

Chapter 5

Legal aspects

Legal basis for the legislation

5.1 The Australian government imposed price controls on petrol from 1939 to 1948. From the 1970s to 1990s a variety of authorities regulated petrol prices.¹ After prices were deregulated in 1998 the ACCC was tasked with monitoring petrol prices and has conducted a number of inquiries, the most recent reporting in December 2007.²

5.2 Section 51(xx) gives the Australian government power to legislate with respect to 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'. Some small petrol retailers are not corporations, which has led to some speculation that the proposed national legislation may not be constitutional.³

5.3 However, Treasury has reported that they had 'taken advice from the appropriate authorities that the bill is constitutional'.⁴ They commented:

The advice from the Australian Government Solicitor in preparing the legislation is that the corporations power is not restricted to laws addressed to constitutional corporations. It also supports laws addressed to noncorporations insofar as a constitutional corporation acts through them—that is your example of a partnership structure at the retail level—or where a noncorporation's conduct is, or is capable of, affecting a constitutional corporation's activities, functions or business.⁵

5.4 All state and territory governments have legislation under which petrol prices could be regulated.

1 The Prices Justification Tribunal (1973-1981), Petroleum Products Pricing Authority (1981-1984) and Prices Surveillance Authority (1984-1998).

2 ACCC, *Petrol Prices and Australian Consumers*, December 2007.

3 This view is attributed to Tom Hughes QC in an article in *The Age*, 9 June 2008, p. 8. It is also raised by Caltex, *Submission 14*, pp 5-6 and Australian Institute of Petroleum, *Submission 2a*, p. 28.

4 *Estimates Hansard*, 4 June 2008, pp 88-100.

5 Mr David Martine, Treasury, *Proof Committee Hansard*, 11 August 2008, p. 34.

Definition of 'standard price' in the bill

5.5 Caltex asks whether the requirement in the bill that petrol be only sold at the 'standard price' notified to the ACCC the previous day (which the bill states should disregard shopper dockets) would make it illegal for stations to offer a lower price to customers with shopper dockets or loyalty cards.⁶ Shopper dockets are still offered in WA under FuelWatch, but the WA legislation uses different wording. A case can be made that it would be a good thing to remove shopper dockets from the market (Chapter 4), but it would appear that this is not intended. The Law Council did not consider that the bill would prevent the use of shopper dockets.⁷

5.6 Similarly, the Motor Trades Association of Queensland were concerned about possible confusion arising from the treatment of the 8.4 cents per litre subsidy provided by the Queensland Government. Service stations:

... currently display a price net of the 8.4c discount provided by the state subsidy. Under Fuelwatch, we understand that the intention is that gross prices would have to be shown.⁸

5.7 BP submitted:

...as drafted, section 10(2) is too prescriptive in that it imposes a positive obligation to sell fuel (even where we may have none for sale due, say, to a stock out). This is quite distinct from an obligation, if an offer to sell is made, to sell at the notified price. The WA legislation makes it clear that it is only if a retailer offers fuel for sale that they must sell it at the notified price.⁹

5.8 The Australian Institute of Petroleum commented:

AIP also notes that civil penalties will apply where retailers notify a price for the 24 hour period, but do not sell fuel at the notified retail price. There is no explanation in the legislative package of what this means in the context of 'stockouts' of fuel at service station sites running out of fuel and what evidence will be required to satisfy inspectors that there is no hoarding occurring.¹⁰

6 Caltex, *Submission 14*, pp 6-7. Similar concerns were expressed by Mr Aivars Blums, Motor Trades Association of Queensland, *Proof Committee Hansard*, 17 July 2008, p. 2.

7 Mr Roger Featherston, Law Council of Australia, *Proof Committee Hansard*, 1 August 2008, p. 4. Nor did the Motor Trades Association of Australia; *Submission 16*, p. 5.

8 Mr Aivars Blums, Motor Trades Association of Queensland, *Proof Committee Hansard*, 17 July 2008, p. 2.

9 BP, *Submission 31*, p.7.

10 AIP, *Submission 2a*, p. 28.

Recommendation 3

5.9 The committee recommends that the Government examine the wording used in regard to 'standard prices' in the bill, and if there is a risk of ambiguity, adopt the wording that has been used in the Western Australian legislation instead.

Review provisions

5.10 The Law Council advocated a three-year sunset provision, whereby Fuelwatch would lapse unless specifically renewed following a review.¹¹

5.11 There have been calls for the Fuelwatch scheme to be reviewed after it has operated for some time:

...there should really be a mechanism in place for appropriate evaluation. We have recommended in our submission that that should be 12 months.¹²

...the current proposed Fuelwatch scheme is best viewed as a work in progress and that we should leave room open for it to be tweaked, reformed drastically, or what have you, as we learn more.¹³

...the NRMA recommends that once introduced, the Government undertake a thorough public review of Fuelwatch after 12 months...¹⁴

5.12 The Explanatory Memorandum states that 'the Government will review the effectiveness of the scheme 12 months after its commencement'.¹⁵

Recommendation 4

5.13 The committee recommends that the designated review of the scheme after twelve months be undertaken in an open and transparent manner by an independent body.

11 Mr Roger Featherston, Law Council of Australia, *Proof Committee Hansard*, 1 August 2008, pp 3, 9.

12 Mr Jonathan Kennedy, National Seniors Australia, *Proof Committee Hansard*, 11 August 2008, p. 13.

13 Professor Joshua Gans, *Proof Committee Hansard*, 7 August 2008, p. 55.

14 NRMA, *Submission 23*, p. 2.

15 *Explanatory Memorandum*, p. 12.