of the Franchise Act was to provide franchisees in the motor fuels industry with a level of certainty during negotiations with refiner/marketers and thus encourage the entry of small businesses into the retail petroleum market.²

Consequences of the Franchise and Sites Acts

The effect of the two Acts has been to create a two-tier—and discriminatory—system:

- the Acts apply to only part of the industry:

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- the Acts have not prevented—and indeed have encouraged—the growth of retailing outside the Acts’ ambit, most notably through the entry of supermarkets and independent importers/marketers into the industry
- while intended to ensure competition, the Acts have also restrained competition by limiting the ability of the majors to compete with retailers operating outside the Acts’ coverage
- legislative coverage differs:
 - whereas the sites to which the Acts apply are subject to industry-specific legislation and general competition law, other segments of the industry operate under only general competition law
- one group of small businesses (franchisees) is advantaged over another (commission agents):³
 - whereas the Franchise Act provides some security to franchisees, the position of commission agents is more tenuous:

Entities operating under commission agency arrangements have no set minimum standards in relation to contract requirements and tenure. Under current arrangements these entities remain vulnerable to the commercial decisions of the retail site owners (generally the refiner/marketers, importer/marketers or the supermarkets) and their contractual arrangements may be terminated with minimal notice and little justification.⁴

- commission agents (and independent operators) are at a relative disadvantage with respect to dispute settlement:

Unlike franchisees, who may access the services of the O[ffice] of the M[ediation] A[dvisor], commission agents may only seek to formally address disputes with fuel suppliers through the legal system. The high cost associated with this type of litigation usually prevents smaller market participants from challenging perceived injustices.⁵

The Government's proposals

The *Explanatory Memorandum* sets out three options for regulating the industry:

- option A: no change to the current legislative arrangements
- option B: repeal of the Sites Act and the Franchise Act, and
- option C: repeal of the Sites Act and the Franchise Act, and regulation of industry conduct through the industry code (the Oilcode) mandated under section 51AE of the *Trade Practices Act 1974*.⁶

The Government prefers Option C.

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According to the *Explanatory Memorandum*, the Oilcode will:

establish minimum standards for petrol re-selling agreements between retailers and their suppliers to provide a baseline for negotiations, including strengthening of provisions (similar to those in the Franchise Act and the Franchising Code of Conduct) dealing with pre-disclosure, variation, agreed early surrender and expiry procedures to provide greater certainty and protection for parties;

introduce a nationally consistent approach to Terminal Gate Pricing arrangements to improve transparency in wholesale pricing and allow access for all customers, including small businesses, to petroleum products at Terminal Gate Pricing, whilst not negating the ability of entities to negotiate individual supply agreements nor preventing the offering of discounts (**Note:** Terminal Gate Pricing is the price at which wholesale suppliers are prepared to sell full tanker loads (usually a minimum of 35 000 litres) of fuel to wholesale customers at seaboard terminals or refineries on a spot basis⁷; and

establish an independent downstream petroleum dispute resolution scheme and appoint a Dispute Resolution Adviser, to provide the industry with an ongoing cost-effective dispute resolution mechanism.⁸

Basis of policy commitment

The introduction of the Bill is the second time the Government has sought to repeal the Franchise and Sites Acts. In 1998, the Government introduced the Petroleum Retail Legislation Repeal Bill 1998 (1998 Bill) which—like the current Bill—sought to repeal both Acts.⁹ Indeed, the wording of both Bills is virtually identical. As with the current Bill, a feature of the 1998 reform proposal was a mandatory Oilcode. However, in September 1999, the Government announced that it would not proceed with the 1998 Bill because the interested parties could not agree on the proposed Oilcode.¹⁰

On 7 December 2004, the Minister for Industry, Tourism and Resources, the Hon. Ian Macfarlane, announced the Government's intention to proceed with reform.¹¹ As in 1998, the Minister proposed to introduce an Oilcode and then repeal the Franchise and Sites Acts. Components of the Oilcode were to be:

- a national terminal gate pricing regime
 - currently, only Victoria and Western Australia regulate terminal gate pricing
- minimum standards for new fuel re-selling arrangements
- greater coverage for different forms of agreements, such as commission agencies, and
- a dispute resolution service.

Subsequent measures were:

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On 17 March 2005, the Minister for Industry, Tourism and Resources held an Industry Roundtable to consider outstanding industry issues in relation to the Oilcode. Following this meeting, the Government and industry agreed to a number of changes to the Oilcode to:

ensure that the tenure of pre-Oilcode franchise agreements would continue to apply until those agreements expired;

extend the tenure provisions for new franchise type agreements to 9 years from the 5 years originally proposed (unless otherwise noted, commission agency arrangements would retain 5 years tenure under the Oilcode); and

ensure that the Dispute Resolution Advisor will liaise regularly with industry and relevant government authorities on issues relating to the retail petrol market.

On 27 April 2005, the Department held an industry briefing on Section 46 (misuse of market power) of the *Trade Practices Act 1974*. This briefing highlighted the role of the *Trade Practices Act 1974* and the Australian Competition and Consumer Commission in facilitating a competitive Australian petrol market. The upcoming reforms to the *Trade Practices Act 1974* legislation were also discussed

Since these fora the Department has conducted an exercise with stakeholders to facilitate the changes outlined above and correct minor ambiguities identified in the previous draft Oilcode. **These changes do not alter the intent of the Oilcode as outlined below.**

A revised copy of the Oilcode was sent to stakeholder groups in August 2005.¹²

A more detailed history of proposed reform going back to 1996 is contained in Appendix A of the *Explanatory Memorandum*.

Position of significant interest groups

The [Australian Institute of Petroleum](#) (AIP)—which represents the oil majors—has welcomed the introduction of the legislation. The AIP claims that the repeal of the Franchise and Sites Acts is:

... essential to ensure that costly and overly prescriptive regulations are removed and that all participants can compete effectively in the evolving retail petroleum market.¹³

The Motor Trades Association of Australia, which represents service station operators, has said that it is:

... extremely disappointed that the Government has introduced legislation.

Service station operators believe that the proposed code is defective because it will not ensure a level playing field that will allow small service station operators to be able to compete fairly in the market with the large supermarkets and oil companies.

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The outcome of the Government's proposed changes will be:

- the closure of more small franchised and independent retail outlets-meaning in rural and regional areas, in particular, motorists will have to drive longer distances to obtain fuel;
- increased dominance of the retail petroleum market by the two supermarket chains;
- loss of competition in the retail and in the wholesale market as independent importers will struggle to find sufficient retail outlets necessary to sustain a viable import business; and
- detrimental to motorists in the longer term as smaller competitors exit the market and the large chains gain a greater share of the retail petrol market leading to less price competition.

Service station operators wonder where the benefits to motorists and the Government are in these proposed reforms? The only winners here would seem to be the oil majors and the two supermarket chains.¹⁴

The Chief Executive Officer of the [Service Station Association Limited](#), Mr Ron Bowden, has predicted that between 1000 and 1500 service stations would close and another 200 franchisees would leave the industry in the next two years. Mr Bowden also predicted that, in the longer term, the Government's proposals would increase concentration in the industry and that market power would be in the hands of a few large companies, which would lead to higher prices.¹⁵ Mr Bowden also claimed that the repeal of the Acts would affect the oil majors differentially. With respect to independents, they may find that both their fuel sales volumes and convenience store sales will increase.¹⁶

Table 6 of the *Explanatory Memorandum* sets out the positions of the main parties with respect to the Oilcode. This table is reproduced below.

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Benefits	Costs
<p><i>Motor Trades Association of Australia (MTAA)</i> The national peak body for the whole of the retail, service and repair sectors of the Australian automotive industry.</p>	
<ul style="list-style-type: none"> · Nationally consistent TGP arrangements for those purchasing from primary suppliers · Transparent supply documentation · Greater transparency and certainty in fuel re-selling agreements · Extended coverage of fuel re-seller agreements · Dispute resolution scheme 	<ul style="list-style-type: none"> · Loss of Sites Act, which requires refiner/marketers to use franchise arrangements · No industry specific restrictions on pricing behaviour
<p><i>Australian Institute of Petroleum (AIP)</i> The key representative body of Australia's petroleum refining industry.</p>	
<ul style="list-style-type: none"> · Repeal of Sites Act · Disputes about fuel re-seller agreements may be easier to resolve under Oilcode than Franchise Act 	<ul style="list-style-type: none"> · Commission agency arrangements covered by Oilcode
<p><i>Independent Petroleum Group (IPG)</i> The representative body of the major independent importer/marketers.</p>	
<ul style="list-style-type: none"> · Nationally consistent TGP arrangements for those purchasing from primary suppliers · Transparent supply documentation · Dispute resolution scheme 	<ul style="list-style-type: none"> · Commission agency arrangements covered by Oilcode · No industry specific restrictions on pricing behaviour
<p><i>Petroleum Marketers Association of Australia (PMAA)</i> Represents the interests of those small businesses that are not covered by the MTAA or the IPG.</p>	
<ul style="list-style-type: none"> · Nationally consistent TGP arrangements for those purchasing from primary suppliers · Dispute resolution scheme 	<ul style="list-style-type: none"> · Commission agency arrangements covered by Oilcode · No industry specific restrictions on pricing behaviour
<p><i>Australian Petroleum Agents and Distributors Association (APADA)</i> A representative body of wholesale and retail distributors.</p>	
<ul style="list-style-type: none"> · Nationally consistent TGP arrangements for those purchasing from primary suppliers · Dispute resolution scheme 	<ul style="list-style-type: none"> · Commission agency arrangements covered by Oilcode

Source: *Explanatory Memorandum*, p. 32.

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ALP/Australian Democrat policy positions In June 1999, the Senate Rural and Regional Affairs and Transport Legislation Committee issued its [Report on the Provisions of the Petroleum Retail Legislation Repeal Bill 1998](#). Labor Senators issued a minority report, which stated, in part:

Labor Senators do not support a Repeal of either the *Petroleum Retail Marketing Franchise Act* (the Franchise Act) the *Petroleum Retail Marketing Sites Act* (the Sites Act) until an Oilcode has been drafted and is agreed to by all parties ... Labor Senators maintain that the issue of access has not been resolved. To this end, Labor will not support the repeal of the Sites Act until mechanisms to address access and the vertical nature of the industry have been implemented. The Oilcode deals only with issues arising out of relationships between players in the industry and does nothing to address the important market issues.

While Labor recognises the market has moved on since the introduction of the Sites Act in 1980, it will not support the Repeal Bill in the absence of an agreed Oilcode and alternative mechanisms for dealing with the market issues the Sites Act was designed to address.

The Australian Democrats also issued a minority report, which concluded:

5.1 The issues for the petroleum industry are vertical and horizontal integration, open access to terminals and protection of the rights of individual operators. The correct mix of regulation of each of these areas should result in increased competition and profitability, and better pricing practices. It would also result in a beneficial end to the market dominance of the oil majors in the wholesale and retail sectors.

5.2 The Australian Democrats agree with the majority report to the extent that it recommends the retention of the Franchise Act until the completion and tabling of the OilCode in the Parliament as a regulation pursuant to Part IVB of the *Trade Practices Act 1974*.

5.3 We agree that an appropriate access regime should be implemented. The description by the majority of the regime is an appropriate starting point for the development of an access regime.

5.4 The Australian Democrats do not agree with the majority in its recommendation that the Sites Act be repealed after two years unless the Senate passes a resolution adopting a recommendation of a committee of the Senate that the Act not be repealed. This is an unusual mechanism. The ordinary procedure would be for the Sites Act to be left in place and for the Senate to repeal that Act after two years (or any other period) if a Senate Committee recommended that that was appropriate.

5.5 The Australian Democrats agree that there should be a Parliamentary review of the access regime after 18 months of operation.

On 19 April 2006, Mr Joel Fitzgibbon MP issued a press release that states, among other things:

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Labor supports the repeal of the antiquated Petroleum Sites and Franchise Acts but wants both the proposed Oilcode and section 46 of the Trade Practices Act strengthened as part of the package.¹⁷

Any consequences of failure to pass

Failure to pass the legislation would mean the continuation of the legal status quo. However, the industry's structure would be likely to continue to evolve with more reductions in service station numbers, and further development of the industry outside the coverage of the Franchise and Sites Acts.

Financial implications

The Bill does not seek the appropriation of funds. However, according to the *Explanatory Memorandum*:

As the Oilcode will be a mandatory code under the Trade Practices Act, the Australian Competition and Consumer Commission would assume primary responsibility for enforcement of the Oilcode and in educating market participants about rights and responsibilities.

The dispute resolution scheme would be established and administered by Department of Industry Tourism and Resources on an outsourced basis. The funding required to implement the Oilcode is \$11.8 million over a four year period, with an ongoing funding requirement of \$3 million a year thereafter. This funding would be shared between the ACCC and DITR.¹⁸

Main provisions

Schedule 1—Repeal of Acts, contains two items. **Item 1** repeals the entire *Petroleum Retail Marketing Franchise Act 1980* while **Item 2** repeals the entire *Petroleum Retail Marketing Sites Act 1980*.

Schedule 2—Consequential amendment, contains two clauses. **Clause 1** omits a reference to the *Petroleum Retail Marketing Franchise Act 1980* in the Schedule to the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

Clause 2 provides that despite Clause 1, the *Jurisdiction of Courts (Cross-vesting) Act 1987* continues to apply in relation to matters that arose under the *Petroleum Retail Marketing Franchise Act 1980* before Clause 2 takes effect, as if Clause 1 were still in effect. The *Explanatory Memorandum* explains that the purpose of Schedule 2 is to ensure that the repeal of the *Petroleum Retail Marketing Franchise Act 1980* does not affect any court proceedings that are already in train.

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Concluding comments

The Franchise and Sites Acts are a form of protection for one group, principally, franchisees. As with all protection, this comes at the cost to someone else. This takes the form of a distorted and less than optimally efficient industry structure for which petroleum products consumers ultimately pay.

The repeal of the Franchise and Sites Acts is likely to result in a more efficient industry structure. This may entail fewer but larger service stations than is now the case. The economies of scale associated with larger outlets should result in a fall in service station costs, with the potential for benefits in the form of lower prices for consumers. It is not possible to quantify how large the fall in prices might be.

The beneficiaries of the current system, principally franchisees, are likely to lose from the restructuring. The Explanatory Memorandum acknowledges that under Option B—the repeal of the Franchise and Sites Acts but without the Oilcode—this may be case:

...the number of small businesses operating under franchise agreements may diminish...¹⁹

A main claim by opponents of the legislation is that the reduction in the number of sites will reduce competition and result in price increases. In particular, repeal of the two Acts will allow the refiner/marketers to use their market power to push up prices to consumers. Several points about this claim are worth noting.

First, the number of service stations has been contracting for decades. The Franchise and Sites Acts have thus not prevented this from happening. Despite the contraction in the number of service stations, the industry has remained competitive as attested to by several ACCC reports. In short, it is not just the number of service stations that has determined whether the industry has remained competitive.

Second, competition for refiner/marketers will remain from other market participants notably importers/marketers and the supermarkets. The supermarkets, in particular, have the ability to compete vigorously with the refiner/marketers.

Third, the general competition laws will apply to the entire industry. The Government's proposals would have the effect of uniformly regulating the entire industry—including supermarkets and importer/marketers—unlike now. Regulation would have two elements:

- the general competition laws, and
- the industry-specific Oilcode.

Both elements contain protections against possible abuse of market power. The competition laws were tested in the case of the segment of the industry operating outside the Franchise and Sites Acts when the Australian Competition and Consumer Commission

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(ACCC) reviewed the tying of petrol discounts to grocery sales by Coles and Woolworths. The ACCC [found](#) that the shopper docket schemes had encouraged competition and lower prices.²⁰

Despite various changes, all interested parties still do not agree with elements of the proposed Oilcode:

Despite several years of negotiation, and significant concessions by some industry participants, it has not proven possible to develop an Oilcode that both satisfies all industry stakeholder demands and is consistent with the Government's competition policy principles. A number of parties representing independent operators and small businesses in the industry remain concerned that the Oilcode does not prevent either below-cost selling or the provision of discounts to large volume customers in the wholesale market (refer Table 6). However, amendments to accommodate such a position would be inconsistent with the Government's competition policy objectives as outlined in its responses to the 2003 Review of the Competition Provisions of the Trade Practices Act 1974 (The Dawson Review) and the 2004 Senate Economics References Committee Inquiry on The Effectiveness of the Trade Practices Act in Protecting Small Business.²¹

As noted, Table 6 (on page 32 of the *Explanatory Memorandum*) sets out the positions of the main parties with respect to the Oilcode.

Endnotes

1. A copy of the Oilcode can be found on the Department of Industry, Tourism and Resources website at <http://www.dist.gov.au/assets/documents/itrinternet/Circulationdraft26July0520050802154047.pdf>. Accessed 10 April 2006.
2. *Explanatory Memorandum*, paragraph 1.1.2, p. 7.
3. The *Explanatory Memorandum* (on page 5) defines a commission agency as a site, managed by an individual on behalf of the refiner/marketer, whose compensation is generally in the form of a commission based on the quantity of products sold.
4. *Explanatory Memorandum*, paragraph 5.1.4, p. 20.
5. *ibid.*
6. *Explanatory Memorandum*, pp. 17–18.
7. *Explanatory Memorandum* paragraph 2.4, p. 14.
8. *Explanatory Memorandum*, paragraph 5.3, p. 26.
9. The Bills Digest for the 1998 Bill is at <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd045.htm>. Accessed 10 April 2006.

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10. Senator the Hon. Nick Minchin, (Minister for Industry, Science and Resources), *Government's petrol reform package will not proceed*, media release 99/309, 23 September 1999.
11. Hon. Ian Macfarlane, (Minister for Industry, Tourism and Resources), *Macfarlane to proceed with retail petrol reform*, media release, 7 December 2004.
12. Department of Industry, Tourism and Resources, *Downstream Petroleum Industry Reform*, at <http://www.industry.gov.au/content/itrinternet/cmscontent.cfm?objectid=3E367701-9861-4C07-9BA2646593FDBFB4&indexPages=/content/sitemap.cfm?objectid=1412803B-CB25-81B8-48325E46EA993A55>. Accessed 11 April 2006.
13. Australian Institute of Petroleum, *AIP welcomes action to implement retail petroleum market reform*, media release, 30 March 2006.
14. Motor Trades Association of Australia, *Service station operators disappointed with Government action to repeal petroleum legislation*, 30 March 2006 at <http://www.mtaa.com.au/> Accessed 11 April 2006.
15. Sue Mitchell, 'Petrol reforms put small players under pump', *Australian Financial Review*, 6 April 2006.
16. Service Station Association magazine, editorial, *Repealing the PRMS and PRMF Acts: What will it mean for you?*, February at http://ssa.org.au/magazine/pdf/2005/02/200502_editorial.pdf. Accessed 11 April 2006.
17. J. Fitzgibbon, *Coalition Split On New Code For Petrol Industry*, media release, 19 April 2006.
18. *Explanatory Memorandum*, paragraph 5.3.6, p. 28.
19. *Explanatory Memorandum*, paragraph 5.2.8, p. 24.
20. Australian Competition and Consumer Commission, *Assessing shopper discounts and acquisitions in the petrol and grocery sectors* at <http://www.accc.gov.au/content/index.phtml/itemId/501158/fromItemId/655475>. Accessed 12 April 2006.
21. *Explanatory Memorandum*, paragraph 6, p. 31.

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