EXPLANATORY STATEMENT

Minister for the Environment and Energy on behalf of the Treasurer

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes – Oil) Regulations 2017

Introduction

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations under the Act, provided they are not inconsistent with the Act.

Section 51AE of the Act provides that the regulations may prescribe a mandatory industry code for the purposes of the Act.

The *Competition and Consumer (Industry Codes – Oil) Regulations 2017* (the Regulations) are enabled by the Act, with the Minister responsible for Energy responsible for policy related to the code. Consequently, on 22 April 2016 the Minister for Revenue and Financial Services, Kelly Dwyer MP agreed to the Minister for the Environment and Energy, Josh Frydenberg MP progressing the Regulations to the Executive Council on behalf of the Treasurer.

The Regulations have been remade from the *Competition and Consumer (Industry Codes – Oilcode) Regulations 2006* (the 2006 Regulation) after a comprehensive review concluded that that the Australian Government should take steps to remake the 2006 Regulation prior to its scheduled sunsetting date of 1 April 2017.

Background

The 2006 Regulation formed part of the Government's Downstream Petroleum Reform Package which also involved the passage of the *Petroleum Retail Legislation Repeal Act 2006* (the Repeal Act). The Repeal Act repealed the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act).

The 2006 Regulation commenced upon repeal of the Sites Act and the Franchise Act and apply to all retail petroleum industry participants. The 2006 Regulation was designed to remove restrictions on competition, promote industry certainty about the future, promote cultural change and improve sustainability. This has created a more effective regulatory regime, giving all industry players the freedom to respond to changing conditions in the retail petroleum market without reducing levels of competition.

Industry Consultation and Oilcode Review

The *Oilcode Review – Final Report* (Oilcode Report) was developed following extensive consultation with key industry and government stakeholder groups. The Oilcode Review was designed to determine whether the 2006 Regulation should be repealed, remade or rolled-over. The Oilcode Review found that the 2006 Regulation remained fit for purpose and should be remade with minor technical amendments.

In December 2014, an Issues Paper was released, outlining the key areas of the 2006 Regulation for public consultation. In addition to discussing the ongoing need for the 2006 Regulation generally, the paper also specifically consulted on:

- the establishment of standard contractual terms and conditions for fuel re-selling agreements
- the usefulness and effectiveness of terminal gate price arrangements; and
- the operation of the dispute resolution scheme.

Based on the responses to the Issues Paper, the Department released the Oilcode Review Options Paper in September 2015.

Four responses were received to the Options Paper, including a response from the Australian Institute of Petroleum, a body which represents members including ExxonMobil, Viva Energy Australia, BP Australia and Caltex Australia (these companies comprise 90% of the fuel supply market). The Australian Convenience and Petroleum Marketers Association (ACAPMA), a body representing over 90% of fuel distribution and storage businesses in Australia, also responded. A further response was received from the Australian Competition and Consumer Commission, in addition to one confidential submission.

Additionally, consultation was undertaken during the drafting process. As a result of changes to best practice legislative drafting, several features of the 2006 Regulations were flagged to be amended in order to ensure that the instrument remained fit for purpose and legally effective for the coming decade (these changes may be found at Attachment B). Consequently, in January and February 2017, targeted consultation was undertaken with the Australian Institute of Petroleum and the Australian Convenience and Petroleum Marketers Association, who confirmed that the new Regulations would not have any unintended consequences on the industry.

Due to drafting conventions, review provisions could not be included in the Regulations as per the Oilcode Report recommendations. However, as a sunsetting instrument for the purposes of the Legislation Act 2003, the Regulations will be subject to periodic review. Furthermore the department administering the Regulations will undertake a mid-term review to verify their ongoing effectiveness.

Regulation Impact Statement

The Oilcode Report addresses the requirements of a Regulation Impact Statement (RIS). It was published on the Department of the Prime Minister and Cabinet's website on 29 September 2016. A copy of the Report may be found at (Attachment A).

The Competition and Consumer (Industry Codes – Oil) Regulations 2017

The Oilcode Report concluded the Oilcode continues to be fit for purpose and recommended that the Government retain the Oilcode.

Details of the Regulations are set out in (Attachment B).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Purpose of the Regulations

The Regulations are largely a continuation of the 2006 Regulation, and thus there will be no new impact on industry. The Regulations prescribe a mandatory industry code for the retail petroleum industry. The Regulations:

- continue to specify standard contractual terms and conditions for fuel re-selling agreements for both franchise and commission agency arrangements. The Regulations provide that tenure of fuel re-selling agreements entered into prior to the commencement of the 2006 Regulation will be honoured but all other contractual conditions will be expected to comply with the minimum standards established under the Regulations;
- continue to provide a nationally consistent approach to terminal gate pricing (TGP) arrangements to ensure transparency in wholesale pricing and allow access for all customers, including small businesses, to petroleum products at TGP, whilst not negating the ability of entities to negotiate individual supply agreements nor preventing the offering of discounts; and
- continue to provide an independent, downstream petroleum dispute resolution scheme, including the appointment of a Dispute Resolution Adviser to provide the industry with a cost-effective alternative to taking action in the courts.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Industry Codes – Oil) Regulations 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Legislative instrument is an industry code of conduct under the *Competition and Consumer Act 2010* designed to regulate the conduct of participants in the petroleum marketing industry.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Josh Frydenberg MP
Minister for the Environment and Energy

On behalf of the Treasurer

Attachment A

Oilcode Review – Final Report

Authorised Version Explanatory Statement registered 14/03/2017 to F2017L00223

Table of Contents

1 Introduction

The *Competition and Consumer (Industry Codes–Oilcode) Regulation 2006* (Oilcode) regulates the conduct of suppliers, distributors and retailers in the petroleum marketing industry. The Department of Industry, Innovation and Science has a regulatory requirement, resulting from the 2008 review of the code, to undertake a review of the Oilcode.

The Oilcode is also scheduled for sunsetting on 1 April 2017. Sunsetting provisions require a review of the legislative instrument to determine if it remains fit for purpose before it can be remade, retained or repealed.

This Oilcode Review (the Review) examines the ongoing need for the Oilcode and the operation of the code to determine if it provides appropriate regulation of the conduct of participants in the petroleum marketing industry.

The Review is also being considered in the context of broader government processes including the Competition Policy Review and the Government's commitment to regulatory reform and reducing the regulatory burden for individuals and businesses.

2 Policy context

2.1 Overview of the Market

The fuel industry changed considerably between 1980 (when petroleum retailing legislation was first introduced) and 2006 with more independent importers and the supermarket chains entering the market.

Since the Oilcode was last reviewed in 2008 we have seen these trends continue to impact on the industry, albeit at a much slower rate.

Wholesale

In 2008, the four refiner-marketer majors (BP, Caltex, Mobil and Shell) were largely responsible for both refining and importing fuel. In 2007-08, the refiner-marketers were responsible for around 94 per cent of imported petrol, leaving a 6 per cent share for independent importers.[1] By 2010-11, independent imports had increased to around 40 per cent of unleaded petrol imported into Australia.[2] However, in 2013-14 this had dropped to around 27 per cent.[3] This stems from the closure, and impending closure, of refineries and their conversion to import terminals, resulting in refiner-marketers relying on a greater percentage of imports. In absolute terms, petrol imports by independent importers have increased five-fold since 2007-08.[4]

The growing role of independents is also seen in the wholesale market, where the independent wholesale market share has doubled since 2006-07. While this has been a generally upward trend, it has plateaued in recent years.

The way in which Australia's petroleum market is perceived internationally is changing due to the decline of local integrated refiner marketers and the increasing reliance on imported refined product. The Australian Competition and Consumer Commission (ACCC) has noted that these factors will raise Australia's importance in global trade flows and thus, commodity traders' interest in the downstream petroleum industry.[5]

In 2014, this was borne out with a new entrant in the refining industry through Vitol's purchase of Shell's Geelong refinery and retail business, and the entrance of Puma Energy and Idemitsu Kosan to the wholesale sector in 2013, following such companies as Liberty Oil and United Petroleum. Increasing independent involvement in the sector is likely to lead to the independent wholesaler share of the market increasing in future years.

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[1] Australian Competition and Consumer Commission, 2008, *Monitoring of the Australian petroleum industry 2008*, http://accc.gov.au/publications/monitoring-of-the-australian-petroleum-industry.
[2] Australian Competition and Consumer Commission, 2011, *Monitoring of the Australian petroleum industry 2011* http://accc.gov.au/publications/monitoring-of-the-australian-petroleum-industry.
[3] Australian Competition and Consumer Commission, 2014, *Monitoring of the Australian petroleum industry 2014* http://accc.gov.au/publications/monitoring-of-the-australian-petroleum-industry.
[4] Australian Competition and Consumer Commission, 2013, *Monitoring of the Australian petroleum industry 2013* http://accc.gov.au/publications/monitoring-of-the-australian-petroleum-industry..
[5] Australian Competition and Consumer Commission, 2013, *Monitoring of the Australian petroleum industry 2013* http://accc.gov.au/publications/monitoring-of-the-australian-petroleum-industry.

Retail

The current retail fuel market consists of a number of different operation types: directly owned and operated; distributor owned operations; independent retailer; franchisee; and commission agent.[6]

The table below shows the makeup of the retail fuel industry by operations type in 2013-14.

Brand	Business operated by					
	Directly owned and operated %	Distributor owned operations %	Independent retailer %	Franchisee %	Commission agent %	Total %
BP	6.5	10.7	9.2	0.3	0.0	**26.6**
Caltex	1.9	7.3	2.1	1.8	7.3	**20.4**
Mobil	0.0	0.8	0.0	0.0	0.0	**0.8**
Shell	0.5	0.0	4.1	0.0	0.0	**4.6**
Woolworths/Caltex (Co-branded)	12.2	0.0	0.0	0.0	0.0	**12.2**
Coles Express/Shell (Co-branded)	12.4	0.0	0.0	0.0	0.0	**12.4**
Specialist retailers	0.0	0.0	1.9	7.9	0.1	**9.5**
Independent wholesalers	0.0	0.7	3.2	1.8	7.2	**13.1**
Total	**33.5**	**19.7**	**20.5**	**11.8**	**14.5**	**100.0**

Australian Competition and Consumer Commission, *Percentage of retail sites by brand and business operator,* 2013-14

Distributor owned operations have declined in recent years, while directly owned operations have increased, largely due to the expanding presence of the supermarket chains in that category.

In 2008, the rationalisation of service stations was continuing, including the move to centralised and highway outlets. The impact of the supermarket chains was becoming more marked, particularly with the prevalence of 'shopper docket' schemes. Retailers responded to this by introducing new services.[7] This is a trend that is still present in the market.

The heightened presence of the supermarket chains has seen a focus on convenience store goods sold at service stations, with increasing sales of these goods over the past five years. The sale of non-fuel products is accounting for a larger proportion of profit than fuel and related goods.[8]

Between 2008-09 and 2013-14, the combined market share of supermarket chains and independents increased from 54 to 67 per cent. Individually, large independent chains increased their share of the market dramatically, while the growth of the supermarket chains was more constrained.[9]

[6] Commission agents generally manage a business owned by a refiner-marketer or independent chain, and are generally compensated in the form of a commission based on the quantity of product sold.
[7] Australian Competition and Consumer Commission, 2008, *Monitoring of the Australian petroleum industry 2008* http://accc.gov.au/publications/monitoring-of-the-australian-petroleum-industry.
[8] Magner, L 2014, IBISWorld Industry Report G400, *Fuel Retailing in Australia*, IBISWorld.
[9] Australian Competition and Consumer Commission, 2014, *Monitoring of the Australian petroleum industry Dec 2014* http://accc.gov.au/publications/monitoring-of-the-australian-petroleum-industry

During the same period, the share of major oil firms' retail outlets decreased from 48 to 33 per cent.[10]

2.2 What's the problem?

Firms with a substantial degree of market power can engage in behaviour that damages the competitive process, restricting the ability of other firms to compete effectively. Most industrialised countries have enacted competition laws with prohibitions against monopolisation or abuse of a dominant market position.

A common feature of competition laws is the principle that firms are entitled, and indeed are encouraged, to succeed through competition even if they achieve a position of market dominance through their success. Laws only prevent firms with substantial market power from engaging in conduct that damages competition.

Large firms may enjoy strong bargaining power that can be abused in dealings with their suppliers and business customers. While imbalance in bargaining power is a normal feature of commercial transactions, policy concerns are raised when strong bargaining power is exploited through imposing unreasonable obligations on suppliers and business customers. Such exploitation can traverse beyond accepted norms of commercial behaviour and damage efficiency and investment in the affected market sectors, requiring the law to respond to encourage efficient market outcomes.

2.3 The Oilcode

To address the potential for market power to be exercised by fuel suppliers in their dealings with fuel retailers, the *Competition and Consumer (Industry Codes–Oilcode) Regulation 2006* was established in 2006. The Oilcode was designed to respond to the changes in the market and to facilitate an equitable market environment for petroleum wholesalers and retailers and improve the operating environment for small businesses, which operate as franchisee or commission agents to fuel suppliers. These small businesses had no specific protections, other than those provided by general law.

The Oilcode replaced the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act). The Sites Act restricted the number of retail sites that the prescribed oil companies - BP Australia, Mobil Oil Australia, Caltex Oil Australia and Shell Australia - could own, lease, or operate either directly or on a commission basis. This Act operated concurrently with the Franchise Act, which set out minimum terms and conditions for oil company franchises.

The objectives of the Oilcode are as follows:

- improve transparency in wholesale pricing and access to declared petroleum products at a published terminal gate price
- set minimum standards in relation to contract requirements and tenure

[10] Ibid.

- assist participants to make informed decisions when managing fuel re-selling agreements through the disclosure of specific information
- provide for access to a cost-effective and timely dispute resolution scheme as an alternative to litigation.

The objectives of the Oilcode are outlined in detail in the following provisions of this industry code.

Terminal gate price and related arrangements

The terminal gate price (TGP) is the price at which wholesale suppliers are prepared to sell tanker loads of fuel to wholesale customers at seaboard terminals or refineries on a spot basis. The TGP is quoted for fuel only and includes no added services, such as delivery.

The Oilcode sets out the arrangements for offering a TGP. A wholesale supplier must give a customer the option of purchasing petroleum products at the posted TGP or at a price derived from TGP. The Oilcode requires that the TGP: be expressed in cents per temperature corrected litre; be posted on a website or available through a phone service; be posted each day; and not include any amount for an additional service.

The Oilcode also requires that suppliers provide customers with documentation that acknowledges the sale, including the type and volume of product purchased, the total purchase price and the applicable posted TGP. A wholesale supplier must not unreasonably refuse to supply a declared petroleum product to a customer.

TGP was included in the Oilcode to address a lack of national consistency in TGP arrangements. Western Australia and Victoria mandated TGP arrangements; however there was nothing similar in other states. Introducing TGP arrangements is intended to increase transparency and information for customers of the fuel wholesalers.

Fuel reselling agreements

The Oilcode also covers fuel reselling agreements between suppliers and retailers. It provides standard contractual terms and conditions for wholesale supplier-fuel retailer re-selling agreements for franchise and commission agency arrangements, such as the use of marketing funds and agreement duration.

This section of the Oilcode establishes the requirement for a disclosure document to allow the retailer to make appropriate decisions about agreements (i.e. conduct due diligence before entering an agreement) and establishes conditions for fuel re-selling agreements. It also provides arrangements for terminating a fuel re-selling agreement.

These arrangements are designed to protect and encourage small businesses participating in the industry.

Dispute resolution scheme

The Oilcode allows for the establishment of a dispute resolution adviser (DRA) to provide the industry with an ongoing cost-effective dispute resolution mechanism. It establishes processes for dispute resolution and provides for mediation and assistance.

The dispute resolution scheme was originally established to avoid costly and time consuming court action, which prior to the establishment of the Oilcode was the main recourse available. Resolving a dispute through the courts was beyond the means of many small businesses, putting them at a disadvantage.

2.4 2008 Oilcode Review

The last Oilcode review, in 2008, examined whether the objectives of the Oilcode had been met. The Review concluded that, although the Oilcode had met its objectives, there were some improvements that could be made. The review included recommendations focusing on contract terms and conditions; terminal gate pricing arrangements; dispute resolution and ongoing review.

In particular, the review made recommendations to enhance the disclosure of the contact details of past and current resellers the supplier had an agreement with to potential resellers. This information allows resellers to conduct referee checks on potential suppliers and make an informed decision before entering into any arrangements.

The 2008 Oilcode Review also made recommendations to enhance and provide clarity to the Oilcode's dispute resolution scheme, including ensuring that there is information available to parties in dispute about what factors the dispute resolution advisor may consider in making a non-binding determination.

The 2008 Oilcode Review also recommended adopting a formal dispute definition and notification mechanism, whereby the complainant must tell the respondent the nature of the dispute, the outcomes they are seeking and what action they consider would settle the dispute. In addition, the review recommended that the procurement process for dispute resolution services be streamlined for the Oilcode, the Franchising Code and the Horticulture Code by having a single contract managed by one department, The Treasury.

The government response accepted these recommendations, which have been integrated into the Oilcode. Since amending the Oilcode, the percentage of these small businesses (franchisees, commission agents) in the retail fuel market has increased from 18 per cent to 26 per cent (see table below).

Percentage of retail sites		
Business operated by		
Total/Year	**Franchisee %**	**Commission agent %**
2009	6.1	11.8
2009-2010	12.8	8.3

2010-2011	10.4	14.3
2011-2012	11.2	13.8
2012-2013	11.5	13.9
2013-2014	11.8	14.5

Source: Australian Competition and Consumer Commission, *Monitoring of the Australian Petroleum Industry*, 2009- 2014

2.5 Competition Policy Review

In December 2013, the Government announced an independent review of Australia's competition policy. The objective of the Competition Policy Review was to identify competition enhancing microeconomic reforms to drive ongoing productivity growth and improvements in the living standards of all Australians.

The key areas of focus for the Competition Policy Review included: identifying regulations and other impediments to competition across the economy which are not in the broader public interest; examining the competition provisions of the *Competition and Consumer Act 2010* (CCA) and the special protections for small business in the CCA to ensure they are fit for purpose; considering whether the structure and powers of the competition institutions remain appropriate; and reviewing government involvement in markets.

The Review found that industry codes of conduct play an important role under the CCA by providing a flexible regulatory framework to set norms of behaviour. Codes of conduct complement the provisions of the CCA and generally apply to relationships between businesses within a particular industry. Codes also provide a mechanism to implement industry specific dispute resolution frameworks.

2.6 Regulatory reform

The Australian Government is committed to a regulatory reform agenda that enhances productivity and economic growth e.g. through removing unnecessary burden and red tape. A key feature of the agenda includes reducing the regulatory burden for individuals, businesses and community organisations by at least $1 billion a year. In November 2015, the Government announced that it will strengthen its regulation reform agenda so that it focusses on changes that increase innovation and productivity.

Government policy aims to achieve regulatory savings through the development of effective policy and programmes. The impact of regulation on Australian industries can be minimised by identifying unnecessary or inefficient regulation, considering options to streamline processes, better managing risks and implementing regulation only if necessary.

3 Review Process

3.1 Scope of the Review

As part of the Review, the Department released the Oilcode Review Issues Paper in December 2014, which canvassed the key areas of the Oilcode for public consultation. Stakeholders were requested to comment on specific aspects of the Oilcode including:

- Is the Oilcode a necessary piece of legislation?
- Were the changes from the 2008 Oilcode Review effective?
- Are the terminal gate pricing arrangements suitable against their objective, to improve transparency in wholesale market pricing?
- Are the contractual terms and conditions of the Oilcode appropriate?
- Is the dispute resolution scheme effective for those who use it?

Based on the responses to the Issues paper, the Department released the Oilcode Review Options Paper in September 2015. The following three options were considered:

- Repeal the Oilcode
- Retain the Oilcode (i.e. remake the Oilcode without substantive changes)
- Remake the Oilcode (i.e. may include substantive changes).

Four submissions were received in response to the Options Paper, including submissions from two peak industry bodies representing the views of the majority of fuel suppliers and retailers. This included a submission from the Australian Convenience and Petroleum Marketers Association (ACAPMA); a national peak body representing the interests of the petroleum distribution and petrol retail businesses, whose members comprise 90 per cent of Australia's fuel distribution and storage businesses[11]. A submission was also received from the Australian Institute of Petroleum (AIP) on behalf of the four major refiner-marketer companies, who supply around 90 per cent of the transport fuels market[12]. A confidential submission was also received from a large independent petroleum company and the ACCC, which is responsible for promoting and enforcing compliance with the CCA, Australian Consumer Law and the Oilcode.

3.2 Out of Scope Issues

Some issues raised by key stakeholders in the formulation of the 'Issues' and 'Options' papers have previously been considered prior to the establishment of the Oilcode or during the 2008 Oilcode Review. Due to previous consideration afforded these issues, they are considered to be out of scope for the purposes of this review. Examples of out of scope issues include:

[11] ACAPMA, *About Us*, accessed 13 January 2016, http://www.acapma.com.au/aboutacapma/
[12] AIP, *About AIP,* accessed 13 January 2016, http://www.aip.com.au/about/index.htm

- The applicability of legislation predating the Oilcode, including the provisions of the *Petroleum Retail Marketing Franchise Act 1980* and *Petroleum Retail Marketing Sites Act 1980*;
- The 30 day notice for termination under section 37(2) for the purchase of goods under $20,000;
- Altering or lessening the current ten year minimum duration for all fuel re-selling agreements;
- Payment of 'goodwill' at the initiation and cessation of contracts;
- Mandatory provisions of a 'disclosure document' including all relevant previous disputes between a supplier and retailers notified under the dispute resolution mechanism (potential for unforeseen consequences); and
- Changes to the current arrangements around mandatory posting of TGP for the purposes of transparency.

4 Analysis of Oilcode Options

4.1 Repeal the Oilcode

Unless further legislative action is taken to extend the Oilcode, it would sunset on 1 April 2017 under Part 6 of the *Legislative Instruments Act 2003* (LIA). Alternatively, in accordance with best practice regulation principles, if the Oilcode is no longer required because it is deemed ineffective or irrelevant to current industry operations by the review, it could be actively repealed rather than allowing it to sunset. The Oilcode could be repealed as a legislative instrument through the automatic and bulk repeal provisions of Part 5A of the LIA on another date prior to 1 April 2017.

Stakeholder views

None of the submissions received in response to the Oilcode Review Options Paper supported repeal of the Oilcode. Submissions received presented a range of justifications for retaining the regulations and protections offered by the Oilcode including:

- The Oilcode provides effective regulation of the industry;
- The Oilcode has ensured continued rigorous competition between competitors; and
- The high level of risk associated with repealing the Oilcode, including the lack of legislative protection for key groups such as commission agents.

Costs and benefits

The costs associated with implementing the Oilcode have already been incurred by fuel suppliers and retailers and the ongoing costs are minimal. Repeal of the Oilcode may see some fuel re-selling agreements become regulated by the Franchising Code of Conduct. The Franchising Code regulates the conduct of parties to a franchise agreement where no other mandatory code, such as the Oilcode, applies. However, unlike the Oilcode, the Franchising Code does not cover the operation of commission agent agreements between fuel suppliers and retailers. A higher percentage of fuel retail sites are covered by commission agent agreements rather than franchisee agreements due to this being a lower cost method of entering the retail fuel sector (see Figure 2).

Contractual Agreements

Given the similarities between the codes in areas such as disclosure requirements and dispute resolution, fuel franchising parties will be broadly subject to similar regulation as currently under the Oilcode – with the addition of recent reforms to the Franchising Code such as good faith and pecuniary penalty provisions. However, some protections offered by the Oilcode including the guarantee of tenure under s32 (5) is not provided in the Franchising Code of Conduct.

Furthermore, petroleum retailers believe that, if a decision is made to repeal the Oilcode, the Government would need to explore alternative mechanisms for the accommodation of commission agent agreements, as they cannot be readily accommodated under the national franchise legislation.

Terminal Gate Pricing

Repeal of the Oilcode would also remove the requirement for Terminal Gate Pricing (TGP), reducing price transparency in the wholesale fuel market. Petroleum retailers believe that TGP provides a useful reference price for both market participants including for use in agreements and the community at large and should continue.The ACCC also uses TGP as a benchmark for wholesale prices when monitoring fuel prices to ensure compliance with the CCA and identify anti-competitive behaviour.

Dispute Resolution Services

It may appear that repealing the Oilcode could align with the Government's regulatory reform agenda, reducing the regulatory burden for businesses through removing associated regulatory business costs for both retailers and suppliers. However, repeal of the Oilcode would have little impact on the cost of dispute resolution for franchisees as the dispute resolution services for the Oilcode and the Franchising Code are provided by the same organisation.

Dispute resolution services are offered under a number of codes of conduct across industries nationwide. The 2015 Competition Policy Review indicated that such codes of conducts are a valuable addition to the CCA, as they provide a flexible regulatory framework and set norms of behaviour.

However, fuel retailers not covered by the Franchising Code (e.g. commission agents) could be faced with higher costs to resolve disputes through the courts or other legal channels. Furthermore, during such legal proceedings, commission agents could be at a disadvantage in disputes with fuel suppliers as there would be no code which provides for minimum terms and conditions in supply contracts.

4.2 Retain the Oilcode (remake with minor amendments)

To keep the Oilcode in its current form without major amendment, it is a requirement that the legislative instrument be remade prior to the scheduled sunsetting date. This is the same process as the options outlined in part 4.3 – to remake the Oilcode with significant amendments.

Stakeholder views

Retaining the Oilcode is supported by both fuel suppliers and fuel retailers. As noted in Section 4.1, stakeholders consider that the Oilcode has provided for effective regulation, rigorous competition and legislative protection for key groups. Another benefit of this option is that the existing arrangements and regulatory compliance costs are unchanged. Fuel suppliers note that the Oilcode provides a consistent regulatory framework for industry that is administered at minimal cost to industry and government.

Against the backdrop of the Government's regulatory reform agenda, fuel suppliers note that the Oilcode was the outcome of a previous market reform package that saw the repeal of the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act). These two Acts were found to be outdated and ineffective and their repeal removed barriers to greater competition in the fuel market.

Retaining the Oilcode is consistent with the Competition Policy Review's Final Report, which supports industry codes under the CCA. It also indicated that industry codes play an important role by providing a flexible regulatory framework to set norms of behaviour.

Costs and benefits

As noted in Section 4.1, the costs associated with implementing the Oilcode have already been incurred by fuel suppliers and retailers and the ongoing costs are minimal.

The benefit of retaining the Oilcode in its current form is that it continues to meet the requirements of the fuel retailing market. While fuel retailing has continued to evolve, the changes that have occurred since 2006 are not as far reaching as those that occurred prior to the establishment of the Oilcode. For example, since 2006, the number of retail sites has remained relatively stable, ranging from 6000 to 6500 sites. Between 1980 and 2006, the number of retail sites declined from around 13,000 to around 6300.

Another reason for retaining the current arrangements of the Oilcode is that small business has already benefitted from amendments made following the 2008 Oilcode Review. The percentage of retail sites operated by either commission agents or franchisees increased from 18.4 per cent in 2009 to 26.3 per cent in 2014.

Due to this increase in the portion of the market controlled by small business, the need for the protections offered by the Oilcode has assumed greater importance over time. Furthermore, as noted in Section 4.1, the Oilcode – unlike the Franchising Code - covers the operation of commission agent agreements between fuel suppliers and retailers. A higher percentage of fuel retail sites are covered by commission agent agreements than franchisee agreements (see Figure 2).

In examining the costs to industry of complying with the Oilcode, it is valuable to consider the costs of the various components.

Contractual Agreements

In relation to the minimum standards for contracts, there should be negligible on-going cost for existing fuel suppliers which have already ensured that their contracts are consistent with minimum standards. For new retailers entering the fuel market, the benefits of minimum standards should far outweigh the costs, as these new entrants should be able to make more fully informed decisions.

These minimum contractual conditions require the disclosure to potential retailers of the contact details of past and current resellers with which the supplier has an agreement. This information allows resellers to conduct referee checks on potential suppliers and make an informed decision before entering into any arrangements. Furthermore, fuel retailers are given a period of fourteen days to undertake the due diligence measures.

Terminal Gate Pricing Arrangements

The requirement for fuel suppliers to issue terminal gate prices imposes only modest costs on fuel wholesalers. The industry is constantly reviewing wholesale prices to reflect changes in global oil prices and movements in the US$/AU$ exchange rate. The cost of implementing TGP is also minimised by posting prices on the Internet. In addition the TGP provides a low cost mechanism for contracts to reflect the constantly changing wholesale prices.

In the event that the Oilcode was repealed, the industry is likely to be faced with some other form of wholesale price disclosure. The ACCC uses TGP as a benchmark for wholesale prices when monitoring fuel prices to ensure compliance with the CCA.

Dispute Resolution Services

The dispute resolution scheme provides only benefits for the fuel industry, as it provides an avenue for resolving dispute at an earlier stage, and at lower cost, than pursuing the matter through litigation. The framework provides support to all parties and its availability reduces costs for those who require such services.

Another important aspect of the Oilcode is that its existence has potentially lessened the need for parties to access the dispute resolution service. Since 2007- 08, the dispute resolution service has averaged 13 enquiries and 1.5 mediations per year. Although less than one per cent of participants covered by the Oilcode access the service annually, fuel retailers have noted that the

existence of this service is an incentive for parties to resolve issues without the need for recourse to these procedures.

4.3 Remake the Oilcode (remake with major amendments)

If the Oilcode is retained and significantly amended, the Minister could seek to have it remade. A remade instrument is a 'new' instrument, which may include desirable or important policy changes to the existing instrument.

The remade instrument will have a new ten year sunsetting period and must:

- have a new title
- repeal and replace the existing Oilcode, and
- be made and registered before the sunsetting date of the current Oilcode.

Stakeholder views

Although fuel retailers and a major independent petroleum company[13] are supportive of some changes to the contractual terms and conditions in the Oilcode, their positions differ on matters of detail and would take the Oilcode in different directions. While the independent fuel supplier advocates a streamlining of conditions in accordance with the Government's regulatory reform agenda, fuel retailers support a strengthening of the conditions to align with recent changes to the Franchising Code.

The risks associated with remaking the Oilcode were emphasised by fuel suppliers, who noted that the market reform package that led to the establishment of the Oilcode arose from several phases of consultation and negotiation with interested parties, over an extended period of time. Over that period, many compromises were made in order to find a workable solution for all parties. Given the past experience, both fuel suppliers and retailers were comfortable with maintaining the Oilcode in its current form, rather than making changes to the code which were potentially costly and time-consuming to resolve.

Importantly, this approach would ensure that commission agents retain cover under the mandatory industry codes and TGPs remain as a benchmark for prices. This approach would also enable experience to be gained from administering new provisions in the Franchising Code before considering their inclusion in the Oilcode.

Costs and Benefits

The costs and benefits of remaking each component of the Oilcode are examined in the following sections.

[13] The company made a confidential submission to the Oilcode Review consultation process.

Contractual Agreements

As noted above, a potential benefit from remaking the Oilcode is to strengthen the conditions to align with recent changes to the CCA. The CCA was recently amended to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes. The first code to incorporate the new civil penalties is the new Franchising Code of Conduct, which took effect from 1 January 2015.

However, the Competition Review Panel considered that experience with administering these new provisions in the Franchising Code is needed before determining whether they should be applied more broadly. Furthermore, applying these new provisions to the Oilcode would not only have implications for franchisees but also commission agents, which comprise a larger percentage of retail sites covered by this industry code.

Extending protections provided to franchisees to commission agents without increasing the associated costs for commission agents could have unintended consequences for the fuel retail market. For example, such an arrangement could devalue the benefits of existing franchising agreements when compared to commission agent agreements. Such an approach was rejected by the 2008 review of the Oilcode.

Amendments to the Oilcode, following the 2008 Oilcode Review, have enhanced the disclosure to potential retailers of the contact details of past and current resellers with which the supplier has an agreement. This information allows resellers to conduct referee checks on potential suppliers and make an informed decision before entering into any arrangements. Furthermore franchisees are given a period of fourteen days to undertake the due diligence measures so as to allow them to make informed choices before entering into contracts.

In relation to the costs, past experience would suggest that remaking the Oilcode with significant amendments could be a time-consuming exercise in negotiation between the interested parties. Having negotiated these changes, fuel suppliers and retailers would then be faced with the cost of drawing up new contracts to reflect the changes to the Oilcode.

5 Conclusion

The Review finds that the benefits of this industry code outweigh any associated costs. Notwithstanding on-going changes in the retail fuel market, the Oilcode continues to be fit for purpose, by facilitating an equitable market environment for petroleum wholesalers and retailers and improving the operating environment for small businesses, which is consistent with the findings of the 2008 Oilcode Review.

The Review considers that the Oilcode strikes an appropriate balance between competition and regulation reform. The Oilcode was the outcome of a previous market reform package in 2006 which imposed minimal costs on fuel market participants and removed barriers to greater competition in the market.

Repealing the Oilcode would deliver minimal cost savings for fuel market participants and would expose commission agents - the largest category of small businesses in the market - to uncertainty about terms and conditions and potentially higher costs associated with resolving disputes through the courts or other legal channels.

Remaking the Oilcode with significant amendments would impose additional costs on market participants without evidence of commensurate benefits. The Oilcode has already benefitted from improvements which were implemented following the 2008 Oilcode Review. In the intervening period the percentage of small businesses in the retail fuel market has increased from 18 per cent to 26 per cent.

6 Recommendations

It is recommended that the Government pursue retain Oilcode. This would be consistent with the findings of the Competition Policy Review's Final Report, the Government's regulatory reform agenda and it has the broad support of fuel suppliers and retailers. In terms of the specific issues addressed by the Review, it is recommended that:

1. Terminal gate pricing arrangements be retained in their current form;
2. The code be retained so as to offer continued contractual protection to all parties; and
3. The dispute resolution scheme be continued to offer services to industry participants under the Oilcode.

In retaining the Oilcode, it is recommended that there be minor amendments to:

1. correct outdated references to Departments, Ministerial and other position titles and legislation; and
2. provide for a mid-term review of the Oilcode.

ATTACHMENT B

Details of the Competition and Consumer (Industry Codes – Oil) Regulations 2017

Part 1 – Preliminary

Regulation 1 – Name
This regulation provides that the title of the Regulations is the *Competition and Consumer (Industry Codes – Oil) Regulations 2017* (the Regulation). The Regulation replaces the *Competition and Consumer (Industry Codes – Oilcode) Regulation 2006* (the Oilcode).

Regulation 2 – Commencement
This regulation provides for the Regulations to commence 1 April 2017.

Regulation 3 – Authority

Section 51AE of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations prescribing a mandatory industry code for the purposes of the Act.

Regulation 4 – Schedules

This regulation sets out the rules concerning each instrument that is specified in a Schedule to this instrument.

Regulation 5 – Code of Conduct
This regulation provides that for section 51AE of the *Competition and Consumer Act 2010,* the code set out in Schedule 1 is prescribed and is a mandatory code of conduct.

Part 2 – Transitional matters relating to the repeal of the Competition and Consumer (Industry Codes – Oilcode) Regulations 2006

Regulation 6 – Transitional – continued appointment of dispute resolution adviser etc.

This regulation provides for the ongoing appointment of the dispute resolution adviser appointed by the Minister under the 2006 Regulation upon its repeal. The regulation allows for continuation of a contracted mediation service in place on 1 April 2017.

Regulation 7 – Things done under the Competition and Consumer (Industry Codes – Oilcode) Regulation 2006.

This regulation allows for the continuation of things done under the 2006 Regulation.

Schedule 1 – Oilcode

Name of code
Clause 1 provides that the name of the code is the Oil Code of Conduct.

Purpose of Oil Code of Conduct
Clause 2 provides that the purpose of the code is to regulate the conduct of suppliers, distributors and retailers in the petroleum marketing industry.

Monitoring and review
Clause 3 provides for monitoring of the code by the Australian Competition and Consumer Commission. In addition, a mid-term review to be undertaken by the department responsible for policy related to the Oil Code of Conduct.

Definitions
Clause 4 defines various terms used in the code.

Meaning of fuel re-selling agreement
Clause 5 defines a 'fuel re-selling agreement' for the purposes of the code. A fuel re-selling agreement is an agreement (which may be written, oral or implied) that has the following characteristics:

1. The supplier grants to the retailer the right to carry on a business and is able to exert substantial control over the operation of that business, or the supplier agrees to be a transferee in relation to the fuel re-selling agreement;
2. The business will be associated with a trademark or symbol owned, used or specified by the supplier or an associate; and
3. The retailer is required to pay, or agree to pay, a fee before starting business.

The section excludes certain relationships, including landlord/tenant relationships, employee/employer relationships, partnership relationships, cooperative agreements recognised under State and Territory law and fuel agreements related to a retail site that is not owned or leased by the supplier.

Part 2 – Terminal gate price and related arrangements
Division 1 – Preliminary

Application of this Part
Clause 6 provides that Part 2 of the Oil Code of Conduct applies to wholesale suppliers (as defined) and to sales of declared petroleum products by a wholesale supplier to a customer.

Terminal gate price arrangements
Clause 7 specifies that services additional to the supply of a declared petroleum product may not be included in a posted terminal gate price (TGP), but may be charged as an additional amount. It also provides that the supplier may apply a discount to the posted TGP.

For new and existing term contracts, a wholesale supplier must offer the customer the option of purchasing a declared petroleum product at the posted TGP or at a price derived from that price.

Division 2 – Terminal gate price for declared petroleum products

Setting terminal gate price
Clause 8 specifies which wholesale suppliers, involved in the selling of declared petroleum products by wholesale from a wholesale facility, must identify a TGP to be charged on a given day.

A TGP is to be posted by all wholesale suppliers (refiners, importers and wholesalers) who sell declared petroleum products from a wholesale facility to a non-related party e.g. a sale by a refiner to an end user, retailer or a distributor.

The only exception to this requirement is where more than one related body corporate is selling declared petroleum products by wholesale from a given wholesale facility. Under these circumstances, only one of the related body corporate entities is required to post a TGP that may be utilised by the group of companies for the purpose of complying with the Oil Code of Conduct.

Disclosing terminal gate price
Clause 9 provides that a wholesale supplier must make its TGPs available to the public each day on publically accessible website or from a telephone or facsimile service operated by, or for, the supplier.

Selling declared petroleum products - documentation
Clause 10 sets out the documentation required for sales of declared petroleum products where the price is based on the TGP. The applicable TGP and temperature corrected value is required on delivery, unless this information is available from a telephone or facsimile service or an internet website operated by, or for, the supplier. Complete documentation is required within 30 days of delivery.

Division 3 – Supply of declared petroleum products

Supplying declared petroleum products
Clause 11 specifies that a wholesale supplier must not unreasonably refuse to supply a declared petroleum product to a customer and also sets out some conditions, such as insufficient supplies, under which the supplier is not required to supply a declared petroleum product.
A supplier may advertise a minimum amount of declared petroleum product that the supplier will accept as a spot sale and is not required to supply an amount less than that minimum.

Health and safety requirements
Clause 12 sets out the health and safety requirements for sale and delivery of declared petroleum products.

Part 3 – Fuel re-selling business

Division 1A – Application of this Part
Clause 12A outlines the application of the Part. The Part applies to fuel re-selling agreements under the Oil Code of Conduct, the Oilcode, the Sites Act and the Franchise Act.

The Part will not apply to fuel re-selling agreements, including existing agreements, where the amount of motor fuel that will be sold at all sites is combined less than 30,000 litres for each month of the term of the agreement.

Division 1 – Fuel re-selling agreements

Subdivision A – Disclosure document for fuel re-selling agreement

Preparing and updating disclosure documents
Clause 13 provides for the circumstances in which a disclosure document must be produced, specifically, for the purpose of entering into a fuel re-selling agreement; and not later than 3 months after the end of each financial year in which a fuel re-selling agreement is in force.

Purpose of disclosure document

Clause 14 specifies that the disclosure document is to ensure adequate information is provided by the supplier to allow the retailer, prospective retailer or transferee to make an informed decision on the proposed fuel re-selling agreement, or to provide relevant information to current retailers regarding ongoing operation of the retail businesses.

Content and layout of disclosure document
Clause 15 specifies the content and layout of a disclosure document. A more comprehensive level of disclosure is required for agreements with duration of 5 years or greater.

Giving disclosure document
Clause 16 provides for the circumstances in which a supplier must give a disclosure document to a retailer or a person who intends to become a retailer.

Giving additional disclosure document
Clause 17 sets out the circumstances in which a supplier may be required to provide additional information to a retailer or a person who intends to become a retailer or transferee for agreements with less than 5 years duration.

Subdivision B – Disclosure before completing fuel re-selling agreement

Application of Subdivision 2
Clause 18 defines the circumstances under which this Subdivision applies to a disclosure document, namely when a disclosure document is given by a supplier to a person who proposes to become a retailer or transferee or when a retailer proposes to renew or extend a fuel re-selling agreement.

Supplier's obligations
Clause 19 sets out a supplier's obligations under this Subdivision.
The supplier must give a copy of the Oil Code of Conduct and the relevant disclosure document to a retailer or prospective retailer or transferee, at least 14 days before entering into, renewing or extending a fuel re-selling agreement or paying non-refundable money to a supplier in connection with a proposed agreement.

Requirements before entering into fuel re-selling agreement
Clause 20 specifies the requirements on a supplier before entering into a fuel re-selling agreement. A supplier must not enter into, renew or extend an agreement until the supplier has received a written statement from the other party stating that the party has read and understood the Oil Code of Conduct and the disclosure document.

A supplier must not enter into an agreement before receiving a statement that the prospective retailer has obtained independent professional advice or has declined to seek such advice. However this does not apply to the renewal or extension of a fuel reselling agreement.

Division 2 – Transfer of fuel re-selling agreement

Creating disclosure document
Clause 21 provides that a person who proposes to transfer a fuel re-selling agreement must prepare a disclosure document.

Content and layout of disclosure document
Clause 22 specifies the content and layout of a disclosure document for the transfer of a fuel re-selling agreement.

Giving disclosure document
Clause 23 provides for the circumstances in which a person proposing to transfer a fuel re-selling agreement must give a disclosure document to the transferee and specifies the additional information to be given to the supplier. The information to be given by the supplier to the proposed transferee is also specified in this Clause.

Division 3 – Conditions of fuel re-selling agreement

Cooling-off period
Clause 24 allows for a cooling-off period of seven days after entering into a fuel re-selling agreement or paying any money under the agreement. It also requires the supplier to fully refund all money paid should termination of the agreement result except where the agreement allows for the suppliers reasonable expenses to be deducted.

Copy of lease
Clause 25 specifies that, where the fuel re-selling agreement includes lease of a premises, the supplier must give the retailer a copy of the lease or the agreement to lease within one month after the document is signed by the parties.

Similarly, where a retailer occupies, without a lease, premises leased by the supplier (or an associate of the supplier), the supplier (or the associate of the supplier) is required to provide a copy of the supplier's (or associate's) lease or agreement to lease, or a copy of the documents giving the retailer rights to occupy the premises, or written details of the conditions of occupation, to the retailer within 1 month after occupation commences or after documents giving rights to occupy are signed.

Association of retailers
Clause 26 prohibits a supplier from inducing a retailer not to form an association for a lawful purpose or inducing a retailer not to associate with other retailers for a lawful purpose.

Prohibition on general release from liability
Clause 27 prohibits a fuel re-selling agreement entered into after commencement of the Regulations from containing, or requiring a retailer to sign, a general release of the supplier from liability towards the retailer. However, a retailer is able to settle a claim against the supplier after entering into a fuel re-selling agreement.

Marketing and other cooperative funds
Clause 28 sets out the information to be provided to retailers who are required to make financial contributions into a general marketing or cooperative fund.

The provision requires an annual audited statement on marketing expenditure to be prepared within 3 months after the end of the last financial year and to be provided to the retailer, on request, within 30 days after the request. A vote by 75% of the supplier’s retailers in Australia in any year may waive the requirement for the audit.

Disclosure of materially relevant facts
Clause 29 requires the supplier to disclose listed issues within 14 days of the supplier becoming aware of the fact(s). The facts to be disclosed are limited to changes to majority ownership or control of the supplier, details of certain types of litigation, other legal proceedings and insolvency matters. The Clause also identifies which information should be disclosed in these instances.

Making current disclosure document available
Clause 30 requires suppliers to provide a retailer with an updated disclosure document within 14 days after the retailer requests, in writing, a copy of the disclosure document. A retailer can request an updated disclosure document only once in any 12 month period.

Supplier's proprietary fuel card
Clause 31 sets out the time limits within which a supplier must reimburse a retailer if the retailer is required under their fuel re-selling agreement to accept the supplier's proprietary fuel card for purchases by an end-user customer. The retailer must be reimbursed within three business days, except in circumstances beyond the control of the supplier.

Duration of agreement
Clause 32 prescribes the duration for different types of existing and new agreements, and also prescribes arrangements for renewal of certain agreements with an aggregate duration greater than 5 years.

A fuel re-selling agreement entered into prior to 1 March 2007 (the commencement date of the 2006 Regulation) must retain the duration specified in the agreement, including any arrangements for renewal of the agreement. If the agreement was previously covered by the *Petroleum Retail Marketing Franchise Act 1980*, the duration and renewal arrangements must be those specified in that Act. Under the Oilcode and the Oil Code of Conduct a new fuel re-selling agreement must have a duration of 5 years, except under the circumstances where:

1. the fuel re-selling agreement is a 'franchise-type' agreement that requires the retailer to purchase fuel from the supplier or that gives the supplier an entitlement to sell fuel to the retailer, and that relates to a retail site owned or leased by the supplier. Under these circumstances the duration of the agreement is to be 9 years total, comprising an initial 5 year period and a renewal or renewals of the agreement totalling 4 years; or
2. the supplier and the prospective retailer agree that the site lease will expire within the 5 year timeframe or the site is expected to be leased, disposed of or otherwise used for a purpose other than the retail sale of motor fuel, or if the initial up front investment, as goodwill or 'key money' by the prospective retailer is less than $20 000. Under these circumstances the fuel re-selling agreement does not have to specify a duration.

A supplier must not fail to honour a renewal in an existing agreement or fail to implement a mandatory renewal as prescribed in 1 above, except under the circumstances where the supplier has decided that the retail site associated with the fuel re-selling agreement is to be leased, disposed of or otherwise used for a purpose other than the retail sale of motor fuel.

The procedures involved in a renewal of an agreement are outlined and include, disclosure requirements, the need for any changes to the agreement to be reasonable and in good faith, and arrangements for mediating disputes.

If a retailer and a supplier enter into an agreement for a different duration for reasons that do not comply with 2 above, the agreement is taken to have the standard duration for that type of agreement (i.e. 5 or 9 years).

If the supplier and retailer agree to terminate a fuel re-selling agreement before it would otherwise expire, the supplier and another retailer may enter into a temporary agreement covering that site. The duration of a temporary agreement may not exceed 6 months.

Renegotiation or variation of agreement
Clause 33 sets out the conditions under which a party to a fuel re-selling agreement can require that the terms of the agreement be renegotiated, varied or exercise its discretion under the agreement.

Renegotiation may occur where the operation of the agreement is substantially affected by a matter that is within the control of the other party that was not disclosed by the other party and was not reasonably foreseen by either party.

Terms may only be unilaterally varied or a party may only exercise a discretion under the agreement if the terms in the original agreement specified that a given term could be actioned in such a manner.

Where the parties are unable to reach agreement the Dispute Resolution Advisor (DRA) may be of assistance. If the parties are still unable to resolve the issue with assistance from the DRA, the retailer may request that the supplier terminate the agreement.

Transfer of the fuel re-selling agreement
Clause 34 provides for the transfer of a fuel re-selling agreement to a third party and sets out the circumstances under which it would be reasonable for the supplier to refuse to consent to the proposed transfer.

Division 4 – Termination of fuel re-selling agreement

Termination by supplier – breach by retailer
Clause 35 provides that a supplier must give the retailer reasonable notice that the supplier proposes to terminate the fuel re-selling agreement because of a breach and give the retailer reasonable time to remedy the breach. If the breach is remedied within the prescribed timeframe then the supplier may not proceed to termination as a result of that breach. Where the parties are unable to reach agreement the DRA may be of assistance.

Termination by supplier – special circumstances
Clause 36 sets out the circumstances under which a supplier is not required to provide a right of remedy to a retailer prior to proceeding to terminate a fuel re-selling agreement. Such circumstances include, bankruptcy, voluntarily abandonment of the fuel re-selling business or conviction of a serious offence.

In addition, a supplier may terminate a fuel re-selling agreement relating to particular retail premises if Commonwealth, a State or a Territory law relating to the compulsory acquisition of land is invoked or the sale of motor fuel at the premises is prohibited by, or under, a law relating to the use of land.

Termination by supplier of agreement mentioned in paragraph 32 (11) (c)
Clause 37 applies to the termination of a fuel re-selling agreement which does not specify a minimum duration (as defined in paragraph 32(11)(c)).

A supplier intending to terminate such an agreement must give the retailer at least 30 days notice and offer to buy, or nominate a purchaser for, a reasonable quantity of saleable stocks of motor fuel, merchandise and equipment supplied under the supplier's franchise or operational specifications.

Where the parties are unable to reach agreement on appropriate compensation in regard to termination under this Clause the DRA may be of assistance.

Agreed early termination
Clause 38 applies if a retailer and supplier agree to terminate a fuel re-selling agreement before it expires.

The supplier must notify the retailer that the retailer has rights under the fuel re-selling agreement, seek to negotiate the reasonable termination of those rights, and advise the retailer that they should seek independent financial and legal advice about any offer made by the supplier.

The supplier must also offer to pay costs relating to the termination of the fuel re-selling agreement, which may include, subject to the terms of the agreement, a proportional refund of any fee paid to the supplier under the agreement. The supplier must also offer to buy, or nominate a purchaser for, a reasonable quantity of saleable stocks of motor fuel, merchandise and equipment supplied under the supplier's franchise or operational specifications.

Where the parties are unable to reach agreement on appropriate compensation in regard to termination under this Clause the DRA may be of assistance.

Expiry
Clause 39, prescribes that the supplier and retailer must discuss the procedures that will apply to settle the commercial arrangements between the supplier and the retailer at least 60 days before the expiry of a fuel re-selling agreement.

On expiry of an agreement the supplier must offer to buy, or nominate a purchaser for, a reasonable quantity of saleable stocks of motor fuel, merchandise and equipment supplied under the supplier's franchise or operational specifications.

Part 4 – Dispute resolution scheme

Application of Part 4
Clause 40 prescribes that the dispute resolution scheme under the Oil Code of Conduct applies to disputes arising when a wholesale supplier fails to supply a declared petroleum product to a customer, a dispute between parties to a fuel re-selling agreement and to any other dispute arising from Part 2 (terminal gate price) or Part 3 (Fuel re-selling business) of the Code. .

The DRA will be a non-binding decision maker for industry disputes relating to right of supply (where the DRA will get directly involved with a view to an immediate (24 hour) resolution) and for all other issues covered by the Oil Code of Conduct, the DRA will appoint a mediator or other such facilitator to assist the parties to resolve the dispute in a confidential and efficient manner.

The DRA will establish and publish guidelines explaining how the dispute resolution scheme will function. They will also liaise regularly with industry and relevant government authorities on issues relating to the retail petrol market.

The Scheme does not apply to disputes relating to pricing issues, such as predatory pricing activities and concerns about below cost selling of declared petroleum products. However, the Government accepts that the DRA may become a focal point for the industry to express concerns

in regards to these issues. As a result the DRA guidelines will set out the protocols for dealing with the various complaints and issues that will be brought to its attention.

Dispute resolution adviser
Clause 41 specifies that the Minister with responsibility for the Oil Code of Conduct must in writing appoint a person, the DRA, to advise the Minister in relation to dispute resolution that occurs in accordance with this Part.

Disputes about supply of a declared petroleum product — advice about supply
Clause 42 applies if a wholesale supplier experiences a supply interruption or shortfall. Under such circumstances the wholesale supplier may supply the DRA with details of the supply interruption or shortfall to assist the DRA in managing customer expectations.

Disputes about supply of a declared petroleum product
Clause 43 sets out the procedure to be applied to disputes arising from a failure by a wholesale supplier to supply a declared petroleum product to a customer. The customer may provide details and evidence of their complaint to the DRA and ask the DRA to attempt to resolve the dispute.

Under these circumstances, the DRA may seek details from the wholesale supplier on the situation or, if applicable, on issues relating to compliance with workplace health and safety requirements. The wholesale supplier must comply with the DRA's request.

After consideration of the issues the DRA may choose to make a non-binding determination about the dispute.

Dispute resolution procedure — disputes other than under Clause 43
Clause 44 sets out the procedure to be applied to all other disputes arising under the Oil Code of Conduct. It prescribes that unless the DRA agrees that the dispute can not be resolved through negotiation the parties must try to reach resolution.

If the parties are unable to reach resolution on their own they may refer the matter to the DRA, who must appoint a person to mediate or provide other assistance to try to resolve the dispute.

The parties must use best intentions to work with the appointed person to bring about a resolution of the dispute.

Either party to the dispute may involve a third party to assist or otherwise provide advice, but only the original parties to the dispute may enter into an agreement to resolve the dispute. However, should the person appointed by the DRA determine that the dispute revolves around a broader issue impacting on the industry, that person may ask the supplier to raise the matter with their dealer council or other fora as appropriate.

Provision of mediation and assistance
Clause 45 notes that all mediation or other assistance offered in accordance with this Part 4 of the Oil Code of Conduct must be carried out in good faith. The person appointed by the DRA must, within 28 days of being appointed, advise the DRA of arrangements they have put in place to assist the parties to seek resolution.

The person appointed by the DRA may need to consider a range of documents and seek the assistance of both parties in order to attempt to resolve the dispute. If a resolution cannot be

reached within 30 days of the start of arrangements to resolve the dispute, the parties may choose to cease utilising the services of the person appointed by the DRA.

The DRA may comment on any advice provided by the person they appointed to mediate or otherwise assist the parties to resolve to dispute. The DRA may also choose to make a non-binding determination about the dispute.

Self-incrimination
Clause 46 provides that any statement made as part of the procedures under Part 4 of the Oil Code of Conduct is not admissible in a criminal proceeding or a proceeding for the imposition of a penalty. The term 'person' in this Clause is extended to include bodies corporate.

Conditions
Clause 47 sets out the conditions of using the dispute resolution scheme under the Oil Code of Conduct. It notes that any action taken under Part 4 of the Oil Code of Conduct does not affect the right of a party to a dispute to take legal proceedings under the Code.

It specifies that Part 4 cannot be used by a party to dispute the termination of a fuel re-selling agreement under circumstances where the retailer: no longer holds a licence that the retailer is required to hold to conduct a fuel re-selling business; becomes bankrupt, insolvent under administration or an externally-administered body corporate; voluntarily abandons the fuel re-selling business; is convicted of a serious offence; or agrees to the termination of the fuel re-selling agreement.

It specifies that, unless otherwise agreed, the parties are equally liable for any costs relating to resolution of the dispute and must pay for their own costs relating to any mediation to resolve the dispute.

Annexures

Annexure 1 – Supplier's disclosure document for fuel re-selling agreements – long form.
Annexure 1 details the minimum information required to be contained in a disclosure document to be provided to a retailer or prospective retailer for a fuel re-selling agreement which specifies a minimum duration of at least 5 years.

Annexure 2 – Disclosure document for retailer or prospective retailer – short form
Annexure 2 details the minimum information required to be contained in a disclosure document to be provided to a retailer or prospective retailer for a fuel re-selling agreement which specifies a minimum duration of less than 5 years.

Annexure 3 – Retailer's disclosure document for transfer of fuel re-selling business
Annexure 3 details the minimum information required to be contained in a disclosure document to be provided to a proposed transferee of a fuel re-selling agreement.