Australian Government
Department of Resources, Energy and Tourism

ENHANCING AUSTRALIA'S ECONOMIC PROSPERITY

OILCODE REVIEW

Statutory review of the *Trade Practices (Industry Codes – Oilcode) Regulations 2006*

Department of Resources, Energy and Tourism

May 2009

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TERMS OF REFERENCE

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 reselling 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 stems 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*.

ABBREVIATIONS

2007 ACCC petrol price report – ACCC, *Petrol Prices and Australian Consumers – Report of the ACCC inquiry into the price of unleaded petrol,* December 2007

2008 ACCC petrol price report – ACCC, *Monitoring of the Australian petroleum industry – Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia,* December 2008

2008 ACCC review of the Horticulture Code of Conduct – ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries,* July 2008

ACAPMA – Australian Convenience and Petroleum Marketers Association

ACCC – Australian Competition and Consumer Commission

AIP – Australian Institute of Petroleum

BP – British Petroleum

Caltex – Caltex Australia Ltd

CAV – Consumer Affairs Victoria

DRA – Dispute Resolution Adviser

DRS – Dispute Resolution Scheme

Franchise Act – *Petroleum Retail Marketing Franchise Sites Act 1980*

Franchising Code of Conduct – *Trade Practices (Industry Codes – Franchising) Regulations 1998*

Horticulture Code of Conduct - *Trade Practices (Horticulture Code of Conduct) Regulations 2006*

LPG – Liquefied Petroleum Gas

Mobil – Mobil Oil Australia Pty Ltd

MTAA – Motor Trades Association of Australia

MTAQ – Motor Trades Association of Queensland

Oilcode – *Trade Practices (Industry Codes - Oilcode) Regulations 2006*

RACV – Royal Automobile Club of Victoria

RET – Australian Government Department of Resources, Energy and Tourism

Shell – The Shell Company of Australia Ltd

Sites Act – *Petroleum Retail Marketing Sites Act 1980*

SSA – Service Station Association Ltd

TGP – Terminal Gate Price

TPA – *Trade Practices Act 1974*

7-Eleven – 7-Eleven Stores Pty Ltd

VACC – Victorian Automobile Chamber of Commerce

WA-DoCEP – Western Australia Government Department of Consumer and Employment Protection

EXECUTIVE SUMMARY

Introduction

The Department of Resources, Energy and Tourism (RET) presents this Review of the *Trade Practices (Industry Codes - Oilcode) Regulations 2006* (the Oilcode) to the Minister for Resources, Energy and Tourism, the Hon Martin Ferguson AM MP, for the Government's consideration.

Section 3(2) of the Oilcode required that a Review of the Oilcode be undertaken after it had been in operation for 12 months. RET commenced this Review in March 2008 which included the release of an issues paper in April 2008 and a public consultation process to solicit stakeholder views on the Oilcode.

RET also undertook consultation with Treasury, the ACCC, the Department of Innovation, Industry, Science and Research and the Department of Agriculture, Fisheries and Forestry in respect to the operation of the three mandatory industry codes under the *Trade Practices Act 1974* (TPA).

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 stems 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*.

Fourteen organisations, including representations from fuel refiners/marketers and their industry body, fuel resellers and reseller industry associations, state government bodies and Ministers, the ACCC and the Oilcode Dispute Resolution Adviser (DRA), have made submissions to the Oilcode Review. A full list of submissions is available at Appendix C. Submissions can be viewed at www.ret.gov.au.

The majority of submissions focussed on the issue of Terminal Gate Pricing (TGP) and its effectiveness. Further, as the Government specifically requested that RET examine the appropriateness of the arrangements for TGP publication, TGP is the central focus of this Review. Other key issues surrounding contractual terms and conditions for tenure and disclosure of information and the Oilcode's Dispute Resolution Scheme (DRS) are also discussed in detail.

General Findings

The introduction of the Oilcode has been generally well received with a number of submissions expressing support for the regulations. Some submissions suggested that the Oilcode could be tightened, improved or overhauled and RET has examined these suggestions.

Overall RET has found that the Oilcode regulations have met the objectives set out in the Oilcode's explanatory statement. The underlying finding of this Review is the importance of providing adequate information to assist the downstream petroleum industry to reshape itself in a dynamic period of change. The proposed changes to enhance information disclosure and to the DRS will improve protections for small business and improve the operation and effectiveness of dispute resolution services. A greater focus on identifying and addressing the barriers to utilising the Government's streamlined collective bargaining arrangements is also recommended to enable smaller independent operators in the industry to negotiate the most competitive outcomes possible.

Standard contractual terms and conditions for fuel reselling agreements

RET has found that the Oilcode has delivered a minimum set of contractual terms and conditions for both franchise and commission agency arrangements. This safety net set of standard terms and conditions provides

industry players with the freedom to respond to changing market conditions, as well as providing certainty and protection to industry participants and improving industry sustainability.

Resellers and commission agents now have increased certainty about the terms and conditions in which they operate and have protection from illegal behaviour. The Oilcode is a framework of minimum industry standards for fuel reselling agreements which provides a baseline for commercial arrangements. The parameters and base levels are set but the precise terms and conditions are negotiated between contracting parties.

RET recommends that no changes occur to the current tenure arrangements noting that the Oilcode now provides a minimum level of tenure to all industry participants, particularly for commission agents, that did not previously exist. RET notes that a minimum tenure period of five years is provided under the Oilcode regulations if over $20,000 is paid as an entrance fee. RET notes that concerns were raised in some submissions that fuel suppliers are not required to set a minimum tenure period for a fuel reselling agreement if, *inter alia*, an amount of less than $20,000 is sought from the prospective reseller. On the basis that granting tenure without a substantial up front payment could effectively devalue all existing industry resellers and tenured commission agency arrangements, and recognising that the industry is continuing to respond to the removal of the *Petroleum Retail Marketing Sites Act 1980* (the *Sites Act*), RET does not propose any modifications to these arrangements.

RET does recommend that changes be made to the information disclosure requirements in order to strengthen the amount and quality of information made available to potential resellers. This additional information will enable potential resellers to determine whether the fuel reselling agreement they may be considering is appropriate for them, and will enhance industry decision making. Recommendations have been made to increase supplier disclosure requirements including for suppliers:

- to make potential resellers aware of ACCC published Oilcode information and how to source it;
- to disclose the name and contact details of previous and existing resellers, on request, to potential resellers;
- in the interests of transparency, not to attempt to induce a reseller or past reseller to make it a condition of their contract that their contact details are not disclosed; and
- to provide, on request, Long Form Disclosure Documents to resellers currently receiving Short Form Disclosure Documents.

These suggested changes to the Oilcode are consistent with changes to the Franchising Code of Conduct which entered into effect on 1 March 2008.

Terminal Gate Pricing

RET has found that the Oilcode has delivered a nationally consistent approach to TGP arrangements which provides a higher level of transparency to the national wholesale fuel market than existed previously and facilitates, subject to health and safety and other requirements being met, greater access to fuel supply for all industry participants.

By improving access to the supply of fuel, subject to appropriate conditions, and by providing a spot wholesale price indicator, RET considers that the TGP arrangements under the Oilcode have delivered an element of certainty and improved wholesale price transparency, beyond what is available in many other markets.

RET acknowledges that the current national TGP scheme provided by the Oilcode is supplemented by stricter TGP arrangements in two jurisdictions (Western Australia and Victoria) but does not consider that these stricter arrangements are necessary on a national scale. A feature of these stricter TGP arrangements is that they give state regulators access to additional information on wholesale fuel pricing. RET notes the ACCC, under

the TPA and particularly through its enhanced petrol price monitoring role, already has the ability to access much of the same information from industry.

RET further notes that the ACCC is already actively engaged in obtaining detailed information about the components of the terminal gate prices from the major wholesalers and, on this basis, RET does not consider there is a need to add further regulation to the petroleum industry to access information which is already available and being provided to the regulator. Doing so would only impose a compliance burden on the petroleum industry for no net gain. For these reasons RET considers there is no compelling reason to adopt either of the Western Australia or Victoria TGP regimes for the sake of consistency in national TGP arrangements.

Appropriateness of TGP publication

On the issue of the overall appropriateness of TGP publication, RET has determined that the current arrangements are appropriate. RET notes that very few wholesale fuel sales actually occur at the posted terminal gate price and the terminal gate price quoted is often not the final price paid. For example, additional transport cost may be levied and volume discounts may also be deducted from the posted terminal gate price. Nevertheless the majority of industry participants noted that the terminal gate price was used as a baseline for price formation and the ease of comparison of terminal gate prices, made possible by the Oilcode, at different locations across Australia for different fuels has established the terminal gate price as an important benchmark. This benchmark is broadly used in the wholesale fuel market to inform market participants about the current level of wholesale prices and the starting price for long term contract negotiations.

RET considers that the publication of a terminal gate price is important to the downstream petroleum wholesale market. Whilst not providing all relevant price and term information, the terminal gate price indicates to the market the price at which spot bulk fuel sales could occur and facilitates price discovery to inform long term contract negotiations between suppliers and resellers.

In relation to calls for greater transparency in relation to the level of volume discounts and actual wholesale prices transacted in the market, RET considers this issue fundamentally reflects a desire by some players in the industry to access exactly the same prices as is achieved by large volume market participants, regardless of the level of quantity of product bought and other commercial arrangements. RET notes it was never the intention of the Oilcode to prevent the provision of discounts to large volume customers in the wholesale market and that the presence of discounting on the basis of volume is a normal feature present in all competitive markets. Further, RET considers that publication of actual discount levels could lead to tacit price signalling and discourage competition.

Fundamentally RET does not consider, after one year of operation, that a case has been made to change the TGP arrangements under the Oilcode. The TGP arrangements operate effectively in the market and the Oilcode is achieving its objective of improving transparency.

Collective Bargaining

However, on the matter of improving the ability of independent operators in the market to more effectively negotiate competitive outcomes, RET notes that there have been no applications from small operators in the downstream petroleum industry to utilise the streamlined collective bargaining provisions.

In order to enhance the ability of independent operators in the downstream petroleum market to negotiate the most competitive outcomes with suppliers, this Review recommends that 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*.

Dispute Resolution Scheme (DRS)

RET considers that the Oilcode's objective of establishing an independent downstream petroleum DRS, including the appointment of a DRA, to provide the industry with a cost-effective alternative to taking action in the courts, has been achieved with a considerable degree of success. The DRS system has been used by industry in its first year of operation with a number of successful mediations and a non-binding determination made to date.

RET believes that the ACCC and the DRA should continue to educate industry participants on exactly what the DRA can deliver and what issues under the Oilcode can be dealt with by each organisation. For example, there appears to be confusion over the respective roles of the DRA and the ACCC. This Review notes that disputes and requests for mediation between parties can be determined by the DRA whilst alleged breaches of the Oilcode are a matter for the ACCC to investigate.

In responding to suggestions on how to improve the Scheme, RET has made a number of recommendations which aim to improve the DRS for resellers, suppliers and regulators alike by removing uncertainty and clarifying aspects of the Scheme. Recommendations regarding the DRS include:

- adopting a formal dispute definition process;
- better defining what can be considered in a dispute process;
- encouraging attendance at dispute mediation by parties authorised to reach agreement to a dispute;
- developing enhanced information on the nature and expected outcomes of non-binding determinations; and
- clarifying that the detail of matters under dispute is confidential between the parties in dispute.

Many of these recommendations aim to ensure the Oilcode is consistent with similar arrangements under the Franchising Code of Conduct. RET suggests more effort should be made on education and expectations so that industry participants are aware of what the DRS can deliver and to assist industry players to determine if they should use the DRS or rely on their contractual legal rights in court.

RET also notes that there are potential synergies between the DRS under the Oilcode and similar DRS operating under the Franchising Code of Conduct and the Horticulture Code of Conduct, noting that the same organisation is currently delivering all three DRS and that there may be efficiencies which can be achieved through aggregation. On this basis, RET recommends that the Government should examine opportunities to amalgamate the procurement of dispute resolution services under the various industry codes.

Additional issues raised

A number of additional suggestions were raised by submissions and each of these have been examined in the context of this Review. These issues include the following:

- that the TGP component of the Oilcode should be extended to LPG;
- that where businesses are covered by both the Oilcode and the Franchising Code of Conduct, particularly in the case of franchise operations where fuel sales make up only a small proportion of total revenue/profit, that the Franchising Code of Conduct become the applicable code to observe; and
- that the concept of 'fairness' as incorporated in the *Individual Contractors Act 2006* be applied to the Oilcode.

After consultation and examination of these issues, RET is not attracted to accepting any of these suggestions as it remains unconvinced about the utility of doing so.

The issue of TGP being extended to LPG is discussed in the chapter on TGP.

Regarding businesses having to comply with both the Franchising Code of Conduct and the Oilcode at the same time but for different sites, RET notes that this issue is primarily a concern for 7-Eleven. Both the Oilcode and the Franchising Code of Conduct are declared as prescribed mandatory codes of conduct, however section 5(3) of the Franchising Code of Conduct explicitly states that the code does not apply to franchise agreements to which another mandatory industry code, as prescribed under section 51AE of the TPA, applies. This means that only one of the codes will apply to an individual agreement at any one time. Section 6 of the Oilcode describes the circumstances in which the Oilcode applies.

RET understands that some 7-Eleven multi-site franchisees operate under the Franchising Code of Conduct where their stores don't sell fuel but operate under the Oilcode where their stores do sell fuel, even if it was a minor component of the business. These multi-site franchisees seek, on regulatory compliance burden grounds, a waiver to only observe one of the applicable industry codes, in this instance the less prescriptive Franchising Code of Conduct.

The Oilcode is intended to apply to all downstream petroleum industry participants, except very small volume resellers (ie below 30,000 litres per month). Upon investigation RET found that all of the affected 7-Eleven fuel resellers were selling in excess of 30,000 litres per month and on this basis, needed to comply with the Oilcode.

RET considers that all industry participants, except those very small volume resellers, should have to observe the Oilcode for the purpose of industry certainty and consistency. RET further considers that 7-Eleven is a significant player in the downstream petroleum industry and as such should, like its competitors, be subject to the Oilcode. Excluding some fuel resellers from observing the Oilcode on regulatory burden grounds, rather than on the specific ground for exceptions in section 6 (and other than Part 2) of the Oilcode, would be unfair to other industry participants.

In regard to the suggestion that the concept of 'fairness', as incorporated in the *Individual Contractors Act 2006*, be applied to the Oilcode, RET considers that the Oilcode already has sufficient safeguards and notes that there is no strong policy basis to treat resellers as independent contractors.

Future Review of the Oilcode

The normal period of review for Commonwealth regulations is five years.

However, RET considers that the Oilcode should be reviewed again in three years to determine if further changes are necessary following the Government's consideration of the Parliamentary Joint Committee on Corporations and Financial Services report on the Franchising Code of Conduct and the 2008 ACCC review of the Horticulture Code of Conduct[1].

[1] The 2008 ACCC review of the Horticulture Code of Conduct was part of its larger review of grocery prices - *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, July 2008.*

SUMMARY - RECOMMENDATIONS FOR CONSIDERATION

Contract Terms and Conditions - Disclosure

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.

Collective Bargaining

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.

Dispute Resolution Scheme

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:

   <u>Section 44</u>

   (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.

   <u>Section 45</u>

   (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.

General

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

BACKGROUND TO THE REVIEW

The *Trade Practices (Industry Codes - Oilcode) Regulations 2006* (the Oilcode) came into effect on 1 March 2007. The Oilcode is a mandatory industry code that formed part of the Australian Government's Downstream Petroleum Reform Package. This Package also involved the passage of the *Petroleum Retail Legislative Repeal Bill 2006,* which repealed the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Sites Act 1980* (the Franchise Act).

The purpose of the Oilcode is to regulate the conduct of suppliers, distributors and retailers in the petroleum marketing industry. As a mandatory industry code, the Oilcode applies to all downstream petroleum industry participants and was designed to remove restrictions on competition, promote industry certainty, promote cultural change, and improve industry sustainability, giving all industry players the freedom to respond to changing conditions in the retail petroleum market.

Section 3(2) of the Oilcode required that a Review of the Oilcode be undertaken after it had been in operation for 12 months. RET commenced this Review in March 2008.

The Sites Act limited the number of retail sites that the refiner/marketers, specifically BP, Caltex, Mobil and Shell (the oil majors), could own or lease and operate either directly or on a commission agent basis, with the aim of limiting the price setting activities of the vertically integrated oil majors. The Franchise Act set out minimum conditions for franchise agreements and encouraged the entry of small businesses into the retail petroleum industry.

It was considered that the repeal of the two Acts was necessary since they imposed additional costs on petroleum companies and prevented the industry from achieving increased efficiencies or responding to changing market forces such as the market entry of the large independent retail chains and supermarket retailers.

An issues paper was released in early April 2008 (Appendix A) and RET initiated a public consultation process to solicit stakeholder views on the Oilcode. The Review focussed on whether the Oilcode had successfully achieved its objectives to:

- establish standard contractual terms and conditions for wholesale supplier fuel retailer reselling 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.

On 15 April 2008 the Prime Minister, the Hon Kevin Rudd MP, and the Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, announced the Government's full 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* (Appendix B). In that announcement, in response to Recommendation 5, the Government tasked RET with consideration of the appropriateness of the arrangements for TGP publication and to report on its finding to the Government by September 2008.

RET received fourteen submissions, including those from motoring bodies, Australian and State Government bodies, Ministers and agencies, oil suppliers, supplier and reseller associations and an independent distributor chain. The Review was conducted in consultation with industry, the ACCC, Treasury and other stakeholders.

Under section 3(1) of the Oilcode, the ACCC has responsibility for enforcement of the code and prior to its introduction, and in the Oilcode's first year of operation, the ACCC undertook numerous education and compliance initiatives, including:

- meeting with industry stakeholders;
- developing and distributing Oilcode compliance materials;
- developing an Oilcode specific webpage;
- setting up an Oilcode information network; and
- mailing out relevant Oilcode information to all fuel retailers across Australia.

THE DOWNSTREAM PETROLEUM INDUSTRY

The retail petroleum industry underpins many facets of the Australian economy, making a direct contribution to the economic growth of fuel intensive industries such as agriculture, mining, construction and transport.

The recent rationalisation experienced by the retail networks is symptomatic of ongoing structural change in the industry over the past few decades. In 1970 there were over 20,000 retail petroleum sites around Australia, however, following the oil shocks of the 1970s and 1980s this number reduced to approximately 12,500 sites and has continued to decline to the current level of around 6,000 sites.

The structure of the industry was regulated by two interrelated, industry specific Acts, which supplemented the TPA: the *Petroleum Retail Marketing Sites Act 1980* (Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (Franchise Act). Whilst the TPA regulated the general competitive conduct of the industry, the Sites and the Franchise Acts were designed specifically to counteract the dominance of the petrol retail market by the refiner/marketers and to encourage small business entry into the industry under franchise arrangements.

As the structure of the market changed, with the entry of the supermarkets and importer/marketers, the refiner/marketers adopted more innovative responses to the marketing inefficiencies that the Acts placed on their business structures.

A key response was the implementation of multi-site franchising (MSF) arrangements. Under MSF arrangements, a single operator or company with a franchise arrangement with a refiner/marketer could control the operations of several sites. The most notable example of this in the Australian market was the 2003 divestment of Shell's core retail site network to a subsidiary of the Coles Myer retail corporation under a franchise arrangement.

In summary, the problem which faced the industry was that the previous downstream petroleum legislation had failed to keep pace with changes in market structure, for example the entry of the supermarkets. It imposed additional costs on the refiner/marketers and acted as a barrier to competition, provided significant benefits to franchisees but not commission agents, and prevented the industry from achieving increased efficiencies and responding to changing market forces.

In addition to failing to provide the means to meet their regulatory objectives, the Sites Act and the Franchise Act limited the ability of the refiner/marketers to compete vigorously. By restraining freedom of choice in the selection of appropriate business models, the Acts were a barrier to competition in the petrol retail market and imposed additional costs on the refiner/marketers, which were ultimately passed on to consumers.

With the introduction of the Oilcode, supermarkets became subject to retail petroleum industry specific regulation for the first time.

Supermarket Entry to the Australian Retail Petroleum Market

Woolworths, one of Australia's major supermarket chains, entered the retail petroleum market in 1996, as an independent with approximately 300 sites and sourcing fuel from Australia's largest independent petroleum importer, Trafigura. Customer loyalty was developed though the institution of discount shopper dockets linked to the purchase of groceries in Woolworths supermarkets.

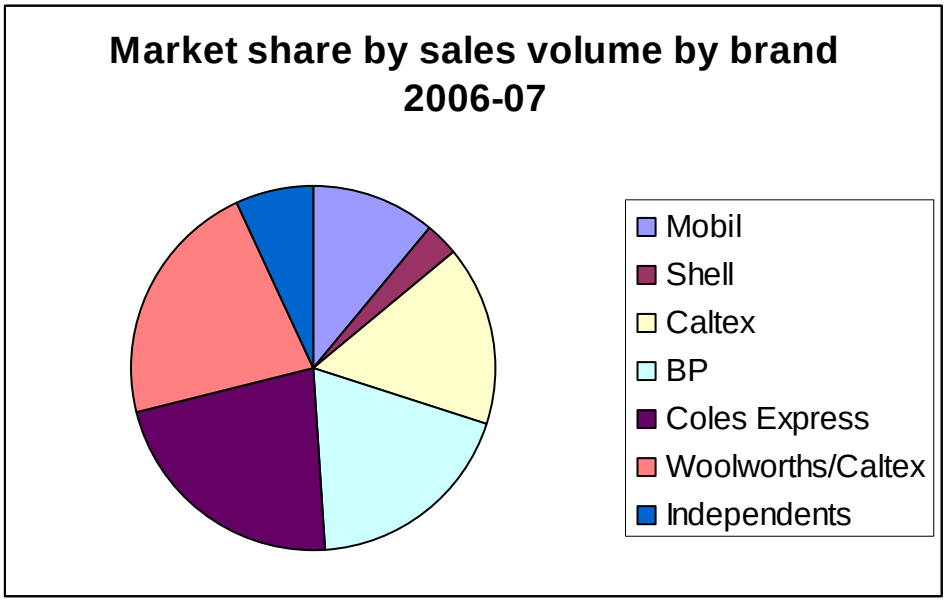
In 2003, the other major Australian grocery retailer, Coles Myer Ltd, established an alliance with Shell, based on a similar fuel discount arrangement. This alliance consisted of Coles assuming responsibility for operating Shell's core retail property network of around 580 service stations in Australia's largest multi-site franchise arrangement.

Woolworths and Caltex subsequently finalised an alliance, which added 120 Caltex retail sites to Woolworths' existing retail sites. Under this arrangement, Caltex supplies fuel to all Woolworths' retail sites, with fuel and grocery prices set by Woolworths Plus Petrol.

Since that time the supermarkets have opened further service stations and according to AIP figures currently operate an estimated 1127 sites nationally.

Market Share

In terms of retail market share, the 2007 ACCC petrol price report states that in 2006-07 the supermarket retailers, Woolworths/Caltex and Coles Express, were the market leaders with a 22% share each of retail sales by brand nationally, with refiner/marketers holding a combined 49% share and the independents holding a 7% share.



Source: Report of the ACCC Inquiry into the price of unleaded petrol, December 2007

Service Station Numbers by Type

There has been an ongoing process of rationalisation of retail sites in Australia. According to data provided by the Australian Institute of Petroleum (AIP), the total number of sites has fallen from 8,370 in 2000 to an estimated 5,743 sites in 2008, and this compared with an estimated 20,000 sites in 1970.

	2000	2004	2007	2008
AIP Member Company Branded Sites	7558	4887	4180	3832
Supermarket Sites	153	872	1116	1127
Sub Total	7711	5759	5296	4959
Independents (non-AIP member service stations)	659	608	740(a)	784
Total	8370	6367	6036	5743

Source: AIP, 2008. **Note:** AIP members are the four major refiner marketers, BP, Caltex, Mobil and Shell. (b) 2007 site data for independents is an interpolation from 2004 to 2008 data.

Business Structures in the Retail Petroleum Industry

As noted in the ACCC report, a number of different business models are utilised in the retail petroleum industry which can broadly be defined on the basis of ownership and wholesale supply arrangements as follows:

- refiner/marketer owned sites;
- refiner/marketer branded independents and distributor owned sites;
- supermarket operated sites; and
- independent operator sites selling their own brands.

Further, retail sites within these categories are operated in one of the following ways:

- Owner operated – the owner of the site is free to choose its wholesale supplier and determine its retail price. An independent operator may choose to align its site with the brand of fuel sold by a particular wholesaler, by receiving branding (signage identifying that site as sourcing its fuel from a particular wholesale supplier;
- Commission agent – an individual manages a site (owned by a refiner/marketer or independent chain) and compensation is generally in the form of a commission based on the quantity of product sold; and
- Franchise operated – an individual rents a site or a number of sites (generally which are owned by a refiner/marketer) and operates under a franchise agreement. At these sites, fuel is sourced from the owner of the site and branded accordingly.

The AIP provided further insight into the structure and operation of the various business models operating in the downstream petroleum industry, as per the box below.

Refiner/Marketer Networks

Sites where the refiner/marketer has a direct impact on fuel pricing decisions - for example sites owned or leased directly by a refiner/marketer and operated either by:

- Company staff – these are usually the high turnover sites such as those in the inner-metropolitan areas; or
- Commission agency – these sites are managed by an individual on behalf of the refiner/marketer and compensation is generally in the form of a commission based on quantity of products sold.

In summary: oil company operated sites (may be owned or leased) are characterised by: oil company supplies fuel to its own sites; retail prices set by oil company; and convenience store options.

Sites where the refiner/marketer does not have a direct impact on pricing decisions

- *Multi-site franchisees* (e.g. Coles Myer) who rent a number of refiner/marketer owned sites and operate them under one or many franchise agreements which legally allows them to determine their own prices;
- *Single-site franchisees* who rent a site owned by a refiner/marketer and operate it under a franchise agreement which legally allows them to determine their own prices;
- *Branded independent operators* who use their own site and equipment but are in a branding agreement with a refiner/marketer that generally also supplies fuel on contract to the operator. These independent operators often form a vital part of the refiner/marketers' network. They allow the refiner/marketers to maintain a presence in rural and regional areas without necessitating major infrastructure investment in areas that may otherwise be considered to be economically marginal;
- *Distributor-owned sites* that are run by a local fuel distributor, some of which are owned or part owned by the refiner/marketers and others which, like branded independent operators, use their own site and equipment and have a brand and supply agreement with a refiner/marketer. In rural and regional areas these sites also play a critical role in the refiner/marketers' network, allowing presence to be maintained within an economically viable framework.

In summary: Franchisee and Commission Agents (CA) are characterised by: full marketing programme support by supplying oil company; fuel supplies from franchisor; retail prices set by franchisee (unless acting as a CA for fuel); and convenience store options controlled by franchisee or CA

AIP Company Branded Independents are characterised by: may be operated by distributors or independent retailers (in some cases may be franchised by distributors or multi-site owners); are subject to branding agreement with fuel supplier; the agreement may or may not include marketing programme support; term fuel supplies; retail prices set by independent operator; and convenience store options controlled by owner/operator

Independent networks

Independent networks range from single sites that are owned and operated by a family through to the large multi-site chains owned and operated by importer/marketers.

- Independent chains (e.g. 7-Eleven, Liberty and Gull) that either import fuel or purchase fuel in bulk from local refiners to sell through their company owned sites. Sites are generally operated on a commission agency basis.
- Supermarket chain operated sites (e.g. Woolworths) that either import fuel or purchase fuel in bulk from local refiners to sell through their company owned sites. Sites are often operated on a commission agency basis.

In summary: these independent chains are characterised by term contract fuel supplies; retail prices set by supermarket; and convenience store operations controlled by supermarket.

- Independent operators who use their own site, equipment and brand name and purchase fuel on an ad hoc or contractual basis from local refiners or importers.

In summary: Non AIP company branded and other independents are characterised by: may be operated by distributors or independent retailers (in some cases may be franchised by distributors or multi-site owners); fuel may be obtained from more than one supplier; and retail prices set by independent operator.

CONTRACT TERMS – TENURE

Background and Policy Intent

The first stated objective of the Oilcode, based on the regulation's explanatory statement, is to "*establish standard contractual terms and conditions for wholesale supplier-fuel retailer reselling agreements for both franchise and commission agency arrangements.*"

The applicable part of the Oilcode dealing with contract terms and conditions is Division 3 - Conditions of fuel reselling agreement. The duration of tenure is dealt with in section 32 - Duration of Agreement. Prior to the introduction of the Oilcode, commission agents were not guaranteed any tenure, and could be removed from their premises without notice. Franchisees had variable tenure arrangements dependent on the fee paid and contractual terms and conditions agreed with the franchisor.

Tenure arrangements under the Oilcode now require fuel suppliers to extend a minimum level of tenure of at least five years (section 32(5)) to those resellers that pay at least $20,000 as an entrance fee or 'key money' (section 32(11)c). The Oilcode allows fuel suppliers to offer variable tenure to those resellers that pay less than $20,000 as an entrance fee but a minimum effective tenure period of 30 days applies unless a longer tenure period is agreed between the parties. A longer tenure period is usually attached to a higher fee being paid.

The Oilcode regulations also provide that the tenure of existing fuel reselling agreements that were in force, prior to the Oilcode, will be honoured but all new contractual conditions must comply with the minimum standards established under the Oilcode.

These minimum standard contractual terms and conditions contained in the Oilcode were designed to build upon and strengthen relevant provisions in both the *Petroleum Retail Marketing Franchise Sites Act 1980* (the Franchise Act) and the *Trade Practices (Industry Codes – Franchising) Regulation 1998* (the Franchising Code of Conduct). The repeal of the Sites Act and Franchise Act was designed to provide industry players flexibility to restructure within a dynamic, evolving industry.

The Explanatory Statement in support of the Oilcode stated that the final version of the Oilcode represents a compromise on behalf of industry stakeholders and will:

> *"establish minimum standards for petrol re-selling agreements between retailers and their suppliers to provide a baseline for negotiations, including strengthening of provisions (similar to those in the Franchise Act and the Franchising Code of Conduct) dealing with pre-disclosure, variation, agreed early surrender and expiry procedures to provide greater certainty and protection for parties."*

Key Issues

The Oilcode allows suppliers to offer a minimum level of tenure to those resellers that pay less than $20,000 as an entrance fee (section 32 of the Oilcode) with a minimum effective tenure period of 30 days applying unless a longer tenure period is agreed between the parties. Further, the Oilcode delivers security of tenure for five years to market participants; however, this security is linked to the payment of an upfront fee of at least $20,000.

Concerns raised in submissions about tenure arrangements were focused on whether the Oilcode's tenure arrangements provide a sufficient safety net of minimum terms and conditions for service station operators, particularly for small businesses operating in the industry. The main concern raised was with section 32(11)(c), which allows for a flexible duration of tenure if the up-front fee paid to the supplier is less

than $20,000. In some circumstances this can result in an effective 30 day rolling tenancy (which is the duration of notice required to be given in the event of a termination). Some submissions questioned whether it is fair and reasonable that fuel resellers should be subject to this type of condition on an ongoing basis under the Oilcode.

In particular, there was a broad view from reseller associations that there should be security of tenure for a minimum of five years with a five year renewal option, irrespective of whether an entrance fee is paid or not. Concerns were also raised that some resellers, whose long term reselling agreements have expired, are being effectively rolled over onto a series of short term arrangements.

The downstream petroleum industry, like many other industries, has significant variation in the contractual arrangements between the participants in the market. This is also the case for tenure provisions between franchise operators, commission agents and branded independents. Franchise operators and commission agents, who have paid a substantial entry fee, may enjoy multi-year tenure. At the other end of the spectrum, commission agents that have paid less than $20,000 to enter the business, have significantly less tenure and in some circumstances operate under an effective month to month tenancy.

RET Considerations

On the issue of the level of tenure for industry participants, RET believes the Oilcode, its explanatory statement and other material quite clearly indicate that the Oilcode was designed to provide a base level of standard terms and conditions for the industry and as such the Oilcode has met this objective.

The fact that commission agents now have a minimum level of tenure illustrates that Oilcode has provided a level of protection and certainty for those resellers. However, RET considers that the level of tenure should be underpinned by commercial decisions such as the level of fee paid, the commercial viability of the business and the relationship between the parties. Not all reseller arrangements are the same so the rules should dictate only a minimum level of conditions to facilitate flexibility in the industry.

Further, RET considers that the safety net of minimum conditions for both resellers and commission agents provided under the Oilcode appropriately balances the need to maintain flexibility for the industry to accommodate different business models with the need to provide appropriate protections for small businesses. Arrangements under the Oilcode provide a baseline for negotiations whilst enabling the industry to negotiate more suitable commercial terms and conditions if appropriate.

The variation in tenure offered is market driven and directly relates to the relative entry cost of the various resellers into the industry and the preference of wholesale suppliers in choosing an appropriate business model. As with any other investment decision, potential fuel resellers need to assess and balance the upfront fee with the relative return on investment and the business risks associated with security of tenure. Wholesale suppliers need to balance projected future returns against the cost and risks associated with various business models and site specific sales volumes with their relative competitive market position.

Submissions advocating multi-year tenure periods for all types of fuel retail operations do not consider the effect that this type of condition would have on the value of existing multi-year franchises, which have high entry costs attached to them. Prescribing multi-year tenure without the payment of an appropriate upfront fee is not the aim of the Oilcode and imposing such a condition may effectively devalue a fuel reseller franchise. On that basis, it is difficult to support any change to the tenure arrangements within the Oilcode as that would end the possibility of suppliers offering short term tenure when business conditions make this the preferred option.

The Oilcode is not a shield or sword for industry participants. It is a framework which endeavours to provide minimum standards and conditions, in order to provide a level playing field, so that commercial arrangements

can be negotiated within that framework and not be dictated by Government. Resellers and commission agents have certainty about the base level of terms and conditions in which they operate and protection from illegal behaviour under the Oilcode. RET considers that it is ultimately up to the parties contracting to determine for themselves whether the contract is one that provides them with protection and appropriate returns relative to the risks involved.

In relation to concerns that some resellers are being effectively rolled over on a series of short term arrangements, it needs to be recognised that the expiry of a long term reselling agreement does not obligate suppliers to offer another long-term agreement to their resellers. Within the Oilcode, options for dealing with such situations involve either formally terminating the relationship, entering a new agreement which may or may not involve multi-year tenure (depending on the up-front fee paid by the reseller) or entering into a temporary agreement, for a maximum of six months.

Temporary agreements under the Oilcode are covered by section 32(14) of the Oilcode, which explicitly states that:

> *(b) a site cannot be the subject of consecutive temporary agreements and on the expiry of the temporary agreement, the supplier must:*
> *(i) offer the retailer a fuel reselling agreement that has a duration complying with this section or*
> *(ii) comply with section 39*.

In the case where the parties enter into a temporary agreement under the Oilcode, it could legitimately be to buy extra time to resolve outstanding issues and determine the nature of any future agreement between the parties. There is no facility within the Oilcode to continually renew such temporary agreements, as is being claimed, unless the new agreement between the parties falls under section 32(11)(c), in which case, the terms of the new agreement do not include multi-year tenure.

Regarding assertions that some retailers may be operating under an effective 48 hour tenure, relating to the notice period required under their contract agreement in the event of a disagreement with their supplier, prima facie this type of contractual agreement does not appear to comply with the Oilcode. If evidence is available to support this circumstance, RET considers it should be referred to the ACCC, which has responsibility for enforcement of the Oilcode.

<u>Other issues concerning environment, terminating agreements if no reasonable profit is made and payments of a regular or continuing nature</u>

The suggestion by 7-Eleven that the Oilcode should be amended to allow for the termination of a fuel reselling agreement in circumstances "*where the environment of the site would be degraded if the business continued*" appears to be adequately covered by section 36(e) of the Oilcode.

Section 36(e) allows termination by a supplier in the circumstance in which the existing retailer:

> "*operates the fuel reselling business or an associated business conducted on the premises in a way that is fraudulent or that endangers public health, safety or the environment*".

Clearly, if environmental degradation is an issue, then the supplier would have recourse to remedy the situation or commence a process to move toward termination of the agreement and related tenure. This would be true whether the environmental degradation was contained within the site itself or beyond that.

As to the suggestion that not making a reasonable profit should become a condition of termination by the supplier, it would seem that mutual agreement to terminate could be negotiated under section 38 of the Oilcode, which allows a retailer and supplier to agree to terminate a fuel selling agreement before it expires.

Finally, Caltex requested clarification as to whether section 32(11)(c) which refers to 'payments of a regular or continuing nature' are included in the less than $20,000 up-front fee, RET notes that there was never an intention that payments of a regular or continuing nature should be counted towards the value of non-refundable key money. This intent is clearly spelled out in section 32(11)(c) (iii) and (iv) and the related note.

RET is ultimately not convinced that any changes to tenure provisions are warranted. As succinctly stated in the AIP's submission, the Oilcode has improved tenure arrangements for commission agents and clarified franchisees arrangements as it provides a minimum level of tenure, which is effectively 30 days.

CONTRACT TERMS – DISCLOSURE

Background and Policy Intent

The first stated objective of the Oilcode, based on the regulation's explanatory memorandum, is to "*establish standard contractual terms and conditions for wholesale supplier-fuel retailer reselling agreements for both franchise and commission agency arrangements"*.

The Oilcode requires suppliers to disclose adequate information to potential resellers to enable them to make informed business decisions with respect to entering and continuing to participate in the petroleum reselling business. These provisions are designed to promote industry certainty about the future and to remove restrictions on competition as adequate information empowers industry participants and promotes a competitive market.

Disclosure documents must be provided (section 19) at least 14 days before entering into, renewing or extending a fuel reseller agreement or paying non-refundable money to a supplier in connection with a proposed agreement. A cooling off period of seven days is allowed (section 24) after entering into a fuel reselling agreement or paying any money under the agreement.

Key Issues

Several submissions recommended an enhancement to disclosure provisions, primarily in relation to the provision of information on the history of disputes involving fuel suppliers. RET notes recent amendments to the Franchising Code of Conduct, which came into effect on 1 March 2008, have enhanced disclosure provisions in this area. These amendments include the requirement to disclose the history of the franchise site and details of past franchisees and were introduced to assist a prospective franchisee to obtain information regarding the viability of the franchise, practical issues in running the franchise business and the level of assistance provided by the franchisor.

While the Oilcode and Franchising Code of Conduct exist as separate industry codes, they often operate in parallel and have similar objectives. Therefore a comparison of the respective disclosure requirements of the two codes is useful. Section 14 of the Oilcode, dealing with the purpose of disclosure documents, explicitly states that disclosure documents are used to provide adequate information to help a retailer make a reasonably informed decision about the agreement and to give current information relevant to the operation of the business.

Further, the Oilcode provisions require disclosure of the number of fuel selling agreements in the past three years, which were: transferred; ceased to operate; terminated by supplier; terminated by reseller; not renewed; bought back by the supplier and terminated, then bought back by the supplier (Oilcode's Annexure 1). However, they do not require disclosure of the actual names and contact details of current or previous resellers (except for the previous operator of the specific site in question). In contrast, following the aforementioned amendments, the Franchising Code of Conduct requires disclosure of the name, address and contact details for past and existing franchisees.

RET Considerations

The Oilcode provides the framework for commercial operations to operate, whereas the specific terms and conditions for industry are commercial in nature and to be negotiated and agreed between parties. Those contracting give their approval and consent to those terms when they sign a contract. Greater disclosure

assists resellers to determine if the contractual arrangements will provide them with what they need. Both parties can then enter into those arrangements (or not) as informed as they choose to make themselves.

RET considers there is merit in applying the recent amendments to the Franchising Code of Conduct dealing with disclosure to the Oilcode as this information will assist resellers or potential resellers to make a more informed decision about the fuel reselling agreement. The requirement to disclose this information would allow potential new operators an opportunity to contact existing and previous resellers to discuss the nature of the fuel reselling agreement and their previous experience with the supplier.

This measure will give potential new resellers the opportunity to make their own investigations and to form judgements concerning the nature and business practices of the business partner they are considering contracting with. To limit administration costs, RET believes, similar to the Franchising Code of Conduct, if more than 50 resellers are involved, the supplier should be able to give only the names and contact details for those resellers in the state, region or metropolitan area in which the resellers agreement is to be operated.

The Oilcode also requires suppliers to provide substantial disclosure information in two forms, a Short Form, for reselling agreements of less than five years and a Long Form, for reselling agreements of at least five years (details in Appendix D). The Franchising Code of Conduct, which has similar requirements, has been amended to require that prospective franchisees that are given a Short-Form disclosure document may request the additional information that is included in the Long-Form disclosure document. Franchisors are now obliged to make this information available upon request whereas previously, there was no obligation to provide this information if it was reasonable to withhold the information. RET is attracted to adopting these provisions to the Oilcode.

The suggestion that suppliers should be required to disclose additional information about the supplier's history of disputes with resellers has also been considered. Potential resellers, it is claimed, should have access to information, if they choose to, concerning the history of disputes that a supplier has had with its resellers as this may be an important factor in the decision making process of the reseller when considering entering into a significant business relationship.

RET considers, however, that requiring that all formal disputes be disclosed could provide incentives for parties not to formally recognise disputes and therefore to attempt to avoid or delay resolving disputes between parties. Further, any requirement to disclose disputes could leave suppliers vulnerable to vexatious campaigns to discredit them in the marketplace. RET notes that, similar to the Franchising Code of Conduct, the Oilcode already requires suppliers to advise potential resellers of their litigation history and RET considers this, combined with the opportunity to check referees from previous resellers, will provide adequate disclosure of disputes.

RET further considers that, in the interests of transparency, suppliers should not attempt to induce a reseller or past reseller to make it a condition of their contract that their contact details are not disclosed, noting this is not currently a feature of the Franchising Code of Conduct.

RET notes that further amendments to the Franchising Code of Conduct's disclosure requirements have recently been recommended by the Parliamentary Joint Committee on Corporations and Financial Services (see Appendix I). Additionally, the Joint Committee recommends that a review of the efficacy of the 1 March 2008 amendments to disclosure provisions is conducted within the first two years of the requirements coming into effect. While the Government has not yet indicated whether it will move to amend the Franchising Code of Conduct, RET considers it will be important for future reviews of both codes to consider the desirability of harmonised disclosure requirements.

Recommendations

Contract Terms and Conditions - Disclosure

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.**

<u>Oilcode education and compliance material</u>

The ACCC has responsibility for Oilcode education and compliance activity and has developed a wealth of instructive material which describes the operation of the Oilcode. All participants in the fuel retailing industry across Australia were provided with this information at the commencement of the Oilcode. In the interests of continuing to promote information on rights and obligations to the fuel retailing industry, RET considers that prospective fuel resellers should also have access to this material.

On the basis that suppliers themselves are both best placed to keep up to date on the ACCC's education and compliance activities and to identify potential new resellers, RET considers that it should be the responsibility of suppliers to advise potential resellers that this material exists and where it can be sourced, no later than at the time of providing the mandatory disclosure documents. RET considers that this will impose no great compliance burden on suppliers as they are already required to provide disclosure material to prospective resellers.

Ultimately the greatest benefit in promoting transparency and raising awareness of the rights and obligations of all parties subject to the Oilcode comes from an increased level of understanding of how the Oilcode operates. RET believes resellers should be sufficiently armed to perform their appropriate due diligence, have access to all the educational material they need, and fully understand their rights, including the application of the cooling off period and what to expect from the contract.

The ACCC has undertaken considerable work to educate the industry on the Oilcode and it seems entirely reasonable for prospective resellers to be made aware of the available ACCC information. This requirement could be readily met by including reference to the ACCC website in the disclosure material provided to prospective resellers.

Recommendation

Contract Terms and Conditions - Disclosure

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.

TERMINAL GATE PRICING (TGP)

Background and Policy Intent

The second stated objective of the Oilcode is to *"introduce a nationally consistent approach to 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".*

The TGP is the published price at which an independent purchaser can expect to purchase fuel in road tanker loads of 35,000 litres, should they turn up at the terminal gate and wish to purchase a spot cargo, conditional on meeting environmental, financial, health and safety standards. The TGP operates effectively as a spot price for the wholesale fuel market as well as providing a baseline or reference point for price discovery for companies wishing to negotiate longer term contracts.

TGP arrangements for petroleum fuels were included in the Oilcode to provide an indication to the market of the spot wholesale price of declared petroleum products, thereby improving transparency in wholesale market pricing. In addition the TGP arrangements in the Oilcode are designed to improve access to fuel for any wholesale market participant. This provision ensures that independent fuel resellers (that is, those who do not have contractual relationships with fuel suppliers) would be able to access fuel at a known spot wholesale price.

Under the Oilcode's TGP arrangements, fuel is available on the condition (in section 11(1)) that a wholesale supplier must not 'unreasonably refuse' to supply declared petroleum products. Reasonable refusal to supply includes not having enough products to supply, inability of the reseller to pay, the reseller not meeting safety and health standards or not ordering the set minimum limit of supply.

Prior to the introduction of the Oilcode, Western Australia and Victoria had legislation covering TGP arrangements. In other states, major wholesalers voluntarily published TGP. While the ACCC's 2007 petrol price report found that spot TGP sales are relatively uncommon in the current market, it does note that for some suppliers, the TGP forms the basis for price formation for their wholesale sales. In particular BP and Shell's wholesale prices are set with direct reference to TGP.

Broadly, the formula elements used by suppliers to calculate TGP include:

> **Terminal Gate Price** = Import Parity Price (which comprises the Singapore benchmark price + quality premium + shipping costs + wharfage + insurance and loss) + wholesale margin + excise + GST.

The rationale for basing Australian domestic fuel prices on import parity is that imported fuel is both the theoretical and practical alternative to fuel refined in Australia, with Singapore recognised as the regional fuel refining and trading centre. Some variations exist between states and suppliers as to what constitutes various elements of the TGP including the Singapore benchmark price (ie five day or seven day rolling averages) and the related quality premiums.

Key issues and RET considerations

Submissions to the Review raised a number of key issues relating to TGP including:

- a nationally consistent TGP system;
- temperature correction of wholesale fuel;
- transparency in wholesale fuel price invoicing;
- specifying TGP elements and reporting those values (in confidence) to the regulator;
- publication of TGP discounts;
- the periods within which TGP can be changed;
- specifying terminals that report TGP; and
- expanding the coverage of TGP arrangements to include LPG.

The ACCC submitted that it had received a number of enquiries and complaints about TGP under the Oilcode. In the majority of cases, a breach of the Oilcode could not be substantiated but on two occasions, the claims were progressed to an initial investigation and then resolved. Reseller associations report that their smaller volume members do not have access to the same volume discounts that they believe are being achieved by the higher volume supermarket chains.

Conversely, the AIP and various suppliers considered that the current TGP arrangements under the Oilcode are appropriate and meet the objectives originally intended. While very few sales actually occur currently at the posted TGP, the Oilcode's TGP arrangements are accepted and supported by suppliers in that they are used as the effective basis for long term contract pricing.

The AIP has advised that the relatively low number of sales being made at the TGP is a reflection of the market being relatively short of product and the consequential desire for industry participants to enter into long term contractual arrangements in order to guarantee reliable supply. Hence, very few spot sales are actually occurring in the market.

The 2008 ACCC petrol price report undertook analysis to compare the daily wholesale prices and published TGPs for unleaded petrol prices in the five major metropolitan cities in 2007-08 and concluded that:

> *"Based on the analysis undertaken, published TGPs broadly followed actual average wholesale prices in 2007-08. This suggests that published TGPs may be, on average, a reasonable approximation of the actual price of unleaded petrol sold at the wholesale level."*[2]

RET considers that the TGP arrangements under the Oilcode provide a greater level of transparency on wholesale fuel pricing than had occurred previously and publishes a price at which spot sales can occur. Importantly, wholesale fuel supply options for independents have improved under the Oilcode by ensuring that stock is reasonably available to any reseller from any supplier on the basis that suppliers are obliged to offer product at TGP to independent resellers if stock is available (and other conditions are met).

Further, while the bulk of sales in the wholesale fuel market are not being made at the prevailing TGP, long term contracts are set in reference to the TGP (for example TGP plus or minus). This is similar to how many other commodity markets, particularly in the resources sector, operate.

[2] The ACCC noted that the analysis was (1) based on data provided by the four refiner-marketers and excludes published TGPs by other wholesalers; (2) the estimated average wholesale price is an unweighted average which may vary from a volume weighted average wholesale price; and (3) the actual wholesale price may include charges for services other than petrol.

National Consistency

At a broad level, a nationally consistent approach to TGP arrangements currently exists. The TGP arrangement under the Oilcode provides a model for TGP publication and applies nationally, which did not exist prior to the implementation of the Oilcode. The Oilcode specifies that suppliers must publish a TGP but does not specify its elements nor does it require that the TGP be used as the basis of actual wholesale fuel pricing. Detailed invoices for wholesale fuel sales are required, however, only for wholesale sales based on TGP or a price calculated in reference to the TGP.

Two jurisdictions, Victoria and Western Australia, have tighter TGP regimes which pre-date the Oilcode.

The Victorian TGP system is more prescriptive in that:

- it requires the TGP build-up elements to be specified;
- Declared Suppliers are required to publicly advertise their TGP for each of the Declared Products;
- contracts between suppliers and resellers are based on TGP (but may include additional discounts, rebates and charges);
- invoicing must include all pricing elements; and
- TGP cannot change more than once in 24 hours.

The Western Australian TGP system is perhaps the most prescriptive system in Australia in that it further requires:

- suppliers of a Defined Fuel at a Declared Terminal to notify the WA Prices Commissioner (for defined 24 hour periods) of their TGP;
- suppliers to advise their TGP components (in confidence);
- suppliers to report additional charges and spot prices (which cannot exceed the TGP);
- itemised invoices to be provided for all wholesale fuel sales; and
- the TGP is recognised as a maximum price and discounting is allowed.

Under all systems, the actual wholesale prices paid in the market are the result of negotiation between the parties. These negotiations may include discounts (for example for large volume purchases) or additional charges for services rendered (for example transport). Further details on the different TGP systems can be found at Appendix E.

To achieve absolute national consistency on TGP arrangements, it would be necessary for both Western Australia and Victoria to repeal their respective legislation, or for the Australian Government to enact changes to the Oilcode to reflect the Western Australian and Victorian TGP arrangements.

The matter of repealing respective legislation to ensure national consistency is a matter for the Western Australian and Victorian Governments. After considering the elements of the Western Australian and Victorian TGP systems, RET is not attracted to the option of enacting changes to the Oilcode so that it meets the more prescriptive requirements of either of these states' TGP systems.

The introduction of TGP arrangements on a national basis via the Oilcode has achieved a higher level of comparative price transparency at the wholesale level than existed previously. Independent resellers are now able to compare TGP across suppliers and wholesale facilities and this information is more widely available publicly.

The AIP publishes capital city and national average TGP online and in its weekly price bulletins. In its 2007 report on petrol prices, the ACCC noted that while the TGP is a spot price rarely used in practice, it is a wholesale price which is published regularly by wholesalers, and to that extent, is a useful indicator of

wholesale price movements. Further, the 2008 ACCC petrol price report concluded that published TGPs broadly followed actual average wholesale prices in 2007-08.

It should also be noted that the introduction of TGP arrangements to the downstream petroleum industry provides a far greater level of transparency than is available in most other industries, where there is little or no publicly available information on prices at the wholesale level.

On balance, RET considers that the Oilcode's TGP arrangements have improved transparency as they now regulate the publication of TGP for declared petroleum products in all states and provide a window into wholesale pricing that did not exist previously.

Temperature Corrected Wholesale Fuel Prices

Another issue raised in this Review is the temperature correction to 15 degrees centigrade (L15) of fuel and its accompanying documentation. The MTAA noted in its submission that certain oil companies, through their internal information technology (IT) systems, require resellers to enter volumetric information in ambient volume rather than at the temperature corrected volume. The MTAA recommends that L15 needs to be mandated under the Oilcode as the receipted volume across the supplier/reseller system.

Petroleum fuel, as with most physical materials, expands and contracts in response to temperature. Production of fuel through a refinery process involves heating crude oil and distilling its fractions, resulting in relatively warm fuel being produced. Increasingly, with the advent of just-in-time manufacturing processes, warm fuel is often delivered from refineries to bulk storage facilities. Wholesale fuel sales are typically made as a volume sale, which means that resellers can be subject to stock shrinkage if they purchase warm fuel and re-sell cold fuel after it has cooled down (and therefore contracted in volume). Subjecting wholesale fuel sales to L15 temperature correction approximates the temperature of fuel stored in those underground tanks.

The Oilcode regulations address the issue of temperature corrected fuels, specifically in regard to declared petroleum product sold at a posted TGP or at a price, as per section 7(2), that is the posted TGP minus a discount or plus an additional service. RET notes that the Oilcode clearly defines, at section 4, a declared petroleum product to be a variety of 'temperature corrected motor fuels'.

The Oilcode's intention is to regulate wholesale sales made at the posted TGP, or made at a price determined in reference to the posted TGP, on a temperature corrected basis. Further the Oilcode, at section 10(2), deals with the required documentation for such wholesale sales and states that those documents should be expressed in terms of temperature corrected volumes supplied. The Oilcode regulations do not, however, concern sales made separate from the posted TGP.

RET notes that all states and territories have legislation in place that requires all wholesale fuel sales from wholesale facilities, such as refineries and terminals, to be sold at L15, and these regulations are discussed in more detail at Appendix F. RET notes that supplying wholesale fuel at other than L15, outside of the exceptions contained within those regulations, would be contrary to the intention of legislation applying in the states and territories. Further, RET is advised by the National Measurement Institute (NMI) that amendments to the *National Measurement Regulations 1999*, scheduled to come into force from 1 July 2010, will include the temperature correction of fuel at the wholesale level.

RET understands that wholesale fuel suppliers have been complying with both the Oilcode requirements of supplying temperature corrected fuel sold at the posted TGP, or made in reference to the posted TGP, as well as the respective state and territory regulations. On this basis, RET considers this issue is already being appropriately regulated.

Specifying TGP elements and reporting the value of these elements (in confidence) to the regulator

Submissions from some retail associations concern the potential for below cost predatory pricing at the wholesale level. These submissions suggest that this could be addressed by adopting the Western Australian TGP system requiring all TGP components to be defined and individually quantified by suppliers and then disclosed to the regulator in confidence, with only the gross TGP being made available to the public.

The primary claimed benefits of adopting additional price reporting measures under the Oilcode is that it would provide the ACCC with greater access to wholesale information which could be utilised to assist the ACCC in monitoring compliance with the Oilcode and in its fuel monitoring role. However, this measure would also significantly increase the compliance burden on wholesale suppliers by introducing a new (potentially daily or even more frequently) reporting regime to the regulator.

Further, RET understands that the ACCC already has access to similar information through its new fuel price monitoring role conducted under the TPA. Since December 2007, the ACCC has monitored prices, costs and profits relating to the supply of unleaded petrol products. The information and data requirements for monitoring are extensive and cover all levels of the supply chain.

On this basis, RET considers that the introduction of this measure would not make additional information available to the regulator and would have no impact on the ability of the regulator to monitor competition in the sector. Rather it would have the sole impact of substantially increasing the compliance burden on business for no net gain.

Publication of fuel volume discounts and Weighted Average Prices (WAP)

Another measure proposed by reseller associations, with the purported potential to increase wholesale fuel market transparency, involves the publication of target sales volumes that attract defined discounts from the posted TGP. Some fuel resellers consider that a better understanding of the volumes they would need to purchase in order to attract a certain discount from suppliers could place them in a better negotiating position and facilitate their use of collective bargaining provisions.

RET notes that the contention that resellers are more competitive, when they can access deeper wholesale discounts from suppliers, is fundamentally a feature of a competitive market. Access to discounts based on the volume of goods purchased is a common feature present in most markets. Any limitation on the degree to which suppliers can discount their products would be inconsistent with encouraging competition in the market. This fundamental principle is reflected in a core element of the Oilcode's objective which was to '*establish TGP arrangements…, whilst not negating the ability of entities to negotiate individual supply agreements nor preventing the offering of discounts.'*

It is possible that, if suppliers were required to publish volume discounts, they would choose to publish "indicative" volume discount levels only, with the published discounts not reflecting the actual level of discounts available through commercial negotiation. This measure could be in danger of attracting the same criticism which has been made about TGP arrangements, namely that it does not reflect what is actually happening in the market.

Eliminating or artificially limiting wholesale discounts agreed through commercial negotiations would have significant potential to lead to reduced fuel discounting and the establishment of an effective wholesale floor price, which could effectively discourage competition and potentially increase fuel prices.

Fundamentally what reseller associations are seeking is publication of the actual level of long term contract prices for each supplier to each reseller and the ability to access these same prices despite the level of volume being supplied and other aspects of the commercial contractual relationship. RET upholds the principle that central to a competitive market is the ability to negotiate confidentially, particularly in relation to long term contracts. In virtually no other market is there an expectation that the long term contract price should be disclosed, nor that everyone should get the same wholesale price regardless of the quantity of product bought.

There is a further danger that requiring the publication of discounts may facilitate tacit price signalling in the market whereby rival suppliers could use suppliers' published TGP and discounts, coupled with estimates of volume sales, to ascertain the actual wholesale prices being charged in the market by their rivals. This measure could prove counter productive as suppliers may seek to decrease the overall level of discounts they offer to the levels of their rivals. On balance, RET considers that the Oilcode is not designed to limit competition which is potentially what limiting or removing discounting would do.

RET has also examined the issue of publication of historical WAP as is required by Western Australia. RET questions how useful the requirement to report WAP is, what additional impost it puts on industry, and specifically whether it may lead to tacit price signalling in the market place.

The publication of WAP could assist segments of the downstream industry to identify what other customers are paying in the market place. Industry players could conceivably calculate which customers buy at particular terminals and examine the WAP paid at those terminals to determine the discount available to different players in the market. Accordingly, RET is concerned that this practice could also have an anti-competitive effect.

Changing TGP within a period and specifying terminals that report TGP

A key difference between the Oilcode and the respective Western Australian and Victorian TGP arrangements is the limit to how many times a fuel supplier can change its TGP during a day. Victoria allows one change in a 24 hour period, while Western Australia requires that the TGP be set for a defined 24 hour period. Both the Western Australia and Victorian TGP systems, however, allow wholesale price variation within a given day since the TGP is set as a maximum price with discounts allowed.

The Oilcode does not prohibit suppliers from changing their TGP during the day as long as only one TGP applies at any one time. The policy rationale for a '24 hour rule' in the Western Australia context is to address concerns caused by intra-day price volatility.

RET considers that the wholesale sector of the market is well informed and aware of the prices that are available for fuel. As there are few sales actually transacted at the posted TGP, RET considers there is no compelling justification for introducing any restrictions on the amount of times the TGP can be altered under the Oilcode.

Expanding the coverage of TGP arrangements to Liquefied Petroleum Gas (LPG)

LPG is not included as a declared petroleum product under the Oilcode and on this basis, there is no requirement on fuel suppliers to post a TGP for LPG.

RET notes that the use of LPG as an automotive fuel is increasing, with LPG accounting for approximately 6% of all petroleum products sold in Australia in 2007-08 (excluding natural gas). The use of LPG in the automotive sector is being encouraged by the Government, both through its concessionary excise arrangements and the LPG Vehicle Scheme. Following a suggestion from the Victorian Minister for Consumer Affairs to consider including LPG in the Oilcode's TGP arrangements, RET investigated this option and consulted a number of LPG and downstream petroleum industry stakeholders.

RET is conscious that LPG has a variety of uses, including for automotive, domestic, commercial and household purposes, with a range of suppliers and stakeholders. Further, LPG has a variety of compositions, grades and product specifications for different markets which can differ to that of the LPG automotive market. Additionally, the distribution chain for wholesale LPG autogas differs from other downstream petroleum fuels and there are additional wholesale suppliers who would be need to be regulated under the Oilcode arrangements to effectively capture the wholesale supply of LPG autogas.

RET considers that the LPG market is a significantly different market to the downstream petroleum market in its character, composition and structure. Further, there is already sufficient transparency in the international price of LPG, which is provided by the international monthly Saudi Aramco Contract Price (SACP). SACP contract prices are posted for both propane and butane, and reflect prevailing spot market sales concluded for the relevant month. RET notes there is already some voluntary publication of TGP for LPG by at least one LPG Autogas supplier. For these reasons, RET does not support the proposal to expand the coverage of TGP arrangements to LPG at this time.

THE APPROPRIATENESS OF TERMINAL GATE PRICE (TGP) PUBLICATION

Background and Policy Intent

This Review was also tasked with specifically examining the appropriateness of the arrangements for TGP publication.

Key Issues

Section 9 of the Oilcode requires a wholesale supplier to 'make its TGP available to the public each day on an internet website maintained by or for the wholesale supplier'. Alternatives to posting the TGP on the web include providing the information via telephone or facsimile.

The TGP publication arrangements in the Oilcode essentially regulate an already occurring industry practice in Victoria and Western Australia.

Given the importance of transport fuel to the wider economy, RET notes that there is a higher transparency expectation which applies to the wholesale fuel market compared with other wholesale markets. Fuel is a high volume, low margin, largely homogenous commodity, with a market that is supplied by relatively few, highly technical suppliers, most of which are large multinational corporations. The impact of fuel costs on the economy is high: as a significant segment of consumers' budgets; as a direct transport cost for consumers and business users; and as an indirect cost contributing to the cost of many goods and services available in the economy.

However, there is already a considerable amount of information on wholesale fuel pricing available publicly as well as a high level of public commentary. TGP information is available on Australian fuel suppliers' websites, for example BP, Caltex, Coogee, ExxonMobil, Gull, Liberty, Neumann, Shell, and United. All these prices are useful for comparison purposes as they provide indicators of current wholesale prices for different competitors in the market and at different locations. The 2008 ACCC petrol price report concluded that published TGPs broadly followed actual average wholesale prices in 2007-08.

RET notes the important but incomplete concurrent work being undertaken by the Australian Government that may have an impact on the wholesale transport fuel market including:

- the ACCC's work to investigate 'buy-sell arrangements' (in particular if they are exclusionary and have the impact of substantially lessening competition);
- the ACCC's continuing consideration on the role of shopper dockets and the impact on competition in the retail market;
- the ACCC's review of the import parity pricing arrangements for petrol, diesel and automotive LPG. The focus of the review will be on the appropriateness of the international benchmark prices used in the petroleum industry;
- the Australian Government's broad work on significant amendments to the *Trade Practices Act 1974*; and
- RET's Petroleum Import Infrastructure Capacity Evaluation will include, among other things, a comprehensive examination of current and forecast supply and demand for imported petroleum products (crude oil, petrol, diesel, LPG and jet fuel), the capacity of Australia's existing and planned import infrastructure to meet Australia's expanding petroleum import requirements, and any current or potential barriers to competition or efficient investment.

RET Considerations

On the particular issue of assessing the overall appropriateness of TGP publication, RET has concluded that the Oilcode arrangements are appropriate. No changes are suggested or recommended as RET believes that the publication of the TGP contributes to industry, consumer and Government knowledge of the wholesale fuel market. The Oilcode's TGP arrangements provide access to fuel and greater transparency to the market than what was previously in place.

RET does not consider, after one year of operation, that a case can be made to change any of the TGP arrangements under the Oilcode. The TGP arrangements operate effectively in the market and the Oilcode is achieving its objective of improving transparency. Further, the TGP arrangements provide an important mechanism for spot sales of fuel and act as the base line or reference point for long term contractual negotiations.

COLLECTIVE BARGAINING

The role of independents in the downstream petroleum industry remains important as independent operators have a history of price discounting and are an important competitive force.

RET notes that the 2007 ACCC petrol price report found that the key determinants of the final negotiated wholesale fuel price are:

- the existence of a long term supply contract;
- the length of that contract;
- the volumes purchased;
- the relationship with the purchaser; and
- the relative negotiating strengths of the various parties.

Accordingly, RET strongly supports industry collective bargaining which could potentially enhance independents' efforts to negotiate the most competitive outcomes with suppliers. Recent collective bargaining provisions contained within the amendments to the TPA following the Dawson Committee Inquiry are designed to encourage the use of collective bargaining where it is likely to have a pro-competitive outcome, particularly where its use allows smaller businesses to aggregate their bargaining power.

Whilst collective bargaining is able to be authorised by the ACCC, the notification process generally provides for a more streamlined and cost effective process. Appendix G provides further information on this issue.

One option for resellers to enhance their bargaining position with suppliers is to better utilise these collective bargaining provisions. To lodge a collective bargaining notification the intended value of transactions between each member of the collective bargaining group and their common supplier in any 12 month period must not exceed $15 million for the petrol retailing sector.

Businesses can use information such as previous dealings or dealings in similar goods to assist them to determine whether they will meet the threshold. This restriction applies only to the Notification Process, which is intended to operate as a more streamlined and cost effective process for small businesses to obtain immunity under the TPA to collectively bargain, which lasts for 3 years.

Resellers can still collectively bargain and seek immunity under the ACCC's existing Authorisation Process for collective bargaining particularly where:

- immunity is sought for more than three years;
- the members exceed the $15 million threshold limit;
- immunity is sought for 'umbrella' type arrangements, for example, when immunity is sought by a single bargaining group for negotiations with a number of targets or when immunity is sought for arrangements covering several bargaining groups; or
- immunity is sought for future unidentified businesses, for example, when immunity is sought for members of an industry association, which may vary over time, rather than specifically identified businesses.

RET understands that since the introduction of these collective bargaining arrangements there have been no applications from the petroleum sector to use the industry specific provisions. Whilst there is no doubt a range of reasons for no applications being made, including the ability of the industry to collectively negotiate from a logistical perspective, RET considers further work is required to better understand and address the barriers to the use of the petroleum industry specific business to business collective bargaining arrangements under the TPA.

RET believes that there may be a role for relevant industry associations or independent cooperatives to assist independent resellers to negotiate the most competitive deal possible with suppliers in a collective bargaining context.

In order to enhance the ability of independent operators in the downstream petroleum market to negotiate the most competitive outcomes with suppliers, this Review recommends that 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.

Recommendation

Collective Bargaining

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.

DISPUTE RESOLUTION SCHEME

Background and Policy Intent

The third stated objective of the Oilcode is to *"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".*

Neither the Sites nor the Franchise Acts provided a dispute resolution mechanism specifically for petroleum retail industry participants. Oil industry resellers did, however, have access to the services of the Office of the Mediation Adviser (OMA) which was available under the Franchising Code of Conduct.

Access to that service put oil industry franchisees at an advantage over commission agents and independent operators who had contract and common law remedies as the only viable options available to them for addressing alleged abuses of market power, and other disputes, by the larger market participants.

As the cost of litigation was often beyond the means of most small businesses, many disputes remained unresolved or were not pursued. The establishment of a DRS under the Oilcode was aimed at providing a quicker, cheaper and shorter method for resolving disputes, particularly concerning the supply of a declared petroleum product. The DRS was intended to be an ongoing, cost-effective alternative dispute resolution mechanism, as an alternative to taking action in the courts.

There are two distinct types of dispute defined under the Oilcode, being:

- disputes about supply (section 43); and
- all other disputes (section 44).

Disputes under section 43 need to be handled in an expedient manner since non-resolution would threaten the ongoing viability of the reseller's business within a very short timeframe. Section 43 allows for a non-binding determination to be made by the DRA.

Disputes under section 44 cover a much wider variety of issues and involve getting the parties to agree on how to resolve disputes or alternatively agree to the appointment of a mediator. If the parties cannot agree to the appointment of a mediator, the DRA must then appoint a mediator (as per section 44(2)(b)). Ultimately, the DRA can comment on any advice given by the mediator and the parties and make a non-binding determination.

Since the commencement of the Oilcode in March 2007, the Oilcode DRA has received 30 dispute enquiries. In nine of those matters a mediator was appointed, with five matters completing mediation and four matters withdrawing their request prior to the date set for mediation. Of those five matters mediated, one matter proceeded from mediation to a non-binding determination and has now been satisfactorily resolved.

Key Issues

<u>Comparison between the Oilcode and the Franchising Code of Conduct Dispute Resolution Systems</u>

Given the nature and objectives of the Oilcode and the Franchising Code of Conduct are similar, a comparison between the dispute resolution mechanisms under each is instructive to this Review. Under the Franchising Code of Conduct's dispute resolution mechanism, either party to the Franchise Agreement can formally raise a dispute relating to a franchising agreement or the Franchising Code of Conduct. The complainant must first

advise the other party, in writing, of the nature of the dispute, what outcome the complainant wants, and what action the complainant thinks would settle the dispute.

This is different to the Oilcode in two ways. Under the Oilcode, there is no formal way for one party to advise another party that they believe that a dispute exists. The second difference is that the Franchising Code of Conduct allows formal disputes to address any issue relating to a franchising agreement.

The Oilcode, on the other hand, defines the range of issues that can be considered under the DRS as (section 40):

(a) a dispute arising if a wholesale supplier fails to supply a declared petroleum product to a customer;
(b) a dispute arising between the parties to a fuel reselling agreement; and
(c) a dispute arising in relation to any other provision of Part 2 (TGP and related arrangements) or Part 3 (Fuel Reselling business).

Under the Franchising Code of Conduct, the parties to a dispute, once notification is made, should try to agree on how to resolve the dispute. If the parties cannot agree within three weeks, either party can refer the matter to a mediator. If the parties cannot agree on a mediator, either party may ask the mediation adviser to appoint a mediator. Once this occurs, both parties must attend mediation and try to resolve the dispute. In contrast, under the Oilcode similar steps can only occur once both parties agree that a dispute has occurred.

Franchising Code of Conduct arrangements also state that a party is taken to attend the mediation if the party is represented by a person who has the authority to enter into an agreement to settle the dispute on behalf of the party. The Oilcode does not currently have such a provision. Similar to the Oilcode, the Franchising Code of Conduct encourages the parties to try to resolve and agree a mutually satisfactory resolution to the issue between the parties, both before and after (if necessary) an independent mediator becomes involved. If common ground can be found during mediation, the agreement between the parties can then become a legally binding contract.

In contrast, a dispute under the Oilcode, if not resolved by mediation, can progress to a non-binding determination (which is not legally enforceable). However, it is important to note that any action taken under Part 4 of the Oilcode does not affect the right of either party to take legal proceedings or formalise an agreement into a contract, which is legally binding, at a later time.

A key similarity found in the Oilcode and Franchising Code of Conduct dispute resolution mechanisms is that the rights of either party to the dispute to exercise their legal options under common law are not affected by the choice to attempt dispute resolution action. Under both the Oilcode and the Franchising Code of Conduct, both parties are equally liable for the costs of the mediation and the parties must pay for their own costs of attending the mediation. The Oilcode goes one step further in that, if mediation is not successful, the matter can be referred to the DRA for a non-binding determination.

RET Considerations

The submissions dealing with the DRA essentially focussed on three key areas including:

- the need for certainty as to what constitutes a dispute under the Oilcode;
- the expectations of, and on, the parties submitting to mediation; and
- issues around non-binding determinations.

Some fuel resellers would like to see more certainty in the DRA process, with defined, deliverable and enforceable outcomes while some suppliers are concerned that the DRS process is too broad, covering things that fall outside the legal agreements between the parties.

RET considers that there is a considerable difference between some expectations of the DRS and what it was intended and designed to deliver as an alternative dispute mechanism. RET notes that the DRS was never intended to be a replacement to legally enforceable court action. Rather, it was meant to be a cost-effective dispute resolution mechanism, which provides a real alternative to taking action in the courts. On this basis, it is not appropriate to impose binding outcomes, and doing so, may reduce the effectiveness of the dispute resolution process by discouraging participation in dispute resolution.

In essence RET agrees with the AIP submission that the objectives of the DRS have been met and the Scheme is working effectively. RET does, however, note the industry and DRA comments on the DRS and considers there is scope for some improvements.

The concerns raised that the DRS does not currently compel parties to attend mediation or to send sufficiently authorised representatives to mediation can serve to significantly undermine the effectiveness of the dispute resolution process. RET is aware of instances where it has been claimed that representatives attending mediation have not been appropriately authorised to agree to matters that would resolve the dispute, with the effect that the mediation process was interrupted and frustrated. Not sending an appropriately authorised delegate to deal with the dispute is time wasting and inefficient for all involved.

RET considers that the suggested changes raised by the DRA in respect to the DRS are sensible and should be broadly adopted. These suggestions, particularly to ensure that persons attending the mediation from both sides of the dispute have the authority to reach agreement and to clarify the procedures for the non-binding determination process and the factors which may be taken account of in this process, will provide greater clarity and certainty to the DRS process and address many of the concerns raised in the submissions.

Recommendation

Dispute Resolution Scheme

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:

<u>Section 44</u>

(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.

<u>Section 45</u>

(6) The dispute resolution adviser may make a non-binding determination about the dispute, and in doing so should ensure to 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.

RET considers that, in relation to non-binding determinations, the DRA should also work with parties to help them understand their options following a mediation where the DRA's non-binding determination is not acted upon by the other party.

Increasing information about the DRS

In terms of the evident misunderstandings about what the DRS was designed to deliver, one way of addressing this is to increase educational and promotional activities to highlight the purpose of the DRS and what the DRA can deliver. This will help to better manage expectations by ensuring parties have sufficient information to determine whether they wish to use the Scheme at all or alternatively wish to exercise their legal options to resolve disputes through the courts.

The key concern is that misunderstanding of the nature of the DRS and its limitations can result in unreasonable and ultimately, unfulfilled expectations. Reseller associations that have expressed dissatisfaction with the outcome of DRS processes seem to support this position, further demonstrating that there is a mismatch of expectations in the current process.

It was not the intent of the Oilcode that the DRS be a legalistic forum to strictly interpret legal contractual arrangements between parties, but rather, as noted previously, it is meant to be a low cost, alternative process for resolving disputes. RET supports the provision of additional educational material to improve industry's understanding of the mediation process.

Recommendation

Dispute Resolution Scheme

8. The ACCC and the DRA should develop enhanced information material concerning the nature and expected outcomes of DRS Non-Binding Determinations.

Recognising disputes under the Oilcode

Under the Franchising Code of Conduct, in order for a dispute to be mediated, (section 29(1)), 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.

This definition process results in the dispute being formally recognised by both parties which, in itself can assist in the resolution process. The parties, at this stage have an opportunity to resolve the dispute without going to mediation, with the Franchising Code of Conduct going on to state (section 29(2)) that the parties should then try to agree how to resolve the dispute.

The Oilcode does not currently have such a formal process of dispute recognition, resulting in the potential for a situation where one party believes that there is a dispute but the existence of a dispute is denied by the other party.

Adopting a formal dispute definition process consistent with the Franchising Code of Conduct would address this issue and enhance the effectiveness of the DRS. To ensure that this DRS mechanism is not used in a litigious or vexatious way, RET considers that the Oilcode DRA should also have the power to determine if a dispute is genuine.

In summary, RET considers that the process for dealing with matters of dispute between suppliers and resellers should be consistent with the Franchising Code of Conduct in that the parties should first try to resolve the matter informally. If that fails, then the dispute should be formally identified, with the details formally notified to the other party. The parties should then try to resolve the dispute as it is defined. If that is not practically achievable, they should agree on a mediator to assist them and if they cannot agree on which mediator to use, they should formally seek assistance through the DRS. At this point, the DRA will guide the parties through the formal mediation process and if necessary, proceed to a non-binding determination.

One potential benefit of introducing a formal notification process between the parties is that it may be one way to raise the profile of unresolved issues, perhaps to another level of management awareness. This, in addition to requiring that authorised persons attend mediation and non-binding determination processes should increase the effectiveness of the DRS.

Recommendation

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.

Non-binding determinations

Concerns were raised by a number of parties that there needs to be greater certainty about what factors the DRA, in making a non-binding determination, should take into account. As previously stated, RET supports the DRA's suggestions for change in this area.

Reseller concern was expressed over the lack of a requirement for parties to comply with mediated outcomes and non-binding determinations. One reseller association urged the consideration of arbitration powers, enforceable outcomes and criminal law penalties. RET does not support these proposals as the DRS was clearly designed to be an alternative dispute resolution mechanism and there are options already available for parties in dispute to seek enforceable outcomes through the courts.

For the same reason, RET does not support the proposal that another independent party be able to review a DRA non-binding determination if a party to that process is dissatisfied with the outcome. This would seem to introduce an additional mechanism for encouraging parties to simply extend the process and 'shop around' for their preferred result. Those dissatisfied with the outcome of the DRS process still have legal rights that they can exercise. Overall RET wishes to strengthen and bolster the DRS, rather than to limit particular aspects of the Scheme. Further, RET considers that a bolstered DRS, with greater certainty and clarity will better support industry fair play.

Continuation of DRS

Given the broad support for the Oilcode DRS, RET considers that the Scheme should continue. RET notes that there may be opportunities for the Government to amalgamate the procurement of dispute resolution services under the various industry codes. For instance, there are broad similarities between the dispute resolution mechanisms available to parties to a dispute under the Oilcode, Franchising Code of Conduct and Horticulture Code of Conduct and the same provider is currently providing dispute resolution services for all three Codes.

Thus, RET considers there is merit in examining whether there are any opportunities to amalgamate the procurement of dispute resolution services under the various industry codes.

Recommendation

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.

FUTURE REVIEW OF THE OILCODE

The normal period of review for Commonwealth regulations is five years.

However, RET considers that the Oilcode should be reviewed again in three years to determine if further changes are necessary following the Government's consideration of the Parliamentary Joint Committee on Corporations and Financial Services report on the Franchising Code of Conduct and the 2008 ACCC review of the Horticulture Code of Conduct.

Recommendation

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

APPENDIX A

ISSUES PAPER: TRADE PRACTICES (INDUSTRY CODES – OILCODE) REGULATIONS 2006 REVIEW

Section 3(2) of the Oilcode requires the Australian Government to conduct a review of the Oilcode after it has been in operation for 12 months. The review will be conducted by the Department of Resources, Energy and Tourism (RET). Accordingly this paper identifies a number of key areas of the Oilcode that RET seeks information and comment on.

Background

On 1 March 2007, the Australian Government implemented the Downstream Petroleum Reform Package which provides a uniform regulatory environment for downstream petroleum industry participants through the introduction of a mandatory industry code, the *Trade Practices (Industry Codes – Oilcode) Regulations 2006* (the Oilcode). The Oilcode operates under section 51AE of the *Trade Practices Act (1974).*
On 1 March 2007, the *Petroleum Retail Legislation Repeal Act (2006)* (the Repeal Act) commenced. Schedule 1 of the Repeal Act triggered the commencement of the Oilcode regulations and the repeal of the *Petroleum Retail Marketing Franchise Act (1980)* and *Petroleum Retail Marketing Sites Act (1980)*.

The Oilcode applies to all downstream petroleum industry participants and was designed to remove restrictions on competition, promote industry certainty about the future, promote cultural change and improve sustainability. This was intended to create 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. The review will focus on whether the Oilcode has successfully achieved its objectives to:

- establish standard contractual terms and conditions for wholesale supplier-fuel retailer reselling 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.

The Review Process

On Monday 3 March 2008, RET will commence the review into the Oilcode and it will be conducted in conjunction with industry, the Australian Competition and Consumer Commission (ACCC), Treasury and other key stakeholders. RET notes the recent ACCC report into petrol pricing, *Petrol prices and Australian consumers*, contained a recommendation that RET examine the appropriateness of the TGP arrangements as part of this review process.

Once the review is complete, a report will be submitted to the Minister for Resources, Energy and Tourism for consideration.

Consultation Process

RET is seeking the views of interested parties through written submissions, which will be called for during March 2008. Interested parties will be invited to provide submissions to the review via a public media advertisement in early March 2008. There will be four week period for submissions to be received. RET may seek to clarify issues raised in submissions and accordingly may approach stakeholders and interested parties to discuss these issues further. If required, these consultations will take place after the closing date for submissions.

Written submissions

Interested parties are invited to provide submissions to RET in relation to the issues raised in this paper, or any other issues that they consider relevant to the inquiry.

Submissions should be made to RET by no later than Friday 4 April 2008.

As this is a public review, RET intends to publish received submissions online to foster an informed, robust and consultative discussion. Accordingly, in the first instance, submissions will be considered public and be made publicly available. However, in the interest of encouraging submissions from all interested parties, RET will accept confidential submissions. Any information which parties would like to have treated confidentially should be clearly marked "confidential".

RET will accept submissions by email, fax or post. Submissions should be addressed to:

Manager

Petroleum Refining and Retail Section

Department of Resources, Energy and Tourism

GPO Box 1564

Canberra ACT 2601

By email: oilcodereview@ret.gov.au

By fax: (02) 6290 8003

Enquiries may be directed to the Manager, Petroleum Refining and Retail Section, on (02) 6213 7847, by email to oilcodereview@ret.gov.au or fax (02) 6290 8003.

Issues on which RET is seeking comment

RET has identified a number of issues on which it is seeking information and comment. These have been grouped under the three main objectives of the Oilcode.

The issues on which RET is seeking comment are varied. It is not expected that all interested parties will address all of the issues raised, rather that interested parties will address the issues which relate to their business operations or area of interest.

In addition, RET does not consider the issues below exhaustive and would welcome any further information or comment on issues that may not have been identified below but which could be considered relevant to the review. Where possible, all comments should be backed with supporting evidence and data.

1. **Oilcode Objective One:**

To establish standard contractual terms and conditions for wholesale supplier-fuel retailer reselling agreements for both franchise and commission agency arrangements

To the extent that you are able to do so, RET would appreciate receiving information in response to the following questions.

(i) *Has the Oilcode met its objectives to establish standard contractual terms and conditions for both franchise and commission agents arrangements? If not please provide supporting information and evidence.*
(ii) *Have these standard terms and conditions been utilised by industry participants?*
(iii) *How might these standard contractual terms and conditions be improved? Please provide justification and supporting information and evidence for any suggestions for change?*
(iv) *Do you have any concerns/issues regarding the relationship between the Oilcode and the Franchising Code of Conduct?*

2. **Oilcode Objective Two:**

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

To the extent that you are able to do so, RET would appreciate receiving information in response to the following questions.

(i) *Has this objective been met?*
(ii) *How are TGP arrangements working in the industry?*
(iii) *Do you consider the TGP arrangements under the Oilcode satisfactory?*
(iv) *Do you believe there is sufficient transparency and equality with the TGP provisions?*
(v) *Do you believe the TGP arrangements have led to improved transparency in wholesale pricing?*
(vi) *Do you have any concerns regarding the TGP arrangements?*
(vii) *Are there any changes you would like to see made to the TGP provisions in the Oilcode?*
(viii) *If these changes were made, how do you envisage that they would improve the market for downstream petroleum products?*

3. **Oilcode Objective Three:**

To 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

To the extent that you are able to do so, RET would appreciate receiving information in response to the following questions.

(i) *Are you aware of the DRS/DRA?*
(ii) *Have you used, or would you consider using, the services of the DRS/DRA?*
(iii) *Do you believe that it is an effective and low cost mechanism to resolve disputes?*

(iv) *If you have utilised the services of the dispute resolution adviser what was your opinion regarding the level of service provided by the DRS/DRA?*

(v) *Do you have any comments regarding any aspects of the DRS/DRA?*

4. Other

To the extent that you are able to do so, RET would appreciate receiving information in response to the following questions.

(i) *What has been the impact to date of the introduction of the Oilcode on the downstream petroleum industry?*

(ii) *Do you consider that the Oilcode has been an effective mechanism to facilitate greater competition in the downstream petroleum industry?*

(iii) *Are there any other issues or relevant facts that should be considered in the context of this review? If so, please outline them.*

APPENDIX B

GOVERNMENT RESPONSE TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) PRICE INQUIRY

Petrol prices and Australian consumers: report of the ACCC inquiry into the price of unleaded petrol

The ACCC released its report, 'Petrol Prices and Australian Consumers: Report of the ACCC inquiry into the price of unleaded petrol' (the ACCC report), on 18 December 2007. The ACCC report concluded that there is 'no obvious evidence of price fixing or collusion between the major participants in the industry' and that the 'fundamental pricing of petrol is dictated by international factors'.

The ACCC made recommendations in its report relating to reducing impediments to competition in the wholesale petrol market, as well as other minor recommendations relating to terminal gate pricing and an amendment to section 45 of the *Trade Practices Act 1974* (TPA).

The ACCC report concluded that there was an imbalance in pricing transparency between buyers and sellers of petrol in Australia and identified three options for addressing the retail petrol price information imbalance. The ACCC also raised an issue about the role of petrol shopper docket arrangements in the retail sector.

Government response to recommendations and issues raised by the ACCC
Recommendation 1 The Government **supports** the ACCC's recommendation for a more detailed examination and ongoing monitoring of 'buy-sell' agreements to assess fully whether they are exclusionary in nature or have the purpose or effect of substantially lessening competition. The ACCC will form a view on the competition effects of the buy-sell arrangements by the middle of 2008.
Recommendation 2 The Government **notes** the ACCC's recommendation and considers that Australia's fuel standards are already appropriately aligned to the international standards, when taking into account environmental and other objectives and moves in recent years by Asian countries to adopt more stringent standards. Therefore, Australia's fuel standards require no adjustment.
Recommendation 3 The Government **supports** the ACCC's recommendation that a comprehensive audit of terminals suitable for importing refined petrol in Australia be conducted. The Department of Resources, Energy and Tourism will manage the audit, in consultation with the ACCC and the Department of the Treasury, and report to the Government by the end of 2008.
Recommendation 4 The Government **notes** the ACCC's recommendation and will determine the need for ongoing monitoring of the use, leasing and sharing of terminals pending the outcome of the terminal audit.
Recommendation 5 The Government **supports** the ACCC's recommendation that the appropriateness of the arrangements for terminal gate price publication be reviewed as part of the scheduled review of the Oilcode by the Department of Resources, Energy and Tourism and the ACCC. A report outlining the outcomes of the Review will be provided to the Government by September 2008.

Recommendation 6 The Government **notes** the ACCC's recommendation that section 45 of the TPA should be amended to clarify the meaning of the term 'understanding'. The Government will examine the need to amend section 45 in light of the operation of significant amendments to the TPA currently underway.
Issue: Options to improve retail price transparency The Government is committed to addressing the retail price transparency imbalance and eliminating consumers' angst caused by intra-day price volatility. Of the three options outlined in the ACCC report, the Government considers that only FuelWatch will meet the Government's commitment to address the information imbalance and eliminate intra-day price volatility. The Government will therefore introduce a national FuelWatch scheme by 15 December 2008.
Issue: The role of shopper dockets in the retail sector The Government notes that the ACCC will continue to consider developments in petrol shopper docket arrangements, including any changes in the extent of the impact of shopper docket arrangements on competition in the petrol market.

APPENDIX C

SUBMISSIONS LODGED TO THE OILCODE REVIEW

Australian Competition and Consumer Commission (ACCC)

- Australian Convenience and Petroleum Marketers Association (ACAPMA)
- Australian Institute of Petroleum (AIP)
- Caltex Australia
- Dispute Resolution Adviser (DRA)
- Minister for Consumer Affairs - Government of Victoria
- Mobil Oil Australia
- Motor Trades Association of Australia (MTAA)
- Motor Trades Association of Queensland (MTAQ)
- 7-Eleven Stores
- Service Station Association (SSA)
- Shell Company of Australia
- Victorian Automobile Chamber of Commerce (VACC)
- Western Australian Government Department of Consumer and Employment Protection (WA-DoCEP)

APPENDIX D

OILCODE DISCLOSURE DOCUMENT ITEMS

The Oilcode currently requires suppliers to provide substantial disclosure information in two forms. The Long Form disclosure documents (Oilcode Annexure 1) is for reselling agreements of at least five years. The Short Form disclosure documents (Oilcode Annexure 2) is for reselling agreements of less than five years.

Information for including in Short Form Disclosure Document

- Document Title
- Supplier details
- Details of current and immediate past (3 years) litigation proceedings
- Details of serious past convictions of suppliers or a director
- Intellectual property
- Territory
- Marketing and other cooperative funds
- Payments
- Supplier's obligations
- Retailer's obligations
- Pricing policy
- Motor fuel delivery and payment
- Business plan
- Supplier propriety fuel card
- Variation
- Statements
- Financial details
- Receipt

Additional information for Long Form Disclosure Document

- Business experience
- Payments to agents
- Existing and immediate past (3 years) fuel reselling agreements
- Supply of goods and services to a retailer
- Supply of goods and services by a retailer
- Sites
- Financing
- Summary of other conditions of the agreement
- Obligations to sign related documents,
- Earnings information
- Updates
- Other relevant document disclosure information

APPENDIX E

COMPARISON OF OILCODE TGP WITH VICTORIAN TGP AND WESTERN AUSTRALIAN TGP – INCLUDES EXTRACT OF RELEVANT OILCODE SECTION ON TGP

Oilcode TGP (refer Part 2, Sections 7-12 of the Oilcode)

The Oilcode specifies that a wholesale supplier must make an offer to a customer otherwise than under a term contract, to supply fuel at the terminal gate price or at a price based on the terminal gate price less any discount plus an additional amount for any additional services. On each day, suppliers must identify the terminal gate price it charges for the wholesale sale of each declared petroleum product, based on a temperature corrected volume.

Changes to the terminal gate price are allowed throughout the day, although only one terminal gate price per declared product can apply at any given time. Suppliers are required to make their terminal gate price available to the public each day on an internet site maintained by the supplier. The Oilcode is not prescriptive on how the terminal gate price is calculated, what pricing elements are to be included in the calculation, or how often the terminal gate price can change. Unlike the Victorian and Western Australian arrangements, the Oilcode does not require that suppliers base their actual wholesale prices or supply contracts on terminal gate price.

Part 2 Terminal gate price and related arrangements
Division 1 Preliminary

7 Terminal gate price arrangements

(1) A wholesale supplier must not include in a posted TGP any amount imposed for or in relation to an additional service.

(2) However, a wholesale supplier:

(a) may charge the posted TGP minus an amount subtracted as a discount; and

(b) may provide an additional service, and may charge the posted TGP plus an additional amount added for, or in relation to, that service.

Note The wholesale supplier is required to identify charges for additional services separately from the posted TGP in its sales documents: see section 10.

(3) A wholesale supplier that offers a term contract for the purchase of a declared petroleum product must give the customer the option of entering into a term contract to purchase the declared petroleum product at:

(a) the posted TGP price; or

(b) a price calculated in accordance with subsection (2).

(4) If:

(a) a customer purchases a declared petroleum product from a wholesale supplier under a term contract in force at the commencement of this code; and

(b) the customer asks the wholesale supplier to make the customer an offer to purchase the declared petroleum product at:

(i) the posted TGP price; or

(ii) a price calculated in accordance with subsection (2); and

(c) the making of the offer would not disadvantage the wholesale supplier;

the wholesale supplier must make the offer.

(5) For subsection (4):

(a) a customer may make only 1 request under the subsection; and

(b) the request must be made within 60 days after the commencement of this code.

(6) If a customer seeks to purchase a declared petroleum product from a wholesale supplier otherwise than under a term contract, the wholesale supplier must make the customer an offer to purchase the declared petroleum product at:

(a) the posted TGP price; or

(b) a price calculated in accordance with subsection (2).

Division 2 Terminal gate price for declared petroleum products

8 Setting terminal gate price

(1) Subject to subsection (2), a wholesale supplier must, on each day, identify the terminal gate price it charges on that day for the wholesale sale of each declared petroleum product.

Note The wholesale supplier is required to identify charges for additional services separately from the posted TGP in its sales documents: see section 10.

(2) A wholesale supplier is not required to identify the terminal gate price it charges on a day for the wholesale sale of a declared petroleum product if a related body corporate that is also a wholesale supplier at the same wholesale facility has identified the terminal gate price it charges on that day for the wholesale sale of the declared petroleum product.

(3) A terminal gate price must be expressed in cents per temperature corrected litre for each declared petroleum product.

(4) A wholesale supplier may identify more than 1 terminal gate price on a day, but only in a way that makes it clear that:

(a) only 1 price is in effect at any time; and

(b) a price supersedes all other prices previously identified on that day.

9 Disclosing terminal gate price

(1) A wholesale supplier must make its terminal gate prices available to the public each day on an Internet website maintained by or for the wholesale supplier.

(2) However, if the wholesale supplier can not make its terminal gate prices available to the public each day on an Internet website, the wholesale supplier must make its terminal gate prices available by a telephone or facsimile service operated by or for the wholesale supplier.

(3) A terminal gate price becomes a ***posted TGP*** when it is first made available in accordance with subsection (1) or (2).

(4) A posted TGP remains in force in relation to a declared petroleum product until it is replaced by another posted TGP.

10 Selling declared petroleum products — documentation

(1) This section applies to a sale only if the price is based on:

(a) the posted TGP; or

(b) a price calculated in accordance with subsection 7 (2).

(2) A wholesale supplier of a declared petroleum product that sells the declared petroleum product to a customer must provide to the customer, at the time of delivery, a document that acknowledges the sale of the declared petroleum product and includes at least the following information:

(a) the kind of declared petroleum product supplied;

(b) the volume of declared petroleum product supplied, worked out on a temperature corrected basis;

(c) the total price charged per litre for the sale of the declared petroleum product, worked out on a temperature corrected basis;

(d) the posted TGP applicable at the time of the transaction.

(3) A wholesale supplier is not required to include the information mentioned in paragraphs (2) (c) and (d) if, at the time of the sale, the customer has access to all of the information mentioned in the paragraphs from a telephone facility, a fax facility, or an Internet website, operated by or for the wholesale supplier.

(4) The wholesale supplier must also provide to the customer, within 30 days after delivery, a document that acknowledges the sale of the declared petroleum product and includes at least the following information:

(a) the wholesale supplier's name;

(b) the customer's name;

(c) the date of the transaction;

(d) the kind of declared petroleum product supplied;

(e) the volume of declared petroleum product supplied, worked out on a temperature corrected basis;

(f) the posted TGP applicable at the time of the transaction;

(g) the total price charged for the sale of the declared petroleum product, worked out on a temperature corrected basis;

(h) if the customer has requested additional services with the supply of the declared petroleum product:

(i) a description of each service; and

(ii) the price charged for each service;

(i) if the wholesale supplier gives a discount as part of the supply of the declared petroleum product:

(i) the amount of the discount; and

(ii) the way in which the discount was applied.

Note A document mentioned in subsection (2) or (4) may include other information.

Division 3 Supply of declared petroleum products

11 Supplying declared petroleum products

(1) A wholesale supplier of a declared petroleum product must not unreasonably refuse to supply the declared petroleum product by wholesale to a customer.

(2) However, the wholesale supplier is not required to supply the declared petroleum product to a customer if the wholesale supplier:

(a) does not have sufficient supplies of the declared petroleum product that it can reasonably provide to meet the customer's requirements; or

(b) reasonably believes that the customer is unable to pay for the supply; or

(c) reasonably believes that the customer is unable to receive or transport the declared petroleum product in compliance with all occupational, health and safety requirements applicable to the customer and the declared petroleum product.

Note Paragraph 11 (2) (a) does not require a wholesale supplier to supply a declared petroleum product to a customer as a spot sale if the supplier only has sufficient supplies to meet the requirements of its contract customers. The wholesale supplier's refusal to supply the declared petroleum product, because it would breach the contracts with the contract customers, would be a reasonable refusal to supply.

(3) If a wholesale supplier advertises a minimum amount of declared petroleum product that the supplier will supply as a spot sale, the wholesale supplier is not required to accept a request for the supply of an amount of the declared petroleum product that is less than the minimum amount.

12 Health and safety requirements

(1) A wholesale supplier must ensure that:

(a) each road vehicle that is used by the wholesale supplier, or an agent of or a contractor to the wholesale supplier, to transport a declared petroleum product is:

(i) suitable to load the declared petroleum product at the wholesale supplier's facilities; and

(ii) able to transport safely the declared petroleum product; and

(b) each vehicle that is used by the wholesale supplier, or an agent of or contractor to the wholesale supplier, to transport a declared petroleum product is clearly marked as suitable to load, and able to carry, the declared petroleum product; and

(c) each driver of a vehicle that is used by the wholesale supplier, or an agent of or contractor to the wholesale supplier, to transport a declared petroleum product carries evidence that the driver is competent to operate the vehicle.

Note Arrangements for testing the vehicle, and assessing drivers, may be required under law.

(2) A customer to which this code relates must ensure that:

(a) each vehicle under its control that is used to transport a declared petroleum product is:

(i) suitable to load the declared petroleum product at the supplier's facilities; and

(ii) able to transport safely the declared petroleum product; and

(b) each vehicle under its control that is used to transport a declared petroleum product is clearly marked as suitable to load, and able to carry, the declared petroleum product; and

(c) each driver of a vehicle under its control that is used to transport a declared petroleum product carries evidence that the driver is competent to operate the vehicle.

Note Arrangements for testing the vehicle, and assessing drivers, may be required under law.

Victorian TGP

In Victoria, the *Petroleum Products (Terminal Gate Pricing) Act 2000* (Victorian TGP ACT) places obligations on Declared Suppliers of Declared Fuels. The Declared Suppliers are the oil majors, being BP, Caltex, Mobil and Shell as well as the independent terminal operators. Declared Fuels are leaded petrol, lead replacement petrol, regular unleaded petrol, premium unleaded petrol and diesel.

The *Petroleum Products (Terminal Gate Pricing) Regulations 2001* prescribe the manner in which terminal gate prices are published, fuel shortages are notified, records are kept and the inspection arrangements. A Declared Supplier must set a terminal gate price for each Declared Fuel using the prescribed formula, being:

Terminal Gate Price = Landed International Product Price (LIPP) + excise and other taxes + a reasonable terminal margin + GST, where

LIPP = Platts Singapore Products Assessment Spot Price (PSPASP) + freight + insurance + wharfage

Declared Suppliers must publicly advertise a terminal gate price for each Declared Fuel on their web site at each time that it is set or varied and may not change a terminal gate price more than once every 24 hours. Contracts between Declared Suppliers and resellers must be based on the terminal gate price and may include an allowance for discounts or rebates and charges for any of the specified optional services. Invoices for the sale of a load of Declared Fuel must specify terminal gate price plus the price of any optional services that relate to the load, less discounts or rebates.

Declared Suppliers must make their optional services charges and any return on investment in leased sites available on request to resellers and leaseholders respectively. Declared Suppliers must provide access to Declared Fuels from the terminal at the terminal gate price and may only refuse to supply fuel in prescribed circumstances.

The Victorian TGP Act also requires Declared Suppliers to

- notify Consumer Affairs Victoria (CAV) in writing when a shortage arises in the supply of fuel;
- keep certain records available for inspection including published terminal gate prices. Any written refusals to supply fuel, invoices and details of information included in invoices; and
- convert contracts entered into or renewed on or after 1 November 2000 to a terminal gate price basis.

The Victoria TGP Act imposes penalties for breaches by Declared Suppliers of between $500,000 and $1 million.

Western Australian TGP (WA-TGP)

WA-TGP is defined by two orders under the Petroleum Products Pricing Act 1983, being the 1) *Maximum Terminal Gate Price Order 2002* and 2) *Declared Terminals Order 2002*. The WA-TGP system requires that operators of Declared Terminals must display price boards, must provide itemised invoices, must notify the WA Prices Commissioner of their terminal gate price, terminal gate price components, additional charges and spot prices for defined fuels sold directly from a terminal and must supply fuel at or below the terminal gate price to eligible resellers.

Declared Terminals include those operated by the major oil companies; BP, Caltex, Mobil and Shell in metropolitan and regional areas as well as the Gull Petroleum terminal at Kwinana. Defined fuels include unleaded petrol, premium unleaded petrol, lead replacement petrol and diesel. Declared Terminals must clearly display price boards which include terminal gate price, the previous month's Weighted Average Price (WAP) and an optional Spot Price.

The WAP is the previous month volume weighted average price for each product. The Spot Price is an optional price that suppliers can offer, the only condition being that the spot price cannot be higher than the terminal gate price. The WA- terminal gate price is based on a formula including:

- Allowances for the landed cost of the product (based on import parity pricing principles);
- Freight to the relevant terminal;
- An allowance for production to meet WA clean fuel specification;
- Wharfage and insurance costs;
- A margin for the cost of operating the terminal; and
- Taxes such as GST and excise.

Notably, only the maximum terminal gate price is set on a 24 hour basis, with wholesale sales based on prices lower than the terminal gate price allowed.

This is a significant divergence from the rules around the retail side of the WA FuelWatch system. Suppliers are allowed to charge purchasers for any additional services provided on top of the terminal gate price, including 'post terminal gate' services such as delivery, branding and credit facilities. Any extra charges need to be itemised on invoices where the product is sold from a Declared Terminal.

Suppliers must notify the WA Prices Commissioner of the next day's terminal gate price by 2pm on any given day, which is the maximum price at which wholesale petroleum products can be sold from 8:30am the next day for a period of 24 hours. This information is published on the WA FuelWatch website. Suppliers must notify the WA Prices Commissioner (in confidence) of the value of each of the various elements that make up their terminal gate price. This mechanism allows the WA Prices Commissioner to monitor the various terminal gate prices against internal benchmarks to ensure that they are competitive.

APPENDIX F

APPLYING TEMPERATURE CORRECTION TO ALL WHOLESALE FUEL SALES

The issue of temperature correction has been around the downstream petroleum industry for a number of years, with Senator Minchin, the then Minister for Industry, Science and Resources, replying to a Question Without Notice on 20th June 2001, as follows:

> *"The issue of temperature correction of fuel is principally a matter for State and Territory Governments and will be discussed by Ministers at the next meeting of the Ministerial Council of Consumer Affairs on 13 July 2001. This discussion will include consideration of the introduction of mirror legislation in each state to address the issue. I understand that the oil industry is supportive of temperature correction at the wholesale level as action at this level will capture the majority of volume changes without unwarranted expense."*

The issue was considered and the joint communiqué dated 2 August 2002 of the Ministerial Council of Consumer Affairs Meeting stated that:

> *"At the last MCCA meeting in 2001, Ministers agreed in-principle to introduce temperature correction compensation of petrol and diesel fuel loaded at refineries and terminals across Australia"…* and … *"All jurisdictions supported early implementation of temperature correction subject to individual cabinet endorsement."*

The recommendation to proceed with this measure was the subject of a "*Regulatory Impact Statement Temperature Compensation of Petrol and Diesel Fuel*" which was jointly prepared by Consumer and Business Affairs Victoria, Trade Measurement Victoria and Office of Regulation Reform Victoria in November 2001.

Legislation was subsequently adopted in all states and territories except the Australian Capital Territory which already had 15^{o}C temperature correction legislation in place. Some exceptions apply under the various legislations including wholesale sales from country depots (which may not have the necessary equipment that allows them to calculate temperature correction) and all fuel sales from retail outlets.

RET is advised by the National Measurement Institute (NMI) that amendments to the *National Measurement Regulations 1999* scheduled to come into force from 1 July 2010, will include the temperature correction of fuel at the wholesale level. Further the Australian Taxation Office uses 15^{o}C as the reference temperature to measure petroleum products for the calculation of excise duty.

Additionally Australian Standards, specifically Petroleum Liquids and Gases - Measurement – Standard Reference Conditions AS 2649-1983, refer to the reference temperature of 15^{o}C which is consistent with Australia's obligations under the World Trade Organisation's Code of Practice to adopt international standards where possible.

APPENDIX G

COLLECTIVE BARGAINING

The Government recognises that there may be public benefits from small businesses engaging in collective bargaining. For example, an arrangement could result in lower prices for independent fuel resellers that are currently paying higher prices to wholesalers due to their relatively weak bargaining power. These resellers could instead approach the fuel wholesaler as a group, which may provide a greater level of negotiating power than would otherwise be available on an individual basis.

Collective Bargaining Notification

While the collusive nature of collective bargaining agreements may raise anti-competitive concerns under the TPA, independent resellers can obtain protection from legal action by lodging a collective bargaining notification with the ACCC.

The notification process provides a streamlined and cost effective mechanism to allow small businesses to collectively bargain. The notification process allows small businesses to commence collective bargaining in as little as 28 days following the lodgement of a valid notification. As at 1 January 2009, the statutory period was set to 14 days. Ordinarily, to use the notification process the value of the contract between each member of the collective bargaining group and their common customer or supplier must not exceed $3 million in any 12 month period.

However, Trade Practices Regulation 71A increased the threshold for the petrol retailing industry as follows:

> *71A Collective bargaining contracts — motor vehicle fuel for retail sale*
>
> (1) For subsection 93AB (4) of the Act, the amount of $15,000,000 is prescribed for a collective bargain for the purchase of motor vehicle fuel for the purpose of sale to the public.
> (2) Subregulation (1) does not apply to the purchase or sale of other products by convenience stores, repair shops or other business activities that are associated with, or form part of the business of, a motor vehicle fuel retailer.

The ACCC guide to collective bargaining notification is available at http://www.accc.gov.au/. Note that the $15 million restriction applies only to the Notification Process – which is intended to operate as a quick and simple method for small businesses to obtain immunity under the TPA to collectively bargain. The immunity lasts 3 years. Resellers can still collectively bargain and seek immunity under the ACCC's existing authorisation process which can provide more flexibility for example, in the event that the members do not meet the $15 million threshold limit.

APPENDIX H

DEFINITIONS – FROM SECTION 4 OF THE OILCODE

commission agency includes a fuel reselling agreement under which the retailer sells motor fuel at retail as an agent of the supplier.

complainant means a person who starts the dispute resolution.

declared petroleum product means any of the following temperature corrected motor fuels:

(a) ULP;
(b) a product consisting of a blend of ULP and ethanol (for example, E10);
(c) a product consisting of a blend of ULP and 1 or more biofuels other than ethanol;
(d) PULP (other than a PULP proprietary product);
(e) diesel fuel other than a diesel proprietary product.

disclosure document means:

(a) for the grant, renewal or extension of a fuel reselling agreement - a document that contains the information mentioned in Annexure 1 or 2 of the Oilcode; or
(b) for the transfer of a fuel reselling agreement or a fuel reselling business - a document that contains the information mentioned in Annexure 3 of the Oilcode.

distributor means a person who carries on any of the following businesses:

(a) receiving petroleum products;
(b) storing petroleum products;
(c) selling petroleum products to a retailer or another end-user;
(d) delivering petroleum products to a retailer or another end-user.

fuel reselling agreement has the meaning given in **section 5.**

Section 5 Oilcode - Meaning of *fuel re-selling agreement*

(1) A fuel re-selling agreement is an agreement:

(a) that takes the form, in whole or part, of any of the following:
  (i) a written agreement;
  (ii) an oral agreement;
  (iii) an implied agreement; and

(b) in which a person (the ***supplier***) grants to another person (the ***retailer***):
  (i) the right to carry on the business of offering, supplying or distributing motor fuel in Australia under a system or marketing plan substantially determined, controlled or suggested by the supplier or an associate of the supplier; or
  (ii) consent to be a transferee in relation to a fuel re-selling agreement; and

(c) under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol:
  (i) owned, used or licensed by the supplier or an associate of the supplier; or
  (ii) specified by the supplier or an associate of the supplier; and

(d) under which, before starting business or continuing the business, the retailer must pay or agree to pay to the supplier or an associate of the supplier an amount including, for example:
  (i) an initial capital investment fee; or
  (ii) a payment for goods or services; or

(iii) a fee based on a percentage of gross or net income whether or not called a royalty or agreement service fee; or

(iv) a training fee or training school fee;

but excluding:

(v) payment for motor fuel at or below the usual wholesale price; or

(vi) payment for the usual wholesale price of motor fuel taken on consignment; or

(vii) payment of market value for purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the fuel re-selling agreement.

Note To meet the requirements of subparagraph (1) (b) (i), a supplier must have a substantial on-going role in the retailer's operations, in addition to being responsible for branding and supplying fuel. For example:

(a) a traditional franchise or commission agency arrangement would meet the requirements of the subparagraph because of the supplier's substantial on-going role in the operations; but

(b) a 'supply only' or 'supply and branding only' agreement with an owner-dealer would not meet the requirements of the subparagraph.

(2) For subsection (1), the following are taken to be fuel re-selling agreements:

(a) the transfer, renewal or extension of a fuel re-selling agreement;

(b) an agency arrangement to which the requirements of paragraphs (1) (a), (b) and (c) apply;

(c) an interest in a fuel re-selling agreement.

(3) However, any of the following does not in itself constitute a fuel re-selling agreement:

(a) an employer and employee relationship;

(b) a partnership relationship;

(c) a landlord and tenant relationship;

(d) a mortgagor and mortgagee relationship;

(e) a lender and borrower relationship;

(f) a fuel agreement related to a retail site that is not owned or leased by the supplier;

(g) the relationship between the members of a cooperative that is registered, incorporated or formed under any of the following laws:

(i) *Co-operatives Act 1992* of New South Wales;

(ii) *Co-operatives Act 1996* of Victoria;

(iii) *Cooperatives Act 1997* of Queensland;

(iv) *Co-operative and Provident Societies Act 1903* of Western Australia;

(v) *Co-operatives Act 1997* of South Australia;

(vi) *Co-operative Industrial Societies Act 1928* of Tasmania;

(vii) *Co-operative Societies Act 1939* of the Australian Capital Territory;

(viii) *Co-operatives Act 1997* of the Northern Territory;

(ix) the *Corporations Act 2001*.

(4) A fuel reselling agreement may apply to 1 or more retail sites.

fuel reselling business means a business that is subject to, or intended to be subject to, a fuel reselling agreement.

fuel reselling system includes a business system in which a supplier supplies motor fuel to a retailer for reselling.
prospective retailer means a person who deals with a supplier for the right to be a party to a fuel reselling agreement.

retailer includes the following:

(a) a person who carries on a business of selling or supplying petroleum products to end-users;
(b) a person who is a retailer under a fuel reselling agreement;
(c) a person who, otherwise than as a retailer, participates in a fuel reselling agreement as a retailer.

retail site means premises at which motor fuel is sold by retail.

spot sale means a sale by wholesale of a declared petroleum product to an uncontracted customer by a wholesale supplier of the declared petroleum product.

supplier includes the following:

(a) a person who is a supplier under a fuel reselling agreement;
(b) a person who, otherwise than as a supplier, participates in a fuel reselling agreement as a supplier.

supply has the meaning given by **subsection 4 (1) of the Act**.
Note Under subsection 4 (1) of the Act as in force when this code commenced,
supply, when used as a verb, includes:

(a) for goods - supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
(b) for services - provide, grant or confer;
(a) and, when used as a noun, has a corresponding meaning.

temperature corrected means the assessment of the volume of a declared petroleum product by reference to the number of litres that the declared petroleum product occupies, or would occupy, at a temperature of 15 degrees centigrade.

term contract means a contract between a customer and a wholesale supplier that sets out the price at which, and the conditions under which, the customer will purchase a declared petroleum product for a fixed period.

terminal gate price, and ***TGP***, means the price for a wholesale sale of a declared petroleum product that is identified under **section 8:**

(a) worked out on a temperature corrected basis; and
(b) expressed in cents per litre.

transfer, for a fuel reselling agreement, includes an arrangement in which the agreement is made or transferred.

wholesale facility means any of the following:

(a) an oil refinery;
(b) a shipping facility;
(c) a facility connected by a product transfer pipeline to an oil refinery or a shipping facility;
(d) a facility connected by a product transfer pipeline to a facility mentioned in paragraph (c).

wholesale supplier means a person who sells declared petroleum products by wholesale from a wholesale facility.

APPENDIX I

RECOMMENDATIONS FROM THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES REPORT *OPPORTUNITY NOT OPPORTUNISM: IMPROVING CONDUCT IN AUSTRALIAN FRANCHISING*

Recommendation 1 (paragraph 4.80)

The committee recommends that the Franchising Code of Conduct be amended to require that disclosure documents include a clear statement by franchisors of the liabilities and consequences applying to franchisees in the event of franchisor failure.

Recommendation 2 (paragraph 4.91)

The committee recommends that the government investigate the benefits of developing a simple online registration system for Australian franchisors, requiring them on an annual basis to lodge a statement confirming the nature and extent of their franchising network and providing a guarantee that they are meeting their obligations under the Franchising Code of Conduct and the *Trade Practices Act 1974*.

Recommendation 3 (paragraph 4.101)

The committee recommends that the government review the efficacy of the 1 March 2008 amendments to the disclosure provisions of the Franchising Code of Conduct within two years of them taking effect.

Recommendation 6 (paragraph 7.22)

The committee recommends that the name of the Office of the Mediation Adviser be changed to the Office of the Franchising Mediation Adviser and that the Franchising Code of Conduct be amended to reflect this change.

Recommendation 7 (paragraph 7.28)

The committee recommends that the government require the Australian Bureau of Statistics to develop mechanisms for collecting and publishing relevant statistics on the franchising sector.

Recommendation 8 (paragraph 8.60)

The committee recommends that the following new clause be inserted into the Franchising Code of Conduct:

> ***Standard of Conduct***
>
> ***Franchisors, franchisees and prospective franchisees shall act in good faith in relation to all aspects of a franchise agreement.***

Recommendation 9 (paragraph 9.35)

The committee recommends that the *Trade Practices Act 1974* be amended to include pecuniary penalties for breaches of the Franchising Code of Conduct.

Recommendation 10 (paragraph 9.37)

The committee recommends that consideration be given to amending the Trade Practices Act 1974 to provide for pecuniary penalties in relation to breaches of section 51AC, section 52, and the other mandatory industry codes under section 51AD.

Recommendation 11 (paragraph 9.39)

The committee recommends that the ACCC be given the power to investigate when it receives credible information indicating that a party to a franchising agreement, or agreements, may be engaging in conduct contrary to their obligations under the Franchising Code of Conduct.