



Australian Government
Department of Industry



OILCODE REVIEW

Issues Paper

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1 - Introduction

The Oilcode review

The *Competition and Consumer (Industry Codes–Oilcode) Regulation 2006* (Oilcode) regulates the conduct of suppliers, distributors and retailers in the petroleum marketing industry. The Department of Industry has a regulatory requirement, resulting from the 2008 review of the code (see section 3 of this paper), to undertake a review of the Oilcode. The Oilcode is also scheduled for sunseting on 1 April 2017. [Sunsetting provisions](#) require a review of the legislative instrument to determine if it remains fit for purpose before it can be remade, rolled-over or repealed.

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

This Oilcode review will examine the ongoing need for the Oilcode and the operation of the code to determine if it provides appropriate regulation of the conduct of participants in the petroleum marketing industry, particularly with regard to:

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

Section 2 of this issues paper provides the context for this review and discusses the current downstream petroleum industry.

Section 3 of this paper provides a general overview of the Oilcode and discusses the changes made as a result of the 2008 review and issues for consideration in this review.

Competition Policy Review

On 4 December 2013, the Prime Minister and the Minister for Small Business announced an independent review of Australia's competition policy. The objective of the [Competition Policy Review](#) is to identify competition

enhancing microeconomic reforms to drive ongoing productivity growth and improvements in the living standards of all Australians.

Under its terms of reference, released on 27 March 2014, the key areas of focus for the Competition Policy Review include: identifying regulations and other impediments to competition across the economy which are not in the broader public interest; examining the competition provisions of the *Competition and Consumer Act 2010* (CCA) and the special protections for small business in the CCA to ensure they are fit for purpose; considering whether the structure and powers of the competition institutions remain appropriate; and reviewing government involvement in markets.

The [Competition Policy Review's Draft Report](#), released on 22 September 2014, noted that codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour. However, submissions to the review highlighted that codes are seen to be lacking in meaningful enforcement sanctions. The introduction of civil penalties and infringement notices strengthens CCA enforcement options.¹

This review will consider these and any further findings and outcomes from the Competition Policy Review throughout the review process to ensure that any amended Oilcode is consistent with broader competition policy settings.

Have your say

This issues paper outlines the key areas of the Oilcode and poses questions to assist you in considering the need for and effectiveness of the code's provisions and where it could be improved.

You may wish to address all, or some, of the questions individually or provide a more general submission. Your submission may also address areas not covered by this issues paper, but related to the Oilcode, that you believe the review team should also consider.

¹ Competition Policy Review panel, 2014, *Competition Policy Review Draft Report*, <http://competitionpolicyreview.gov.au/draft-report/>.

How to provide a submission

Submissions to the Oilcode review close 20 February 2015.

Submissions can be made by:

Email:

transportfuels@industry.gov.au

Mail:

Manager

Transport Fuels Section

Energy Division

Department of Industry

GPO Box 9839

Canberra, ACT, 2601

Publication of submissions

Submissions will be published on the [Department of Industry website](#) unless you request your submission be kept confidential. Please indicate clearly if you wish your submission to be treated as confidential, whether in full or part.

The Australian Government reserves the right to refuse to publish submissions, or parts of submissions, that contain offensive language, potentially defamatory material or copyright infringing material.

A request may be made under the *Freedom of Information Act 1982 (Cth)* for a submission marked confidential to be made available. Such requests will be determined in accordance with provisions under that Act.

Contact information, other than your name and organisation (if applicable), will not be published. Your name and organisation (if applicable) or state will be included on the website to identify your submission.

2 - Context

The Australian fuel market

The Oilcode was last reviewed in 2008. At this time, the Australian petroleum industry was already seeing a degree of structural adjustment with rationalisation of service stations, the presence of the supermarket chains and the growing role of independents. Since then we have seen these trends continue to impact on the industry.

Wholesale

In 2008, the four majors (BP, Caltex, Mobil and Shell) were largely responsible for both refining and importing fuel. In 2007-08, the refiner-marketers were responsible for around 94 per cent of imported petrol, leaving a 6 per cent share for independent importers.² By 2010-11, independent imports had increased to around 40 per cent of unleaded petrol imported into Australia.³ However, in 2013-14 this had dropped to around 27 per cent.⁴ This stems from the closure, and impending closure, of refineries and their conversion to import terminals, resulting in refiner-marketers relying on a greater percentage of imports. In absolute terms, petrol imports by independent importers have increased five-fold since 2007-08.⁵

The growing role of independents is also seen in the wholesale market, where the independent wholesale market share has doubled since 2006-07. While this has been a generally upward trend, it has plateaued in recent years, as seen in Figure 1.

² Australian Competition and Consumer Commission, 2008, *Monitoring of the Australian petroleum industry 2008*, <http://acc.gov.au/publications/monitoring-of-the-australian-petroleum-industry>.

³ Australian Competition and Consumer Commission, 2011, *Monitoring of the Australian petroleum industry 2011* <http://acc.gov.au/publications/monitoring-of-the-australian-petroleum-industry>.

⁴ Australian Competition and Consumer Commission, 2014, *Monitoring of the Australian petroleum industry 2014* <http://acc.gov.au/publications/monitoring-of-the-australian-petroleum-industry>.

⁵ Australian Competition and Consumer Commission, 2013, *Monitoring of the Australian petroleum industry 2013* <http://acc.gov.au/publications/monitoring-of-the-australian-petroleum-industry>.

Wholesale market share

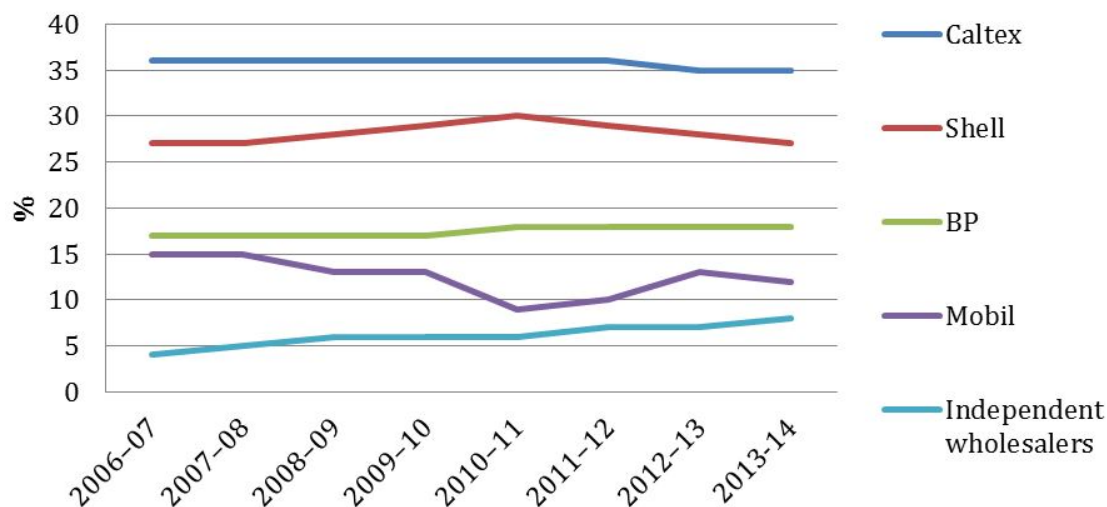


Figure 1. Source: Australian Competition and Consumer Commission petrol monitoring reports, 2014

The way in which Australia's petroleum market is perceived internationally is changing due to the decline of local integrated refiner marketers and the increasing reliance on imported refined product. The Australian Competition and Consumer Commission has noted that these factors will raise Australia's importance in global trade flows and thus, commodity traders' interest in the downstream petroleum industry.⁶

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

Retail

In 2008, the rationalisation of service stations was continuing, including the move to centralised and highway outlets. The impact of the supermarket chains was becoming more marked, particularly with the prevalence of

⁶ Australian Competition and Consumer Commission, 2013, *Monitoring of the Australian petroleum industry 2013* <http://acc.gov.au/publications/monitoring-of-the-australian-petroleum-industry>.

'shopper docket' schemes. Retailers responded to this by introducing new services.⁷ This is a trend that is still present in the market.

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

Between 2008-09 and 2013-14, the combined market share of supermarkets and independents increased from 52 to 67 per cent, while the retail share of major oil firms decreased from 48 to 33 per cent.⁹

Between 2007-08 and 2013-14, the large independent chains increased their share of the market dramatically, while the growth of the supermarket chains was more constrained, as seen in Figure 2.

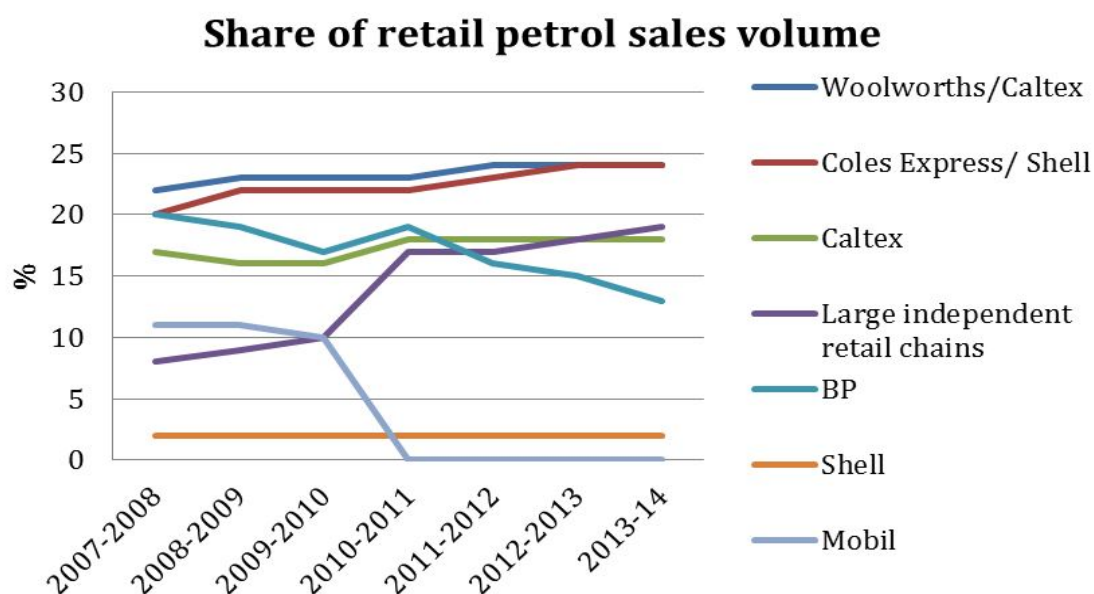


Figure 2. Source: Australian Competition and Consumer Commission petrol monitoring reports, 2014

Over the past few years, the total number of retail sites has plateaued at around 6000, having been largely in decline since the 1960s when there were

⁷ Australian Competition and Consumer Commission, 2008, *Monitoring of the Australian petroleum industry 2008* <http://acc.gov.au/publications/monitoring-of-the-australian-petroleum-industry>.

⁸ Magner, L 2014, IBISWorld Industry Report G400, *Fuel Retailing in Australia*, IBISWorld.

⁹ Ibid.

over 20 000 sites. The number of enterprises¹⁰ in the sector also declined from 3919 in 2009-10 to around 3587 in 2013-14.¹¹ This represents the consolidation in the retail fuel market.

The current retail fuel market consists of a number of different operation types: directly owned and operated; distributor owned operations; independent retailer; franchisee; and commission agent.¹²

Figure 3 below shows the makeup of the retail fuel industry by operations type in 2013-14.

Percentage of retail sites by brand and business operator

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

Figure 3. Source: Australian Competition and Consumer Commission petrol monitoring report, 2014

The percentage of franchisee and commission agent businesses has increased slightly since 2009, however has been relatively constant in recent years. Distributor owned operations have declined in recent years, while directly owned operations have increased, largely due to the expanding presence of the supermarket chains in that category.

¹⁰ Each enterprise consists of one or more establishments that are under common ownership and control.

¹¹ Magner, L 2014, IBISWorld Industry Report G400, *Fuel Retailing in Australia*, IBISWorld

¹² Commission agents generally manage a business owned by a refiner-marketer or independent chain, and are generally compensated in the form of a commission based on the quantity of product sold.

3 - The Oilcode

The *Competition and Consumer (Industry Codes–Oilcode) Regulation 2006* (Oilcode) was established in 2006, replacing the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act). The Sites Act restricted the number of retail sites that the prescribed oil companies, BP Australia Holdings Limited, Mobil Oil Australia Limited, and Shell Australia Limited (the oil majors), could own, lease, or operate either directly or on a commission basis. This Act operated concurrently with the Franchise Act, which set out minimum terms and conditions for oil company franchises.¹³

The retail fuel industry changed considerably between 1980 and 2006 with more independent imports and the supermarket chains entering the market. The Oilcode was designed to respond to the changes in the market and to facilitate an equitable market environment for petroleum wholesalers and retailers and improve the operating environment for small businesses.¹⁴

The Oilcode regulates the conduct of suppliers, distributors and retailers in the petroleum marketing industry. The Oilcode establishes terminal gate price arrangements, fuel re-selling agreement provisions, and a dispute resolution scheme.

Issues to consider

In providing a submission to the Oilcode review you may wish to consider the following issues.

Is the Oilcode a necessary piece of regulation in the current wholesale and retail fuel market?

What benefits does the Oilcode provide to small businesses and franchisees in the retail fuel industry?

What benefits does the Oilcode provide to commission agents, or those operating under other fuel resale agreements, in the retail fuel industry?

¹³ Oilcode explanatory statement, *Trade Practices (Industry Codes - Oilcode) Regulations 2006*.

¹⁴ Ibid.

What costs does complying with the Oilcode pose on businesses?

Does the Oilcode assist businesses to better serve their customers?

The 2008 Oilcode review

The last Oilcode review, commenced in 2008, examined whether the objectives of the Oilcode had been met, these being: to establish standard contractual terms and conditions for fuel reselling agreements; to introduce a nationally consistent approach to terminal gate price arrangements; and to establish a dispute resolution scheme. The review team concluded that the Oilcode had met its objectives however there were some improvements that could be made.

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

The review also made recommendations to enhance and provide clarity to the Oilcode's dispute resolution scheme, including ensuring that there is information available to parties in dispute about what factors the dispute resolution advisor may consider in making a non-binding determination. The review also recommended adopting a formal dispute definition and notification mechanism, whereby the complainant must tell the respondent the nature of the dispute, the outcomes they are seeking and what action they consider would settle the dispute.

Issues to consider

In providing a submission to the Oilcode review you may wish to consider the following issues.

Have the changes made to Oilcode as a result of the 2008 review improved the operation of the Oilcode?

Part 2 - Terminal gate price and related arrangements

The terminal gate price (TGP) is the price at which wholesale suppliers are prepared to sell tanker loads of fuel to wholesale customers at seaboard

terminals or refineries on a spot basis. The TGP is quoted for fuel only and includes no added services, such as delivery.¹⁵

Part 2 of the Oilcode sets out the arrangements for offering a TGP. A wholesale supplier must give a customer the option of purchasing petroleum products at the posted TGP or at a price derived from TGP. The Oilcode requires that the TGP: be expressed in cents per temperature corrected litre; be posted on a website or available through a phone or fax service; be posted each day; and not include any amount for an additional service.

The Oilcode also requires that suppliers provide a customer a document that acknowledges the sale, including the kind of product sold, volume, price and applicable posted TGP. A supplier must not unreasonably refuse to supply a declared petroleum product by wholesale to a customer.

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

As noted in the government response to the 2008 review, the purpose of the TGP arrangements is to publicise the wholesale benchmark price.¹⁶ Long term contracts are set in reference to the TGP; that is TGP plus or minus an amount.¹⁷ The TGP provides a point from which customers can negotiate prices for petroleum products including additional services, such as delivery, or volume based discounts.

Issues to consider

In providing a submission to the Oilcode review you may wish to consider the following issues.

¹⁵ Oilcode explanatory statement, *Trade Practices (Industry Codes - Oilcode) Regulations 2006*.

¹⁶ Department of Industry, *Government response to the statutory review of The Trade Practices (Industry Codes – Oilcode Regulations) 2006*, <http://industry.gov.au/Energy/EnergySecurity/fuels/conventional/Pages/OilcodeReview.aspx>.

¹⁷ Department of Industry, 2008 Oilcode review, <http://www.industry.gov.au/Energy/EnergySecurity/fuels/conventional/Pages/OilcodeReview.aspx>

Have TGP arrangements increased transparency in wholesale pricing?

Has the Oilcode allowed customers to access petroleum products at TGP?

Do you have any concerns regarding the TGP arrangements?

Part 3 - Fuel reselling agreements

Part 3 of the Oilcode covers fuel reselling businesses. It provides standard contractual terms and conditions for wholesale supplier-fuel retailer re-selling agreements for franchise and commission agency arrangements, such as the use of marketing funds and agreement duration.

This section establishes the requirement for a disclosure document to allow the retailer to make appropriate decisions about agreements and establishes conditions for fuel re-selling agreements. It also provides arrangements for terminating a fuel re-selling agreement.

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

Franchising Code terms and conditions

Through consultation phase for the Competition Policy Review, some submissions called for changes to the regulatory framework applying to franchised fuel reselling businesses, including allowing the *Competition and Consumer (Industry Codes-Franchising) Regulation 2014* (the Franchising Code) to cover the petroleum sector. However, as noted in Section 2, only 11.8 per cent of retail fuel sites operated under a franchising agreement in 2013-14. Sites operating under a commission agency or under any other non-franchise arrangements would not be covered by the Franchising Code if the Oilcode were repealed.

The Franchising Code was recently reviewed and the [new code](#) will see many provisions enhanced. The Franchising Code notes that it does not apply where other industry codes do. As a result franchisees in the petroleum sector are covered by the Oilcode, not the Franchising Code. The review will give consideration to whether there should be greater harmonisation between the terms and conditions in the two codes to ensure that franchisees in the petroleum industry are not disadvantaged by not being covered by the Franchising Code.

Some of the changes being made to the contractual terms and conditions in the Franchising Code, which may be appropriate for consideration in the context of the Oilcode, are:

Improvements to reduce red tape and complexity

- abolishing the short-form disclosure document
- removing the requirement to summarise provisions of the reselling agreement in the disclosure document to reduce length and complexity
- headings in the disclosure document are not required if the information is not applicable to the franchisee

Improvements to disclosure to address information asymmetry

- requiring franchisors to disclose materially relevant facts about their associates to franchisees

Improvements to address concerns about conduct within the franchising sector

- requiring both franchisors and franchisees to act in good faith in their dealings with one another
- enforcement options available to the ACCC include pecuniary penalties and infringement notices, which will apply to serious breaches of the new Code and a modest increase in the scope of documents the ACCC can request, including to substantiate the information in a disclosure document

Improvements to address concerns about onerous contractual terms in the franchising sector

- prohibiting franchisors from imposing significant capital expenditure on franchisees subject to a number of exceptions.
- ensuring that franchisors cannot impose their costs of dispute resolution on franchisees through the franchise agreement
- ensuring that franchisors cannot use the franchise agreement to require the franchisee to resolve disputes in a state other than the state in which the franchisee's business is based.

The review will give consideration to how the Oilcode contractual terms and conditions could be amended to ensure that there is no disadvantage to fuel franchisees that are not covered by the Franchising Code.

Issues to consider

In providing a submission to the Oilcode review you may wish to consider the following issues.

Does the Oilcode establish appropriate contractual terms and conditions?

Does the Oilcode address the needs of franchisees, commission agents and those under other fuel re-selling agreements?

Have the standard terms and conditions been used by the industry?

How might the terms and conditions be improved?

What changes to contractual terms being made to the Franchising Code, as outlined in this section, should be replicated in the Oilcode?

Are there any other changes being made to the Franchising Code contractual terms and conditions that could be considered in the context of the Oilcode?

If so, what would be the effect of these changes on the downstream petroleum market?

Do you have any particular concerns about the relationship between the Oilcode and the Franchising Code?

Part 4 - Dispute resolution scheme

Part 4 of the Oilcode allows for the establishment of a dispute resolution adviser (DRA) to provide the industry with an ongoing cost-effective dispute resolution mechanism. It establishes processes for dispute resolution and provides for mediation and assistance.

The dispute resolution scheme was originally established to avoid court action as the only avenue for resolving a dispute, and which was beyond the means of many small businesses, putting them at a disadvantage.

The DRA has been providing services since March 2007. Between 1 July 2012 and 15 September 2014 the DRA received 23 enquiries that related to the Oilcode. In 2013-14 there were no requests for mediation, and only four in

the previous year. Since July 2012 there have been no disputes, reported to the DRA, under section 43 of the Oilcode – disputes about supply of a declared petroleum product. The nature of the disputes reported to the DRA include:

- negotiation of end of term arrangements
- negotiation over sale of a site
- issues surrounding residual stock and equipment after termination of the fuel re-selling agreement
- billing methods
- receipt of security amounts owing
- lack of information
- delayed fuel supply
- contaminated fuel.

Since 2007- 08, the DRA has averaged 13 enquiries and 1.5 mediations per year. This represents a very small number of participants covered by the Oilcode, less than one per cent, accessing the service annually.

Other dispute resolution services

There are a number of small business support services on offer by government. In 2012, the federal government established an Australian Small Business Commissioner (ASBC) to provide advocacy and representation of small business interests and concerns to the Australian Government. The ASBC provides information to small businesses on [resolving disputes](#) and an online tool to help small businesses find an appropriate dispute resolution service.

The Government is in the process of transforming the ASBC into a Small Business and Family Enterprise Ombudsman (SBFEO) with a range of powers. The SBFEO will be a Commonwealth-wide advocate for small businesses and family enterprises and a contributor to the development of small business friendly Commonwealth laws and regulations.

The SBFEO will also provide a Commonwealth-level framework for dispute resolution to assist small businesses: access information; inquire about

complaint handling; get a facilitated referral to a dispute resolution service if required; and receive assistance with early intervention and formal alternative dispute resolution under certain circumstances.¹⁸

There is also a range of low cost state-based dispute resolution services and small business commissioners in Victoria, Western Australia, South Australia and New South Wales (NSW) that provide dispute resolution and mediation advice and services. For example, in NSW, the Office of the NSW Small Business Commissioner helps small businesses deal with business-to-business and business-to-government disputes, in areas such as retail lease, contract and payment, and franchising.¹⁹

Franchising Code dispute resolution

As a result of the review of the Franchising Code, the Government will be improving enforcement options available to the ACCC for breaches of the Franchising Code. These include pecuniary penalties and infringement notices, which will apply to serious breaches of the new Code and a modest increase in the scope of documents the ACCC can request, including to substantiate the information in a disclosure document.

The need for similar provisions in the Oilcode will be considered by this review.

Issues to consider

In providing a submission to the Oilcode review you may wish to consider the following issues.

Have you used, or would you consider using, the dispute resolution adviser services?

Do you believe that it is an effective and low cost mechanism to resolve disputes?

¹⁸ The Hon Bruce Billson MP, Minister for Small Business, 2014, *The Small Business and Family Enterprise Ombudsman*, <http://www.treasury.gov.au/Policy-Topics/Business/Small-Business/Family-Enterprise-Ombudsman/Statement>.

¹⁹ NSW Small Business Commissioner, <http://www.smallbusiness.nsw.gov.au/solving-problems/commercial-dispute-resolution>.

Have you used another dispute resolution service to resolve an Oilcode-related dispute?

Do you believe that improving the enforcement options for the ACCC, consistent with the changes to the Franchising Code and including penalties and infringement notices, should be introduced for non-compliance with the Oilcode?

Consolidated list of questions

The Oilcode

Is the Oilcode a necessary piece of regulation in the current wholesale and retail fuel market?

What benefits does the Oilcode provide to small businesses and franchisees in the retail fuel industry?

What benefits does the Oilcode provide to commission agents, or those operating under other fuel resale agreements, in the retail fuel industry?

What costs does complying with the Oilcode pose on businesses?

Does the Oilcode assist businesses to better serve their customers?

The 2008 Oilcode review

Have the changes made to Oilcode as a result of the 2008 review improved the operation of the Oilcode?

Terminal gate pricing

Have TGP arrangements increased transparency in wholesale pricing?

Has the Oilcode allowed customers to access petroleum products at TGP?

Do you have any concerns regarding the TGP arrangements?

Fuel reselling agreements

Does the Oilcode establish appropriate contractual terms and conditions?

Does the Oilcode address the needs of franchisees, commission agents and those under other fuel re-selling agreements?

Have the standard terms and conditions been used by the industry?

How might the terms and conditions be improved?

What changes to contractual terms being made to the Franchising Code, as outlined in this section, should be replicated in the Oilcode?

Are there any other changes being made to the Franchising Code contractual terms and conditions that could be considered in the context of the Oilcode?

If so, what would be the effect of these changes on the downstream petroleum market?

Do you have any particular concerns about the relationship between the Oilcode and the Franchising Code?

Dispute resolution scheme

Have you used, or would you consider using, the dispute resolution adviser services?

Do you believe that it is an effective and low cost mechanism to resolve disputes?

Have you used another dispute resolution service to resolve an Oilcode-related dispute?

Do you believe that improving the enforcement options for the ACCC, consistent with the changes to the Franchising Code and including penalties and infringement notices, should be introduced for non-compliance with the Oilcode?