CHAPTER 5

CONSTITUTIONAL AND LEGAL ISSUES

Introduction

5.1 One major area of objections to the bill related to constitutional issues. In particular, the Australian Institute of Petroleum (AIP) submitted that the 'Bill amounts to an effective expropriation of property, without just compensation'.[1] The bill would therefore infringe section 51(xxxi). The major oil companies supported this contention,[2] although it would need to be tested in court in order to determine conclusively if the AIP's contention is correct.

5.2 A further legal issue associated with the bill flowed from the fact that, under the provisions of the bill, franchisees will be able to source the supply of up to 50 per cent of their fuel from a source other than their franchisor. This alternate fuel source may even be unknown to the franchisor. In such a situation the major oil companies expressed concern that they would no longer be able to 'guarantee the quality of … fuel'.[3] In this context the issue of 'passing off' was mentioned.[4] Passing off involves consumers ostensibly purchasing the product of company X, in this case the fuel of a particular company, while in reality they are purchasing the product of company Y, the fuel of some other company.[5]

5.3 The Committee also received advice from the Department of Industry, Science and Resources (DISR) relating to several other legal issues, including:

- the Commonwealth's corporations power; and
- amendments to the Trade Practices Act.

5.4 This Chapter examines these issues with a view to determining if they would prevent the bill being put into effect, whether amendments would be required and if an amended bill could still fulfil its objectives.

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1 Submission No. 41, AIP, p. 2.

2 For example, Submission No. 38, BP, p. 6.

3 For example, Evidence, p. E122.

4 Evidence, p. E179.

5 Definitions provided in the Service Station Association Submission No. 34, p. 3: 'Passing off' occurs when a product is sold to a consumer that is not in fact what the purchaser was entitled to believe it was. 'Co-mingling' is said to occur if different products are allowed to combine while still being offered for sale as not having been mixed.

Acquisition of property

5.5 The Commonwealth's power in relation to the acquisition of property is provided for in Section 51(xxxi) of the Constitution which states:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to–
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> …
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> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws; …

5.6 In the High Court case of the *Minister of State for the Army v Dalziel* (1944),[6] Justice Starke found that the property referred to under section 51(xxxi) of the Constitution included 'every species of valuable rights and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action'.

5.7 In the High Court case of *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948),[7] Justice Dixon stated that the definition of property in section 51(xxxi) encompasses 'innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control … of any subject property'.

5.8 Section 4 of the Fair Prices and Better Access for All (Petroleum) Bill defines a franchise agreement as an agreement in which the franchisor grants the franchisee the right to carry on the business of offering, supplying or distributing motor fuel in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor.

5.9 The franchise arrangements that are the subject of the current bill therefore relate to rights to control assets. The franchise agreements thus involve property rights. Property rights are protected under section 51(xxxi) of the Constitution which prevents the Commonwealth authorising the acquisition of property except on 'just terms'.[8]

5.10 In *PJ Magennis Pty Ltd v Commonwealth* (1949),[9] the High Court found that section 51(xxxi) of the Constitution could be infringed even if the Commonwealth did not acquire property directly itself, but rather authorised another entity to acquire the property. Thus in the Magennis case the *War Service Land Settlement Agreements Act*

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6 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

7 *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1.

8 *Constitution of the Commonwealth of Australia*, Section 51(xxxi).

9 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382.

1945 (Cwth) was found to be invalid because it provided for the acquisition of property, on other than 'just terms', by a state government. One can infer, from the decision in the Magennis case, that any Commonwealth legislation authorising the acquisition of property by anyone on other than 'just terms' would be unconstitutional.

5.11 As noted previously, the bill would allow franchisees to obtain up to 50 per cent of their fuel from another supplier, a supplier who had provided no investment in the sites utilised by franchisees. Essentially the bill will allow franchisees, at least in part, to take control of their franchise agreements, that is, the bill would transfer property rights inherent in franchise agreements from franchisors to franchisees. The corollary to this is that the bill will weaken, as it aims to, the control franchisors may exert over their property.

5.12 Unless such transfers take place on 'just terms' the legislation requiring the transfers may be found to be unconstitutional. The current bill contains no provisions for compensation and therefore, if passed unamended, might be struck down.

Retrospectivity

5.13 The Scrutiny of Bills Committee, as long ago as September 1999, expressed concern about the bill's proposed intervention in legally binding contractual arrangements between franchisors and franchisees. It noted that:

> The only circumstance in which provision is made for compensation involves persons who suffer loss or damage through a contravention of the bill – no provision is made for compensation as a result of the operation of the bill and its effect on rights under those existing contractual arrangements.[10]

5.14 The AIP stated that the current bill is an attack on the property rights protected by the Constitution. It is AIP's view that:

> This is a major degradation of the value of the site to the investor. … the Bill does not provide for any compensation to the investor. This is effective expropriation of property from an investor, opening up the real possibility of legal action to contest the appropriation, in both Australian and International legal avenue. The expropriation would also be a major concern for potential investors considering investment in Australia.[11]

5.15 The view of AIP is not unique. All of those with vested interests, such as the major oil companies, incline to the view that as they have invested heavily in service station sites to sell fuel under franchise arrangements, and since the bill would allow franchisees to obtain up to 50 per cent of volume from another supplier who had not invested in the sites, the property rights of franchisors would be infringed by the bill.

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10 Alert Digest No. 14 of 1999, 22 September 1999, pp.12-13.

11 Submission No. 41, AIP, pp. 12-13.

5.16 Representatives of BP stated that their company was particularly concerned about the fact that 'our assets are being used totally against our wishes'[12] and that 'this would amount to an expropriation of our property rights'.[13] BP's submission stated that it was 'not interested in franchising under a system where, using [BP's] assets, the franchisee can readily access our competitors' products'.[14]

5.17 It would be unconstitutional if the provisions of the bill were to apply to existing franchise arrangements. Judging by the reaction of the major oil companies the bill would almost certainly be challenged in the courts. However, during the course of the inquiry doubts were raised as to whether the bill actually would affect existing franchise contracts.

5.18 If after being enacted the current bill did not affect existing franchise contracts, then its provisions in relation to franchise contracts could not be challenged as unconstitutional, at least on this particular ground.

5.19 The Scrutiny of Bills Committee sought Mr Fitzgibbon's advice about the reason for the provisions of his bill intervening in existing franchise contracts and whether compensation should be made available to those who suffer loss as a result of that intervention. The Scrutiny Committee provided a copy of Mr Fitzgibbon's response to its comments, in which Mr Fitzgibbon stated that:

> If proclaimed, my Private Member's Bill would operate prospectively only. That is, it would only impact upon future contractual relationships and future rights.[15]

5.20 However, Mr Starkey, Executive Director, Australian Institute of Petroleum (AIP), stated that, although Mr Fitzgibbon referred to the prospective nature of his legislation in Parliament, the bill, nevertheless, 'is retrospective, as it is drafted'.[16] DISR confirmed this interpretation.[17]

5.21 DISR's advice to the Committee stated that the bill could be amended to ensure that its provisions should only apply to new or amended contracts. By making it clear that the bill only applies to future contracts, the risk of Constitutional challenge for 'just' compensation in relating to existing franchise arrangements could be removed.[18]

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12 Evidence, p. E130.

13 Submission No. 38, BP, p. 6.

14 Submission No. 38, BP, p. 6.

15 Letter from Mr Joel Fitzgibbon MP to the Senate Standing Committee for the Scrutiny of Bills, 20 December 1999.

16 Evidence, p. E196.

17 DISR, correspondence to the Committee, 5 September 2000, p. 1.

18 DISR, correspondence to the Committee, 5 September 2000, p. 1.

Preservation of existing franchise contract property rights

5.22 The Committee noted in evidence that 'Mr Fitzgibbon did not say it was going to intervene and rip up existing contracts. As new contracts were signed they would take account of this bill'.[19] Indeed Mr Fitzgibbon referred in the bill's first reading speech to the effect of his bill on 'future contracts'.[20]

5.23 DISR advised the Committee that by making it clear that the bill only applies to future contracts, the risk of Constitutional challenge could be removed.[21] This is because if the bill is redrafted so that it only applies to future contracts[22] then no existing contract property rights will be affected.

5.24 The advice that DISR supplied to the Committee is correct insofar as it relates to existing contract arrangements. However, the property rights that are inherent in franchising contracts are not the only property rights that would be affected by the bill. Redrafting the bill so that it applies only to future franchise arrangements therefore, as the following section elaborates, may not preserve the bill from being challenged as unconstitutional.

Existing property rights regarding ownership of sites

5.25 Franchisors in many cases built, and continue to own, the service stations that are selling their petrol under franchise agreements. Shell noted that the provisions of the bill, as currently drafted, would allow franchisees to use the franchisors' equipment at service stations to store and dispense fuel provided by another supplier.[23]

5.26 Caltex submitted that the bill 'effectively appropriates oil company service station assets for use by franchisees without compensation'.[24] Further, Mr Topham of Caltex, stated that 'it is not reasonable for a franchisee on a company owned site to use an oil company's assets to sell someone's else's fuel'.[25] Mr Topham expressed concern that 'the property rights of companies are being ignored'.[26]

5.27 Mobil stated that the bill would deny it the right to obtain a return from its property, and provided no compensation for the loss Mobil would therefore suffer.[27]

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19 Evidence, p. E196.

20 First Reading Speech, House of Representatives Hansard, 30 August 1999, p 9333.

21 DISR, correspondence to the Committee, 5 September 2000, p. 1.

22 The Department of Industry Science and Resources suggested this course of action in a letter to the Senate Economics References Committee of 5 September 2000.

23 Submission No. 45, Shell, p.20.

24 Submission No. 44, Caltex, p. 11.

25 Evidence, p. E137.

26 Evidence, p. E137.

27 Submission No. 10, Mobil, p. 7.

5.28 If the bill were redrafted so that its provisions applied only to future franchise agreements it would still, as the oil companies pointed out, affect the property rights of oil companies that own service station sites. This is because the bill would allow a service station franchisee to use the dispensing equipment and underground storage equipment at the service station for the dispensing and storage of fuel which the franchisee might have purchased from suppliers other than the franchisor.

5.29 The bill therefore would allow the franchisee of a service station to use equipment owned by one oil company for the benefit of another oil company, even against the express wishes of the owning oil company.

5.30 From a legal point of view an oil company that has built a service station has the right to enjoy its property. If that oil company is required to allow its property, namely the service station, to be used for the benefit of another, then its property rights, in part, have been acquired by another. If this acquisition is not on 'just terms', and it is not proposed to redraft the bill to include provisions on compensation, then the acquisition is unconstitutional; therefore even a bill redrafted to ensure that it applied only to future contracts still might be challenged as being unconstitutional.

5.31 It should be noted that the Commonwealth Government has, especially in recent years, legislated to allow access to major infrastructure for business. One example of this is the telecommunications sector where the Government legislated to allow access to Telstra's network by other telecommunications companies.

5.32 Such access legislation does not constitute the acquisition of property on other than 'just terms' because the owners of infrastructure are paid for the use of their infrastructure by others. Compensation is thus paid to the infrastructure's owner as recompense for the fact that the owner no longer has sole use of the infrastructure. Access legislation effectively is merely legislation for 'restraining'[28] the prices that the infrastructure owner may charge those whose use its infrastructure.

5.33 The infrastructure inherent in service stations, built and/or owned by the oil majors, could be regarded as infrastructure to which access legislation should be applied. Such legislation would limit the fees that the oil majors could charge for access to the infrastructure.

Effect of redrafting the Bill

5.34 Representatives from DISR, referring to the bill's effect on existing franchise contracts, told the Committee that the bill should be redrafted but that any such redraft might nullify its operation. The representatives from DISR, in evidence, offered the opinion that:

> While the bill could be redrafted to remove questions of legal doubt, to do so would create a situation where the intent of the bill is unlikely to be

28 National Competition Council, Annual Report 1999-2000, p. 83.

> delivered. This is because, to remove the legal doubt, a redrafted bill would only apply to new or amended agreements, thereby affording the opportunity to the major oil companies to change their contracting arrangements to preserve revenue streams from a given site. Implementation of the bill, in such an environment, may actually add to the cost of petrol at the pump, an outcome the government is sure is not intended.[29]

5.35 DISR expanded on their opinion in a later communication to the Committee stating that if the bill were drafted so that it only applied to new or amended contracts, then the bill would be unlikely to deliver any benefits to service station operations:

> Prudent commercial behaviour by suppliers could see changes in contractual provisions and conduct designed to retain returns from a particular site. It would not matter whether the service station operator chose to exercise any rights accorded to them under the [Bill], as contractual arrangements would need to be struck as if such rights were exercised. While the nature of these new arrangements is uncertain, it is likely to see higher entry costs and rental charges and an ending of price support mechanisms.[30]

5.36 As the bill's provisions would be prospective, it might take a considerable period before the effects of the legislation began to be seen in increased competition to supply petrol. This time lag would be such that the oil companies might well, as suggested by DISR, take the opportunity to alter the clauses of their standard franchising contracts to make it financially unattractive, even untenable, for a franchisee to purchase fuel from any source but the original franchisor.

Adulterated Fuel

5.37 A further difficulty raised regarding the bill by the major oil companies is that the ability of franchisees to purchase fuel from other than their franchisors may give rise to product liability issues. Specifically the bill might make it harder to identify who was liable for damage done to vehicles by adulterated fuel for the simple reason that in the environment envisioned by the bill it would be more difficult to determine the origin of adulterated fuel.

5.38 The bill will allow franchisees, notwithstanding any franchise agreements to the contrary, to source their fuel from other than their particular franchisor.[31] A BP service station, for example, therefore may sell fuel which has not been produced by BP, thus there might be a problem in identifying the source of adulterated fuel.

5.39 Mr Chris Hanlon, Chief Executive Officer, Service Station Association**,** stated in evidence that

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29 Evidence, p. E192.

30 DISR, correspondence to the Committee, 5 September 2000 Attachment A, p. 2.

31 Explanatory Memorandum, p. 2.

> there is a problem and a product liability issue. In circumstances where you cannot identify which particular tank the fuel came from and, say, you had got a load of bad fuel with toluene in it, where do you apportion the liability for that? It is in a situation where there are two competing products being supplied from the one outlet that it is very difficult to establish that.[32]

5.40 Mr McKenzie of Shell stated that the 'absolute fuel quality guarantee' which Shell gave its fuel would not be able to be provided if there was a possibility that Shell's branded fuel could be mixed with fuels from other sources.[33]

5.41 The major petroleum producers also raised the problem of identifying the source of adulterated fuel with the Committee.[34] Mr Birrell, Retail Franchise Channel Manager, BP Australia Ltd., told the Committee that under the bill:

> BP could no longer guarantee the quality of our fuel. We would not offer the guarantee on our fuel when it has been subsequently mixed with others. … This will inevitably result in liability issues on who was provided with what and which product was or was not on spec. The current toluene scam in Sydney and Melbourne has shown this to be a real issue.[35]

5.42 Mr Starkey, of AIP, remarked that while there is a national fuel standard, 'it is very broad, it allows all sorts of variations'.[36] Mr Starkey expressed concern that under the bill service stations would be supplied with fuel containing possible harmful additives. Mr Starkey noted that MTBE (methyl-ter-butyl-ether), for example, has been found to be present in some imported petrol, but it is not present in any refined product originating in Australia.[37]

5.43 Identifying the origin of adulterated fuel is already difficult. In the petrol retailing environment envisioned by the bill, however, a consumer whose car suffered damage as a result of 'crook fuel'[38] would have increased difficulty in identifying the origin of the adulterated fuel.

5.44 Senator Schacht made the point that the bill does not give anyone the 'right to escape responsibility for selling dud fuel',[39] and of course various measures could be taken to track down adulterated fuel, such as requiring retailers to sample each fuel delivery and retain the samples for subsequent analysis if required.

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32 Evidence, p. E26.

33 Evidence, p. E164.

34 Evidence, p. E42.

35 Evidence, p. E123.

36 Evidence, p. E207.

37 Evidence, p. E206.

38 Evidence, p. E42.

39 Evidence, p. E113.

Recommendation

The Committee recommends that the bill be amended to require the establishment of a comprehensive fuel sampling and testing regime.

5.45 Senator Schacht also made the point that the bill would not radically alter the prevailing situation in that consumers are 'not told now'[40] when the petrol they purchase is not the product of the company whose logo is displayed above the service station they are at. This practice is known as passing off.

Passing off

5.46 The tort of passing off aims to protect the reputations of businesses and protect consumers from deceptive and misleading trading activities. The tort is generally conceived of as relating to a situation where a retailer sells a product produced by X while making it appear that the product sold actually was produced by Y.[41]

5.47 With regard to the current bill, passing off would occur if a consumer bought petrol at, for example, a BP service station, believing the petrol to have been produced by BP when the petrol was produced by some company other than BP.

5.48 Mr Martin Hadley, Proprietor, BP Kuranda, Queensland, stated in evidence that oil companies currently 'are passing off for economic reasons'.[42] Mr Hadley pointed out that it would not be economic for each major oil company to send its own oil tanker to Cairns so the Government has 'allowed' all fuel to be sent to Cairns to be, for example, Ampol fuel carted in an Ampol tanker. The fuel, however, is retailed in Cairns as 'Shell fuel or BP fuel or whatever'.[43]

5.49 Mr Hadley stated that 'consumers do not give a hoot what brand'[44] of petrol it is that they buy. This may well be true but this does not avoid the legal implications of passing off.

5.50 The oil majors objected to the suggestion that consumers regarded one fuel as interchangeable with any other fuel. According to the oil majors, additives are used to differentiate each company's product from its competitors. For example, refiner marketeers have different additives to enhance fuel which are added at the post refinery stage, thus it may be claimed that each company has developed its own particular fuel.[45]

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40 Evidence, p. E111.

41 'Australian Passing Off Law', Baldwins' Bulletin, June 1999.

42 Evidence, p. E74.

43 Evidence, p. E74.

44 Evidence, p. E74.

45 Submission No. 41, AIP, p.10.

5.51 Mr Ian McKenzie of Shell contended that the idea that each company produced its own, different, fuel was supported by market research:

> Our customer research clearly shows that customers make a distinction between the quality of product offered by Shell and the quality of product offered by competitors who do not put additives in. It is quite clear.[46]

5.52 Shell argued that breaking exclusive supply arrangements would 'undermine the capacity of Shell to manage its brand which it has built up over decades at considerable expense'. Essentially the property that subsisted in Shell's branding would be undermined by the bill.[47]

5.53 The other companies put forward similar arguments in respect of their brands and quality guarantees. For example, Mr Frank Topham of Caltex told the Committee that:

> Branding and the Caltex franchise system are absolutely core marketing assets, and part of the franchise deal is that we supply all the fuel. This means we are able to get the wholesale margin, as well as maintaining quality control and ensuring the integrity of the brand image.

5.54 To support their arguments regarding the necessity of protecting their branding of fuel, the oil majors went to some lengths to persuade the Committee that there were significant differences between the fuels they supplied. For example, BP noted that they had recently introduced a very high quality diesel product. Shell in particular argued that it had done a great deal of work to differentiate its fuels and that the assumption in the bill that petrol is an undifferentiated product is incorrect. Shell's opinion was that:

> Shell has a long history of marketing differentiated fuels in Australia. Recent examples include the introduction of Shell's Half Lead introduced in 1995. In 1999 we were the first company to introduce lead replacement petrol and a revolutionary new fuel call Shell Optimax was introduced in October 1999. The Fitzgibbon bill would discourage this type of innovation because without exclusive supply arrangements it would be impossible to market differentiated fuels.[48]

5.55 Shell contended that the additives it uses in its petrol results in a superior quality product. The company contrasted its practices with those of its competitors:

> Gulf and Liberty do not dose their product. As a result of that, they are actually supplying a product that could result in either clogging of an engine or, potentially, nothing. But we believe that, in adding this product into our fuels, we are providing a cleaner, safer, better running fuel for our

46 Evidence, p. E164.

47 Evidence, p. E164.

48 Evidence, p. E159.

> customers, and part of the guarantee of buying a Shell fuel is that aspect of quality.[49]

5.56 Mr Starkey of AIP stated that passing off fuel would compromise the unique market profile of each oil company's product. Mr Starkey advised the Committee that:

> When an oil company allows a service station to display its brand they must be absolutely sure what is being dispensed under that brand. The issue of passing off is not so much whether one company's fuel is as good as another's, though brand differentiation is increasing; it is more about the company responsible for the fuel having knowledge of what is being dispensed in its name. It is also more about keeping the shonky fuels off the forecourts. Recent fuel substitution events have clearly demonstrated that this is a real danger.[50]

5.57 These objections to the view that fuel is 'a homogeneous product'[51] was undermined by other evidence. Mr Frilay, Manager Government Relations, BP Australia Ltd., was questioned by the Committee about whether it was the case that standard unleaded fuel, whether it is BP, Shell, Mobil or Caltex, was basically the same. Mr Frilay stated that it was his 'understanding … that it is the same fuel'.[52]

5.58 The MTAA questioned assertions that the fuels produced by the oil majors were somehow essentially different. The MTAA remarked that there are only eight refineries in Australia (two in each of NSW, Victoria and Queensland and one in each of WA and SA), consequently:

> The oil majors are all involved in horizontal arrangements which result in them accessing and using one another's product.[53]

5.59 The Committee also noted the opinion of the Chairman of the ACCC, Professor Fels who stated that petrol was 'a homogeneous product'.[54]

5.60 The Service Station Association (SSA) suggested that 'it is now generally accepted, that there is very little, if any, substantive difference between petrol of like grade that has been sourced from any of the oil companies refineries'. This view was shared by the Motor Trades Association of Australia (MTAA) which stated that in its view 'petrol is basically an undifferentiated chain of hydrocarbons'.[55]

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49 Evidence, p. E163.

50 Evidence, p. E200.

51 Evidence, p. E194.

52 Evidence, p. E124.

53 Submission No. 30, MTAA, p. 39.

54 Evidence, p. E194.

55 MTAA, correspondence to the Committee, 6 March 2000, p.2

5.61 Such evidence lends support to the statement of Mr Hadley that different companies' fuels are currently being marketed in an interchangeable manner that may be characterised as passing off.

5.62 The fact that passing off may already be an entrenched, even endemic practice, does not absolve the retailer of Shell petrol, for example, from delivering Shell petrol to customers. The retailer of Shell may only sell another type of petrol to customers if it is perfectly clear to the customers that they are not buying Shell.

5.63 In order to take advantage of the bill's proposal to allow franchisees to purchase up to 50 per cent of the fuel from a source other than their franchisor, franchisees would have to necessarily incur significant signage costs.

5.64 The MTAA suggested that the bill's requirement for displaying appropriate notices regarding the origin of the fuel being dispensed would overcome concerns about passing off.[56] Specifically subclause 5(6) of the bill provides that where a franchisee exercises the right under subclause 5(1) to use any underground storage or dispensing equipment on the site for the storage or dispensing of fuel purchased from other than the primary franchisor for resale, the franchisee must display a notice 'that conforms to the regulations'.

5.65 Passing off is dealt with under the common law and the enacted law of the various states and territories. The only Commonwealth legislation on passing off is the *Trade Practices Act 1974* (Cwth) which seeks, among other things, to prevent misleading and deceptive conduct in trading activities.

5.66 If the current bill were enacted, franchisees might take advantage of the bill's provisions and purchase fuel from other than their franchisors. In the event that it was then unclear whose fuel was being sold, the franchisors, or indeed any other party, could apply for an injunction to prevent relevant franchisees engaging in, what subsection 52(1) of the Trade Practice Act terms 'conduct that is misleading or deceptive or is likely to mislead or deceive'.[57]

5.67 Exactly how much signage would be needed in order to ensure that customers knew that they were purchasing the fuel of X from a service station which was a franchisee of Y is a moot point. Essentially the oil majors could, if they chose to be litigious, ensure that franchisees who took advantage of the provisions of the current bill spent a considerable amount of time in the Courts determining this issue. This matter could, of course, be dealt with by legislation.

5.68 Mr Delaney**,** Executive Director, Motor Trades Association of Australia Ltd., gave evidence that the current bill had been modelled on Acts passed in Victoria and

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56 Supplementary Submission No. 30A, MTAA, p.2.

57 *Trade Practices Act 1974* (Cwth), subsection 52(1).

Western Australia legislation,[58] and that both those State Acts had failed to have any impact because they fell foul of the 'misleading and deceptive provisions' of the Trade Practices Act.[59]

5.69 While Mr Delaney is right to be concerned about the Trade Practices Act being used to negate the operation of the current bill, the similar State legislation he referred to may have failed for other reasons.

5.70 The *Petroleum Retailers Rights and Liabilities Act 1982* (WA) came before the Western Australian Supreme Court in the case of *BP Australia Limited v Dragoon Holdings Pty Ltd* (1991).[60] The Supreme Court found that while the Western Australian Act conferred on a franchisee the right to use storage and dispensing equipment to retail fuel which did not originate from the franchisor, the Act failed to confer any rights 'in regard to the purchase of fuel'.

5.71 Essentially the Western Australian Supreme Court found that the Western Australia Act in no way disturbed existing franchisee agreements. Franchisees were thus still bound by these agreements and so the Act was essentially of no practical effect. This would seem to have been an oversight in drafting.

Corporations power

5.72 Mr Brugger of DISR advised the Committee in evidence, and after receiving advice from the Australian Government Solicitor,[61] that the terminology used in the bill in relation to corporations is not sufficiently narrow to fall clearly within a Commonwealth power. DISR suggested to the Committee that:

> You have to limit the application to constitutional corporations; that is the only head of power we can bring the bill forward under. The wording of the bill is not narrow enough to that.[62]

5.73 If the application of the bill were not limited in the manner Mr Brugger suggested, the Mr Brugger advised the Committee that there would be a very real likelihood that the bill would be challenged for exceeding the Commonwealth's power in relation to corporations.[63]

5.74 The problem raised by Mr Brugger concerns the nature of the Commonwealth's power over corporations. The Constitution states, at section 51(xx), that the Commonwealth has the power to make laws with respect to:

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58 The Acts referred to are the *Petroleum Retail Selling Sites Act 1981* (Vic), and the *Petroleum Retailers Rights and Liabilities Act 1982* (WA).

59 Evidence, p. E9.

60 *BP Australia Limited v Dragoon Holdings Pty Ltd*, WASC, No. 1574 of 1991.

61 Evidence, p. E265.

62 Evidence, p. E264.

63 Evidence, p. E264.

> Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.[64]

5.75 Whether or not section 51(xx) gives the Commonwealth power over companies involved in the petroleum industry is problematic because the exact nature of the power conferred on the Commonwealth by section 51(xx) is unclear.

5.76 A foreign corporation is presumably an entity incorporated in a jurisdiction outside the Commonwealth. A foreign corporation may therefore be readily identified. Entities incorporated within the Commonwealth by contrast, come within the purview of the Commonwealth if, and only if, they can be characterised as 'trading or financial corporations'. The exact meaning of this phrase has never been elucidated.

5.77 In *Huddert, Parker & Co Pty Ltd v Moorehead* (1909),[65] the High Court ruled that the power given to the Commonwealth under section 51(xx) was severely limited and, for example, did not allow the Commonwealth to make general trade practices legislation. Those powers, the High Court held, were the responsibility of the States.

5.78 In *Strickland v Rocla Concrete Pipes Ltd* (1971),[66] the High Court found that the reasoning used in *Huddert, Parker v Moorehead* had been 'in error', and that section 51(xx) of the Constitution did indeed confer on the Commonwealth the power to enact trade practices legislation. The Commonwealth responded to the decision in *Strickland v Rocla* by enacting the *Trade Practices Act 1974* (Cwth).

5.79 Section 51(xx), as has been noted, applies to Australian corporations only if they are 'trading or financial corporations'. It must be noted that the High Court did not, in *Strickland v Rocla*, determine what constituted a 'trading or financial' corporation.

5.80 In *R v Trade Practices Tribunal; Ex parte St George County Council* (1974),[67] the High Court held that the original purposes an entity was incorporated to achieve, as opposed to its current activities, determined whether or not that entity was a 'trading' corporation. In *R v Federal Court of Australia; Ex parte WA National Football League* (1979),[68] the High Court held that it was the current activities of an entity, not the purposes it had been formed for, that determined if it was a 'trading' corporation. The law is therefore uncertain on this point.

5.81 DISR advised the Committee that the bill could be redrafted so that its provisions are clearly limited to matters where the Commonwealth has the authority to

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64 Constitution, section 51(xx).

65 *Huddert, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

66 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

67 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

68 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190.

act.[69] Redrafting the bill so that it clearly only applied to 'trading corporations', and ignoring the fact that there seems to be some uncertainty about that term, would severely restrict the application of the bill.

5.82 DISR explained that:

> With the exception of the amendment to s47 of the [TPA] the remaining provisions of the Bill apply to franchise arrangements generally, regardless of, for example, whether the franchisor is a constitutional corporation. … It could therefore in its terms apply to franchise agreements between natural persons or other business entities outside Commonwealth power.[70]

5.83 This comment of DISR makes the very pertinent point that to be absolutely certain, in the Constitutional sense, the bill would have to apply only in situations where the two parties to a franchise agreement could both be characterised as 'trading or financial corporations' or foreign corporations. In the Department's opinion, franchise arrangements involving individuals would therefore not be covered by the bill.

5.84 The Committee notes the Department's advice. However, short of actually testing the Department's view in a court of law, it is not possible to determine whether this view about limits on the Commonwealth's powers is correct. In the Committee's view, the evidence is not sufficiently convincing to justify changes to the bill.

Amendments to the Trade Practices Act 1974 (Consultation with the States)

5.85 DISR alerted the Committee to procedural issues concerning the bill's proposed amendment to section 47 of the *Trade Practices Act 1974*.[71]

5.86 Commonwealth/State arrangements relating to competition policy enable any amendment to Part IV of the Commonwealth's Trade Practices Act

> … to be applied automatically under State law in relation to persons and circumstances outside Commonwealth constitutional power. [However] this only occurs if the special version of Part IV in the Schedule to the Act is also amended.[72]

5.87 The bill, as it is currently drafted, does not provide for the amendment of this special version of Part IV. The current bill's proposed amendment to section 47 of the Trade Practices Act would not automatically flow through to State and Territory law.[73]

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69 DISR, correspondence to the Committee, 5 September 2000, Attachment A, p. 2.

70 DISR, correspondence to the Committee, 5 September 2000, Attachment A, p. 1.

71 DISR, correspondence to the Committee, 5 September 2000, Attachment A, p. 1.

72 DISR, correspondence to the Committee, 5 September 2000, Attachment A, pp. 1-2.

73 DISR, correspondence to the Committee, 5 September 2000, Attachment A, p.2.

5.88 The bill's proposed amendment to section 47 of the Trade Practices Act would seek to nullify any contract for the supply of motor fuel to resellers which did not allow a fuel reseller to purchase up to half the fuel the reseller intended to market from another supplier.

5.89 Without the proposed amendment to section 47 of the Trade Practices Act flowing through to State and Territory law an anomalous situation would arise. The bill would apply to contracts which fell under the jurisdiction of the Commonwealth, because the entities involved came within the Commonwealth's corporations power, but all other contracts, which would come under State and Territory law, would remain unaffected by the bill.

5.90 Unfortunately this deficiency cannot be remedied simply by redrafting the bill because, as DISR noted, under an inter-governmental agreement[74] the Commonwealth is required to consult with participating jurisdictions before putting forward proposed amendments to Part IV of the Trade Practices Act. It therefore would be a breach of this inter-governmental agreement if, without consulting the States and Territories, the current bill were simply redrafted so that the proposed amendments to the Trade Practices Act flowed through to State and Territory law.

5.91 The Commonwealth could of course commence consultation with the States and Territories. However, in response to Committee questioning, Mr Brugger advised that DISR had not held any discussions with the States about the proposal. Mr Brugger even advised that he was 'not sure of the process for consultation on a non-government bill'.[75] Moreover, the Committee noted that in the course of giving evidence DISR had indicated that 'the government does not support' the bill.[76]

5.92 Since the current Government does not support the bill it presumably will not commence negotiations with the States and Territories to allow the bill's amendment to section 47 of the Trade Practices Act to flow through to State and Territory legislation. A future Government, however, may regard the bill differently.

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74 The Conduct Code Agreement made in 1995 between the Commonwealth, the states and territories to implement the national competition policy. (See *Hansard*, 5 September 2000, p. E266).

75 Evidence, p. E266.

76 Evidence. p. E192.