

(5) In a prosecution under RCW 9.68A.050, 9.68A.060, or 9.68A.070, the state is not required to establish the identity of the alleged victim.

Passed the Senate March 11, 1986.

Passed the House March 5, 1986.

Approved by the Governor April 4, 1986, with the exception of certain items which were vetoed.

Filed in Office of Secretary of State April 4, 1986.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to section 1, Engrossed Senate Bill No. 4705, entitled:

"AN ACT Relating to communications with minors for immoral purposes."

Minors should be protected from exposure to sexually explicit material. Unfortunately, the language used in section 1 of this measure is both broad and unclear, and poses serious problems for libraries. Library staff would have to begin policing minors who use their facilities, and this is not an appropriate role. Unfortunately, provisions which would have exempted libraries and their staff from having to enforce this provision were deleted from the bill.

Selection of books for public libraries has historically been the responsibility of local library boards; I am satisfied this system continues to provide adequate safeguards for communities. Additionally, there are materials used by professional counselors and caseworkers in working with sexually abused children which may be suspect under this section.

Also, the definition of "minor" in section 1 is changed to age eighteen, which puts it in conflict with RCW 9.68A.110 — the defense section to RCW 9.68A.050 — which still refers to the age of a minor as sixteen. This will create serious problems and make the law unenforceable.

With the exception of section 1, Engrossed Senate Bill No. 4705 is approved."

CHAPTER 320

[Engrossed Senate Bill No. 4620]

MOTOR VEHICLE FUELS—RETAIL TRADING PRACTICES

AN ACT Relating to retail trading practices in the sale of motor vehicle fuels; adding a new chapter to Title 19 RCW; creating a new section; prescribing penalties; making an appropriation; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

***NEW SECTION.** Sec. 1. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Advertisement" means any written or printed communication or any communication by means of recorded telephone messages or spoken on radio, television, or similar communication media published in connection with an offer or sale of a franchise.

(2) "Affiliate" means any person, firm, or corporation who controls or is controlled by any motor fuel refiner-supplier, and includes any subsidiary or affiliated corporation in which the motor fuel refiner-supplier or its shareholders, officers, agents, or employees hold or control more than twenty-five percent of the voting shares.

(3) "Community interest" means a continuing financial interest between the motor fuel refiner-supplier and motor fuel retailer in the operation of the franchise business.

(4) **"Marketing area" means an area five miles or less in any direction from a motor fuel retailer selling products of any trademark of the motor fuel refiner-supplier.**

(5) "Motor fuel" means gasoline or diesel fuel of a type distributed for use in self-propelled motor vehicles and includes gasohol.

(6) "Motor fuel franchise" means any oral or written contract, either expressed or implied, between a motor fuel refiner-supplier and motor fuel retailer under which the motor fuel retailer is supplied motor fuel for resale to the public under a trademark owned or controlled by the motor fuel refiner-supplier or for sale on commission or for a fee to the public, or any agreements between a motor fuel refiner-supplier and motor fuel retailer under which the retailer is permitted to occupy premises owned, leased, or controlled by the refiner-supplier for the purpose of engaging in the retail sale of motor fuel under a trademark owned or controlled by the motor fuel refiner-supplier supplied by the motor fuel refiner-supplier.

(7) "Motor fuel refiner-supplier" means any person, firm, or corporation, including any affiliate of the person, firm, or corporation, engaged in the refining of crude oil into petroleum who supplies motor fuel for sale, consignment, or distribution through retail outlets **and has an operable refinery capacity of three hundred twenty-five thousand barrels a day or more as reported to the federal department of energy.**

(8) "Motor fuel retailer" means a person, firm, or corporation that resells motor fuel entirely at one or more retail motor fuel outlets pursuant to a motor fuel franchise entered into with a refiner-supplier.

(9) "Offer or offer to sell" includes every attempt or offer to dispose of or solicitation of an offer to buy a franchise or an interest in a franchise.

(10) "Person" means a natural person, corporation, partnership, trust, or other entity and in the case of an entity, it shall include any other entity which has a majority interest in such an entity or effectively controls such other entity as well as the individual officers, directors, and other persons in act of control of the activities of each such entity.

(11) "Price" means the net purchase price, after adjustment for commission, brokerage, rebate, discount, services or facilities furnished, or other such adjustment.

(12) "Publish" means publicly to issue or circulate by newspaper, mail, radio, or television or otherwise to disseminate to the public.

(13) "Retail motor fuel outlet" means any location where motor fuel is distributed for purposes other than resale.

(14) "Sale or sell" includes every contract of sale, contract to sell, or disposition of a franchise.

(15) "Trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

*Sec. 1 was partially vetoed, see message at end of chapter.

NEW SECTION. Sec. 2. *It is unlawful for any motor fuel refiner-supplier to discriminate in price between motor fuel retailers in the same marketing area for purchases of motor fuel of like grade and quality, where the effect of the discrimination may be substantially to injure, destroy, or prevent competition with any motor fuel retailer who receives the benefit of the discrimination, or with the customers of either motor fuel retailer. Nothing in this section prevents differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the fuel is sold to motor fuel retailers. Upon proof being made of discrimination under this section, the burden of rebutting the prima facie case thus made by showing justification is upon the refiner-supplier. A refiner-supplier may show justification by establishing that a differential price was only made in good faith to meet an equally low price of a competitor if the price was also offered to all other motor fuel retailers under any trademark of the refiner-supplier within the same marketing area as the motor fuel retailer receiving the lower price.*

*Sec. 2 was vetoed, see message at end of chapter.

NEW SECTION. Sec. 3. Notwithstanding the terms of any motor fuel franchise, a motor fuel refiner-supplier shall not absolutely prohibit or unreasonably withhold its consent to any sale, assignment, or other transfer of the motor fuel franchise by a motor fuel retailer to a third party without fairly compensating the motor fuel retailer for the fair market value, at the time of expiration of the franchise, of the motor fuel retailer's inventory, supplies, equipment, and furnishings purchased from the motor fuel refiner-supplier, and good will, exclusive of personalized materials which have no value to the motor fuel refiner-supplier, and inventory, supplies, equipment, and furnishings not reasonably required in the conduct of the franchise business. A motor fuel refiner-supplier may offset against amounts owed to a motor fuel retailer under this section any amounts owed by the motor fuel retailer to the motor fuel refiner-supplier.

NEW SECTION. Sec. 4. Notwithstanding the terms of any motor fuel franchise, no motor fuel refiner-supplier may prohibit or prevent the sale, assignment, or other transfer of the motor fuel franchise to a corporation in which the motor fuel retailer has and maintains a controlling interest if the motor fuel retailer offers in writing personally to guarantee the performance of the obligations under the motor fuel franchise.

NEW SECTION. Sec. 5. Notwithstanding the terms of any motor fuel franchise, the interest of a motor fuel retailer under such an agreement shall be considered personal property and shall devolve on the death of the motor fuel retailer to a designated successor in interest of the retailer, limited to

the retailer's spouse, adult child, or adult stepchild or, if no successor in interest is designated, to the retailer's spouse, if any. The designation shall be made, witnessed in writing by at least two persons, and delivered to the motor fuel refiner-supplier during the term of the franchise. The designation may be revised at any time by the motor fuel retailer and shall be substantially in the following form:

"I (motor fuel retailer name) at the service station located at, in the City of, Washington, designate as my successor in interest under section 4 of this act and as my alternate successor if the originally designated successor is unable or unwilling so to act.

I so specify this day of, 19..."

The motor fuel refiner-supplier shall assist the designated successor in interest temporarily in the day-to-day operation of the service station to insure continued operation of the service station.

NEW SECTION. Sec. 6. Notwithstanding the terms of any motor fuel franchise, the motor fuel retailer shall be given the right of first refusal to purchase the real estate and/or improvements owned by the refiner-supplier at the franchise location, and at least thirty days' advance notice within which to exercise this right, prior to any sale thereof to any other buyer.

NEW SECTION. Sec. 7. Notwithstanding the terms of any motor fuel franchise, no motor fuel refiner-supplier may:

(1) Require any motor fuel retailer to meet mandatory minimum sales volume requirements for fuel or other products unless the refiner-supplier proves that its price to the motor fuel retailer has been sufficiently low to enable the motor fuel retailer reasonably to meet the mandatory minimum;

(2) Alter, or require the motor fuel retailer to consent to the alteration of, any provision of the motor fuel franchise during its effective term without mutual consent of the motor fuel retailer;

(3) Interfere with any motor fuel retailer's right to assistance of counsel on any matter or to join or be active in any trade association; and

(4) Set or compel, directly or indirectly, the retail price at which the motor fuel retailer sells motor fuel or other products to the public.

NEW SECTION. Sec. 8. It is unlawful for any person in connection with the offer, sale, or purchase of any motor fuel franchise directly or indirectly:

(1) To sell or offer to sell a motor fuel franchise in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading.

(2) To employ any device, scheme, or artifice to defraud.

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

NEW SECTION. Sec. 9. Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the motor fuel refiner-supplier and the motor fuel retailers:

(1) The parties shall deal with each other in good faith.

(2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to:

(a) Require a motor fuel retailer to purchase or lease goods or services of the motor fuel refiner-supplier or from approved sources of supply unless and to the extent that the motor fuel refiner-supplier satisfies the burden of proving that such restrictive purchasing agreements are reasonably necessary for a lawful purpose justified on business grounds, and do not substantially affect competition: **PROVIDED**, That this provision shall not apply to the initial inventory of the motor fuel franchise. In determining whether a requirement to purchase or lease goods or services constitutes an unfair or deceptive act or practice or an unfair method of competition the courts shall be guided by the decisions of the courts of the United States interpreting and applying the anti-trust laws of the United States.

(b) Discriminate between motor fuel retailers in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless and to the extent that the motor fuel refiner-supplier satisfies the burden of proving that any classification of or discrimination between motor fuel retailers is reasonable, is based on motor fuel franchises granted at materially different times and such discrimination is reasonably related to such difference in time or on other proper and justifiable distinctions considering the purposes of this chapter, and is not arbitrary.

(c) Sell, rent, or offer to sell to a motor fuel retailer any product or service for more than a fair and reasonable price.

(d) Require motor fuel retailer to assent to a release, assignment, novation, or waiver which would relieve any person from liability imposed by this chapter.

NEW SECTION. Sec. 10. (1) Any person who sells or offers to sell a motor fuel franchise in violation of this chapter shall be liable to the motor fuel retailer or motor fuel refiner-supplier who may sue at law or in equity for damages caused thereby for rescission or other relief as the court may deem appropriate. In the case of a violation of section 8 of this act rescission is not available to the plaintiff if the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know or if he had exercised reasonable care would not have known of the untruth or omission.

(2) The suit authorized under subsection (1) of this section may be brought to recover the actual damages sustained by the plaintiff: PROVIDED, That the prevailing party may in the discretion of the court recover the costs of said action including a reasonable attorneys' fee.

(3) Any person who becomes liable to make payments under this section may recover contributions as in cases of contracts from any persons who, if sued separately, would have been liable to make the same payment.

(4) A final judgment, order, or decree heretofore or hereafter rendered against a person in any civil, criminal, or administrative proceedings under the United States anti-trust laws, under the Federal Trade Commission Act, or this chapter shall be regarded as evidence against such persons in any action brought by any party against such person under subsection (1) of this section as to all matters which said judgment or decree would be an estoppel between the parties thereto.

NEW SECTION. Sec. 11. The pendency of any civil, criminal, or administrative proceedings against a person brought by the federal or Washington state governments or any of their agencies under the anti-trust laws, the Federal Trade Commission Act, or any federal or state act related to anti-trust laws or to franchising, or under this chapter shall toll the limitation of this action if the action is then instituted within one year after the final judgment or order in such proceedings: PROVIDED, That said limitation of actions shall in any case toll the law so long as there is actual concealment on the part of the person.

NEW SECTION. Sec. 12. Any motor fuel retailer who is injured in his or her business by the commission of any act prohibited by this chapter, or any motor fuel retailer injured because of his or her refusal to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including reasonable attorney's fees.

NEW SECTION. Sec. 13. (1) The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful. The prevailing party may in the discretion of the court recover the costs of such action including a reasonable attorneys' fee.

(2) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime by statute or at common law.

NEW SECTION. Sec. 14. In any proceeding under this chapter, the burden of proving an exception or an exemption from definition is upon the person claiming it. Any condition, stipulation or provision purporting to bind any person acquiring a motor fuel franchise at the time of entering

into a motor fuel franchise or other agreement to waive compliance with any provision of this chapter or any rule or order hereunder is void.

NEW SECTION. Sec. 15. The provisions of this chapter apply to any motor fuel franchise or contract entered into or renewed on or after the effective date of this act between a motor fuel refiner-supplier and a motor fuel retailer.

****NEW SECTION. Sec. 16. The Administrative Procedure Act, chapter 34.04 RCW, shall wherever applicable herein govern the rights, remedies, and procedures respecting the administration of this chapter.***

****Sec. 16 was vetoed, see message at end of chapter.***

NEW SECTION. Sec. 17. It is the intent of the legislature that this chapter be interpreted consistent with chapter 19.100 RCW.

NEW SECTION. Sec. 18. This chapter shall be liberally construed to effectuate its beneficial purposes.

NEW SECTION. Sec. 19. This chapter shall be known as the "Gasoline Dealer Bill of Rights Act."

NEW SECTION. Sec. 20. The Washington state attorney general shall conduct a study to determine whether motor fuel refiner-suppliers are injuring competition from motor fuel retailers, by charging retailers that sell products under their trademark, prices for motor fuel which equal or exceed the prices charged for motor fuel in the same geographic market to retail customers at retail motor fuel outlets operated by company personnel, a subsidiary company, or commissioned or contract agents. The attorney general shall report his findings and recommendations to the legislature by December 1, 1986. Periodic reports shall be submitted to the legislative transportation committee. For the purposes of this study, the attorney general is authorized to use all of the civil investigative demand powers enumerated in RCW 19.86.110, subject to the procedures and requirements specified in RCW 19.86.110: PROVIDED, That disclosure of documentary material, answers to written interrogatories, or transcripts of oral testimony produced pursuant to a demand, or the contents thereof, to members of the legislature and legislative staff shall not require a court order unless the documentary material, answers to written interrogatories, or transcripts of oral testimony are identified at the time they are furnished as containing trade secrets. When seeking a court order allowing disclosure of material containing trade secrets, the attorney general shall give reasonable notice of such proceeding to the party furnishing the material.

NEW SECTION. Sec. 21. To carry out this act, the sum of forty-nine thousand dollars, or as much thereof as may be necessary, is appropriated to the office of attorney general from the motor vehicle fund for the biennium ending June 30, 1987.

NEW SECTION. Sec. 22. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 23. Sections 1 through 19 of this act shall constitute a new chapter in Title 19 RCW.

NEW SECTION. Sec. 24. (1) Sections 20 and 21 are necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions and shall take effect immediately.

(2) Sections 1 through 19, 22 and 23 of this act shall take effect June 30, 1986.

Passed the Senate March 9, 1986.

Passed the House March 7, 1986.

Approved by the Governor April 4, 1986, with the exception of certain items which were vetoed.

Filed in Office of Secretary of State April 4, 1986.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to sections 1(4), 1(7) in part, 2 and 16, Engrossed Senate Bill 4620, entitled:

"AN ACT Relating to retail trading practices in the sale of motor vehicle fuels."

This legislation creates a separate franchise law that regulates the business relationship between motor fuel refiner-suppliers and motor fuel retailers.

The Legislature has devoted substantial time and effort to examining allegations that the major oil companies are employing predatory pricing and other unfair practices against the independent lessee-dealers to whom they supply gasoline and other products. These allegations are occurring during a period when the nature of retail gasoline marketing is undergoing significant changes. Preserving a market niche for independent lessee-dealers in this changing environment has been a major concern of the Legislature. Accordingly, Senate Resolution 1985-92 created a Select Committee to investigate these allegations and to submit its findings and recommendations to the Legislature. This legislation is largely a product of the Select Committee's work.

The Select Committee's findings are reflected in the major components of Engrossed Senate Bill No. 4620: (1) recognition and protection of lessee-dealers' franchise rights, (2) prohibitions against certain unfair trade practices and provision of legal remedies to address violations, (3) authorization for a study by the Attorney General to determine whether motor fuel refiner-suppliers are employing unfair price discrimination between their owner-operated retail outlets and their lessee-dealers in the wholesale price charged for fuel, and (4) prohibitions against motor fuel refiner-suppliers unfairly discriminating in the wholesale price of fuel charged to their motor-fuel retailers in the same five-mile marketing area.

I have carefully considered all of these elements, and I support essentially all but those provisions relating to refiner-supplier price discrimination against lessee-dealers in the same marketing area, as contained in section 2 of the legislation. While I can appreciate this as a thoughtful attempt to establish a way to address alleged unfair pricing practices, I am not convinced that section 2 is a workable means for ensuring a competitive gasoline market that protects the lessee-dealers or benefits the consumers.

Therefore, I am vetoing section 2, as well as section 1(4) which defines the "marketing area" applicable to section 2, and a portion of section 1(7) that exempts certain "motor fuel refiner-suppliers" from the jurisdiction of this legislation.

In addition, since no administrative remedies are provided in this legislation, I am also vetoing section 16 which is an unneeded reference to the Administrative Procedure Act.

I will be awaiting the results of the Attorney General's investigation of alleged unfair wholesale price discrimination employed by refiner-suppliers between their owner-operated stations and their independent lessee-dealers. This effort is to be completed by December 1, 1986. The civil investigative demand powers of the Attorney General should be effective in evaluating these alleged practices, which were the genesis of the Legislature's concern but which they were unable to document. Until these results are available, the legislation as approved should provide substantial protection for the investments and franchise rights of lessee-dealers.

With the exception of sections 1(4), 1(7) in part, 2 and 16, Engrossed Senate Bill 4620 is approved."

CHAPTER 321

[Engrossed Substitute Senate Bill No. 4627]

CIGARETTE WHOLESALERS AND RETAILERS

AN ACT Relating to cigarette wholesalers and retailers; amending RCW 19.91.010; adding a new section to chapter 19.91 RCW; adding new sections to chapter 82.24 RCW; creating a new section; repealing RCW 19.91.911, 19.91.010, 19.91.020, 19.91.030, 19.91.040, 19.91.050, 19.91.060, 19.91.070, 19.91.080, 19.91.090, 19.91.100, 19.91.110, 19.91.120, 19.91.130, 19.91.140, 19.91.150, 19.91.160, 19.91.170, 19.91.180, 19.91.190, 19.91.900, and 19.91.910; prescribing penalties; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. It is the policy of the legislature to encourage competition by reducing the government's role in price setting. It is the legislature's intent to leave price setting mainly to the forces of the marketplace. In the field of cigarette sales, the legislature finds that the goal of open competition should be balanced against the public policy disallowing use of cigarette sales as loss leaders. To balance these public policies, it is the intent of the legislature to repeal the unfair cigarette sales below cost act and to declare the use of cigarettes as loss leaders as an unfair practice under the consumer protection act.

*Sec. 2. Section 3, chapter 2, Laws of 1983 as amended by section 1, chapter 173, Laws of 1984 and RCW 19.91.010 are each amended to read as follows:

When used in this chapter, the following words and phrases shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Person" means and includes any individual, firm, association, company, partnership, corporation, joint stock company, club, agency, syndicate, municipal corporation, or other political subdivision of this state, trust, receiver, trustee, fiduciary and conservator.

(2) "Wholesaler" includes any person who: