

**GOVERNMENT RESPONSE
TO THE STATUTORY REVIEW OF THE
*TRADE PRACTICES (INDUSTRY CODES – OILCODE
REGULATIONS) 2006***

Overview

Section 3(2) of the *Trade Practices (Industry Codes – Oilcode) Regulations 2006* (“the Oilcode”) required that a review of the Oilcode be undertaken after it had been in operation for 12 months.

The Minister for Resources and Energy, the Hon Martin Ferguson AM MP, determined that the Oilcode Review should focus on whether the Oilcode has successfully achieved its objectives, including to:

- establish standard contractual terms and conditions for wholesale supplier-fuel retailer re-selling agreements for both franchise and commission agency arrangements;
- introduce a nationally consistent approach to terminal gate pricing (TGP) arrangements to improve 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 operation of discounts; and
- establish an independent, downstream petroleum Dispute Resolution Scheme (DRS) including the appointment of a Dispute Resolution Adviser (DRA) to provide the industry with a cost-effective alternative to taking action in the courts.

After the Oilcode Review had commenced, the Australian Government asked for the review to also examine the appropriateness of the arrangements for TGP publication. This direction stemmed from the Government’s response to the Australian Competition and Consumer Commission’s (ACCC) December 2007 report, *Petrol Prices and Australian Consumers – report of the ACCC inquiry into the price of unleaded petrol*.

The Minister for Resources and Energy released the Oilcode Review report on 24 August 2009. The Department of Resources, Energy and Tourism (“RET”) subsequently sought the views of the organisations which made submissions to the review for the purposes of informing the Government’s response.

The Government’s response to the Oilcode Review recommendations and stakeholder comments on the review are outlined below.

1. Contract Terms and Conditions

The Oilcode Review makes five recommendations to enhance disclosure of information to potential resellers.

- 1. Require the supplier to disclose the name, address and contact details of existing resellers to prospective resellers unless those resellers request in writing that their details not be disclosed.**
 - (a) If more than 50 resellers are involved, the supplier may instead give only the names, addresses and contact details for those resellers in the state, region or metropolitan area in which the reseller's agreement is to be operated.**
- 2. Require the supplier to disclose the name, address and contact details of resellers whose businesses were: transferred; ceased to operate; terminated by supplier; terminated by reseller; not renewed and bought back by the supplier in the past three years unless those resellers request in writing that their details not be disclosed.**
 - (a) If more than 50 resellers are involved, the supplier may instead give only the names, addresses and contact details for those resellers in the state, region or metropolitan area in which the reseller's agreement is to be operated.**
- 3. Require that suppliers not attempt to induce a reseller or past reseller to make it a condition of their contract that their contact details are not disclosed.**
- 4. Allow resellers that receive the Short Form Disclosure Document the right to be provided with the Long Form Disclosure Document on request.**
- 5. Require that suppliers advise potential resellers in their disclosure documents of the existence of ACCC Oilcode published information and how it can be sourced.**

The primary purpose of these recommendations is to ensure the provision of relevant information to resellers. This information will enable resellers to conduct referee checks on the fuel supplier/s with which they may enter into commercial arrangements and to make an informed decision prior to entering into any such arrangements.

Stakeholder comments indicate support for the implementation of the above recommendations. The Government agrees that access to information is a key requirement in facilitating informed decision making by parties.

The Government continues to encourage all potential re-sellers to review the information they receive from fuel supplier/s and obtain independent legal, financial or other advice they deem necessary to be fully aware of the obligations under the proposed agreement, prior to entering such agreements.

Obligations under the Oilcode

The Government notes, with concern, some stakeholder comments that indicate some parties subject to the Oilcode are not meeting their obligations; can circumvent obligations, particularly in respect to tenure, because of the wording of provisions in the Oilcode; and that less powerful businesses are unwilling to bring forward complaints to the ACCC as they fear retaliation from more powerful businesses.

The Government expects full compliance with the Oilcode by all parties. Where disputes occur, the Government encourages the use of the Oilcode's dispute resolution scheme. Where re-selling agreements do not comply with the tenure or other provisions in the Oilcode, the ACCC is empowered to take appropriate enforcement action.

On 5 November 2009, the Government released its response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the Franchising Code of Conduct¹. In its response, the Government announced its intention to introduce an enhanced enforcement package for industry codes of conduct, including the Oilcode.

The package allows the ACCC to issue public warnings about businesses it believes to be in breach of the Oilcode, seek substantiation notices² and give the ACCC the power, at random, to request copies of all documents required to be kept under the Oilcode. The new powers also allow the Court to order redress for all parties harmed due to a breach of an industry code, without requiring every businesses affected by a breach of an industry code to be party to the legal proceeding. The Government's amendments to the *Trade Practices Act 1974* via the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* obtained Royal Assent on 13 July 2010.

The Government also notes that some stakeholders continue to feel aggrieved by the process used to develop the Oilcode, and the view of these stakeholders that the Oilcode's minimum conditions do not provide sufficient security for the ongoing operation of some businesses. Part 3 of the Oilcode provides, amongst other things, a baseline of standard contractual terms and conditions for re-selling agreements. The Government notes that these minimum standard contractual terms and conditions for re-selling agreements should be viewed as the starting point for negotiations, and not as the only option available or acceptable for every situation.

The Government strongly encourages businesses to negotiate outcomes which support strong, productive business relationships. If disputes occur, the Government

¹ See the Australian Government response to the report of the Parliamentary Joint Committee on Corporations and Financial Services, '*Opportunity not opportunism: improving conduct in Australian franchising*', available on the Joint Committee's website, at http://www.aph.gov.au/Senate/committee/corporations_cte/franchising/index.htm.

² Substantiation notices are notices that require a person to give information and/or produce documents that could be capable of substantiating or supporting a claim or representation made by the person. Substantiation notices do not require a person to prove that a claim or representation is true or is not misleading; rather, they are a preliminary investigative tool that helps the ACCC determine whether further investigation is warranted.

encourages the use of the Oilcode's dispute resolution scheme to quickly resolve issues.

The Government accepts Oilcode Review recommendations 1, 2, 3, 4 and 5 as the amendments will provide resellers with more information to assess potential re-selling agreements and is consistent with the 2008 amendments to the disclosure provisions under the Franchising Code of Conduct. The Government will commence the process to amend the Oilcode accordingly.

2. Terminal Gate Pricing (TGP) arrangements

The Government notes some stakeholders' concerns that the Oilcode's TGP arrangements do not provide sufficient transparency in the wholesale fuel market. Some stakeholders preferred to have the elements of the TGP specified in the Oilcode as per the corresponding Victorian or Western Australian legislation, and have actual wholesale prices for particular volumes published or at least be informed of the volume of fuel required to obtain discounts.

The Government notes that the Victorian *Petroleum Products (Terminal Gate Pricing) Act 2000*, the *Petroleum Retail Selling Sites Act 1981* and the *Fuel Prices Regulation Act 1981* were repealed on 1 August 2010 by the *Consumer Affairs Legislation Amendment Act 2010*, No. 1/2010.

The Government notes also that the purpose of the TGP arrangements is to publicise the wholesale benchmark price, which must be offered for spot sales of declared petroleum products or can be used as a reference point for negotiating or determining prices under a term contract. In respect to the publication of prices, the Government notes that contract negotiations take place on a confidential basis and that this in-confidence requirement prevents the publication of actual transaction specific prices obtained for spot purchases or volume discounts. However, the ACCC has the power to collect data on actual wholesale transactions in the course of its monitoring of the Australian petroleum industry.

The Government anticipates that implementation of Oilcode Review recommendation 6 (Collective Bargaining) will increase understanding and use of the collective bargaining provision. The Government encourages independents, or their representatives, to participate in the proposed petroleum industry collective bargaining working group.

The Government also notes some stakeholders' concerns about some suppliers using Oilcode provisions to circumvent wholesale fuel price temperature correction requirements. The *National Trade Measurement Regulations 2009* regulates that the wholesale price of automotive fuel be corrected to a 15°C standard³. The Government encourages businesses to refer evidence of contraventions of these Regulations to the National Measurement Institute.

³ Some exceptions apply – refer to *National Trade Measurement Regulations 2009* available at the ComLaw website <http://www.comlaw.gov.au>. For more information on the current national trade measurement regulations see the website of the National Measurement Institute <http://www.measurement.gov.au/TradeMeasurement/Consumers/Pages/LiquidFuel.aspx>.

3. Collective Bargaining

The Oilcode Review recommends that the Government work with key stakeholders to identify and address barriers to the use of the petroleum industry specific business to business collective bargaining arrangements under the *Trade Practices Act 1974*.

6. The Government work with key industry associations, particularly those representing independent fuel resellers, and independent operators and commissioned agents with the objective of identifying and addressing barriers to the use of the petroleum industry specific business to business collective bargaining arrangements under the TPA.

The Government agrees that the role of independent service stations, resellers and commissioned agents in the downstream petroleum industry is important for competition reasons, particularly in regional areas. The voluntary use of collective bargaining provisions could potentially lead to better wholesale pricing outcomes for independent resellers.

The Government welcomes the support from the various associations representing service stations and independent retailers in respect to this recommendation. The Government notes some stakeholders consider that the current collective bargaining threshold of \$15 million for the petrol retailing sector was too low and the approval timeframe of three years should be extended.

The Government accepts Oilcode Review recommendation 6 as the use of collective bargaining provisions could assist smaller operators by increasing their relative purchasing power with the view to achieving lower wholesale prices.

The Government will establish a petroleum industry collective bargaining working group consisting of RET, Treasury, ACCC and key industry members to initially identify and explore the key barriers to the use of collective bargaining to facilitate the implementation of this recommendation.

4. Dispute Resolution Scheme

The Oilcode Review makes four recommendations to enhance and provide clarity to the Oilcode's dispute resolution scheme, including one recommendation to streamline the procurement process for dispute resolution services provided for the Oilcode, Franchising Code of Conduct and the Horticulture Code of Conduct.

- 7. To provide greater clarity and certainty to the DRS, adopt in principle the following recommendations for Section 44 and 45 of the Oilcode, that is:**

Section 44

(4A) Each party shall be represented in the process providing mediation or other assistance by a person who has full authority to make an agreement without seeking approval from another person.

Section 45

(6) The dispute resolution adviser may make a non-binding determination about the dispute, and in doing so should take account of, among other things:

- (a) the valid contractual arrangements;**
- (b) what should be fair and equitable conduct between the parties;**
- (c) compliance or non-compliance with this code;**
- (d) what may be an appropriate settlement of the dispute; and**
- (e) what would be a reasonable time within which the parties should respond to, and implement, the non-binding determination.**

(7) The dispute resolution adviser shall determine the procedures for the non-binding determination process and the parties shall observe the procedural determinations of the dispute resolution adviser.

(8) Each party shall be represented in the non-binding determination process by a person who has full authority to negotiate an agreement without seeking approval from another person.

- 8. The ACCC and the DRA should develop enhanced information material concerning the nature and expected outcomes of DRS Non-Binding Determinations.**
- 9. Adopt a formal dispute definition and notification mechanism consistent with the Franchising Code of Conduct (section 29(1)), specifically that the complainant must tell the respondent in writing:**
- (a) the nature of the dispute;**
 - (b) what outcomes the complainant wants; and**
 - (c) what action the complainant thinks will settle the dispute.**
- 10. The Government should examine opportunities to amalgamate the procurement of dispute resolution services under the Oilcode, Franchising Code of Conduct and Horticulture Code of Conduct.**

The Government considers that the Oilcode has met the objective of establishing a 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.

Stakeholder comments indicate that the Dispute Resolution Scheme is accepted by the industry and has been used to varying degrees, including one process that has led to a non-binding determination. In terms of cost effectiveness, the Government notes the total costs to parties of mediation under the Oilcode has been, on average, \$2,988 in total (i.e. \$1,494 per party)⁴.

The Government notes a suggestion by a stakeholder for the addition of a new section 44(4A) to the Oilcode, which would require the specification of the level of relief or contribution (financial or otherwise) sought. The stakeholder considers that the current provision requires a party's representative to have unlimited authority to make an agreement. The Government considers that implementation of Recommendation 9 will provide sufficient information for the respondent to determine the representative with appropriate delegation to attend the mediation (or other) process.

On 11 May 2010, the Government announced it would enhance and amalgamate the alternative dispute resolution services provided under the Franchising Code of Conduct, the Horticulture Code of Conduct, the Oilcode and the Produce and Grocery Industry Code of Conduct. The key elements of this initiative are:

- the introduction of early intervention services for businesses operating under the Franchising Code of Conduct and the Horticulture Code of Conduct;
- the continuation of the existing alternative dispute resolution services provided by the Franchising Code of Conduct, Horticulture Code of Conduct, Oilcode and Produce and Grocery Industry Code of Conduct; and
- the amalgamation of the procurement and delivery of the existing alternative dispute resolution services under the Franchising Code, Horticulture Code, Oilcode and Produce and Grocery Industry Code of Conduct as well as the new early intervention services.

Oilcode's dispute resolution model

The Government notes that while the review's terms of reference did not seek an assessment of the dispute resolution model or consideration of alternative dispute resolution models, some stakeholders called for the provision of binding determinations under the Oilcode and/or the ability to tender the DRA's non-binding determination to a court if a legal process is required.

The Government also notes the supplementary submission made by The Accord Group (TAG), which was received after the Oilcode Review had been submitted for Government consideration. The TAG supplementary submission suggests that mediation of matters that do not relate to the supply of a declared petroleum product,

⁴ Average is \$ per dispute for the period since Oilcode commencement to 30 November 2010.

s44 matters⁵, were not resulting in agreements between parties. TAG suggests that for such matters, the Oilcode dispute resolution adviser could be enabled via an amendment to the provision on the appointment of a mediator, s44(2), to provide mediation, other assistance or a non-binding determination at an earlier stage. TAG claim that the above approach would provide the parties with the “*benefit of a single person’s expertise and industry understanding on a consistent basis*” and referred to the conciliator process used under the voluntary Oilcode during the period 1990-96.

The Government notes that mediation encourages open discussion and ongoing business relationships, and that the legal nature of binding determinations may remove these benefits and potentially impose extra costs on the parties. The Government recently announced its intention to develop a new policy document setting out the principles used in determining whether codes of conduct are appropriate, and how prescribed codes should be framed.⁶

The Government considers a full review of the Oilcode’s dispute resolution model could be undertaken as part of the next Oilcode Review.

The Government accepts Oilcode Review recommendations 7, 8 and 9 as the clarification in process and increased information will assist parties to resolve disputes in a conciliatory manner and will commence the process to amend the Oilcode accordingly.

The Government’s announcement, as part of the 2010-11 Budget, to the enhancement and amalgamation of the procurement and delivery of dispute resolution services under the Franchising Code of Conduct, the Horticulture Code of Conduct, the Oilcode and the Produce and Grocery Industry Code of Conduct, demonstrates the Government’s acceptance of Oilcode Review Recommendation 10.

⁵ s44 disputes are disputes other than s43 disputes about supply of declared petroleum product.

⁶ See the Australian Government response to the report of the Parliamentary Joint Committee on Corporations and Financial Services, ‘*Opportunity not opportunism: improving conduct in Australian franchising*’, available on the Joint Committee’s website, at http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/index.htm.

5. Further Review

The Oilcode Review recommends that a further review of the Oilcode be undertaken in three years to determine if additional amendments are necessary.

11. **The Oilcode should be reviewed again in three years.**

Stakeholder comments noted the timeframe for a further review; interest in participating in a further review; and a recommendation to promptly implement the current review's recommended changes to enable consideration of their impact in a subsequent review.

The Australian Government has agreed to review the efficacy of the 1 March 2008 amendments to the Franchising Code of Conduct, and any amendments proposed as part of its response to the Joint Committee report, in 2013. This will allow for a review after an adequate number of contracts, established after the amendments were implemented, have run their course, noting that franchise agreements generally operate for 5-10 years.⁷

The Government is currently considering its response to the ACCC review of the Horticulture Code of Conduct, therefore a future review date for the Horticulture Code of Conduct has not been determined.

The Government accepts Oilcode Review recommendation 11 and will commence the next Oilcode review in 2013 to allow sufficient time for the impact of proposed changes to the Oilcode to be assessed.

⁷ See the Australian Government response to the report of the Parliamentary Joint Committee on Corporations and Financial Services, '*Opportunity not opportunism: improving conduct in Australian franchising*', available on the Joint Committee's website, at http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/index.htm.