



Australian Government
Department of Industry and Science

Energy



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1 Introduction

1.1 The Oilcode Review

The purpose of the *Competition and Consumer (Industry codes-Oilcode) Regulation 2006* (Oilcode) is to regulate the conduct of suppliers, distributors and retailers in the petroleum marketing industry.

The objectives of the Oilcode are:

- setting minimum standards in relation to contract requirements and tenure
- assisting participants to make informed decisions when managing fuel re-selling agreements¹ through the disclosure of specific information
- improving transparency in wholesale pricing and access to declared petroleum products at a published terminal gate price
- provisions for access to a cost-effective and timely dispute resolution scheme as an alternative to litigation.

This review results from the sunset provisions that require a review to assess if the legislative instrument remains adequate and relevant. Options presented in this paper include, repealing, parliamentary roll over, or remaking the Oilcode. The Options Paper has three sections:

Section 1 explains the policy context of the review, the review process, and how to make a submission.

Section 2 discusses the issues raised from the consultation process.

Section 3 outlines available options to address issues raised.

¹ 'Fuel re-selling agreement' is a contractual agreement (either written, verbal or implied) between a supplier and a retailer that provides for a minimum duration and has the following characteristics: one party (the supplier) grants another party (the retailer) the right to conduct a fuel re-selling business and the supplier is able to exert substantial control over the operation of that business; the fuel re-selling business will be associated with a trademark, commercial symbol or advertising owned, used, licensed or specified by the supplier; and the retailer is required to pay, or agree to pay, a fee before starting business.

Australian Competition and Consumer Commission 2011, *The guide to the Oilcode for industry participants in the downstream petroleum retail industry*, Canberra, p. 1.

1.1.1 Policy context

The Australian Government is committed to a regulation reform agenda that increases the productivity and competitiveness of Australian industry through removing unnecessary government red tape. A key feature of the agenda includes reducing the regulatory burden for individuals, businesses and community organisations by at least \$1 billion a year.

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

1.1.2 Process to date

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

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

Submissions closed on 20 February 2015. The Department received only a limited number of confidential written and verbal submissions upon which to inform the options included in this paper.

1.1.3 Next steps

- The Department has released this Options Paper for a period of four weeks for comment.
- The Department will consider submissions, and may consult key industry stakeholders in developing the Oilcode Review – Final Report.

- The Oilcode Review – Final Report will recommend a policy option for the Oilcode and is planned to be published by the end of 2015. If the preferred option requires a Regulatory Impact Statement (RIS), it will be undertaken as part of the Oilcode Review – Final Report.

1.1.4 Making a submission

Stakeholders are requested to provide submissions which clearly indicate a preferred option and supporting reasons that identify costs and benefits, particularly in the case of Option 3 - Remake the Oilcode.

Stakeholders may also wish to suggest alterations to the options in this paper. To the extent that suggested alterations do not fundamentally alter an option and remain consistent with the Oilcode objectives they will be considered.

In developing your submission it is important to note that proposals, which are inconsistent with the policy context and in particular the objectives of the Oilcode will be deemed outside the scope of the Review.

It should be noted that consultation on the Issues Paper indicated limited stakeholder interest in the Oilcode with only two written submissions and an additional two verbal submissions. Stakeholders are encouraged to provide a submission if they wish to avoid the perception that the Oilcode is no longer relevant.

Submissions to the Oilcode Options Paper are due 9 October 2015 and can be made electronically by <https://consult.industry.gov.au/transport-fuels-section/oilcode-options-paper>

or mailed to:

Manager
Transport Fuels Section
Energy Division
Department of Industry and Science
GPO Box 9839
Canberra, ACT, 2601

Submissions will be published on the [Departmental Consultation Hub](#) with your name and organisation (if applicable) or state to identify your submission. Please indicate clearly if you wish your submission to be treated as confidential, whether in full or part. However, please note that a request may

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

2 Stakeholder Issues raised from consultation

Issues raised by the limited stakeholder responses to the Issues Paper covered several aspects of the Oilcode. These issues are discussed below including identifying those that have been considered in previous reviews or are inconsistent with the policy context and scope of this review.

2.1 General Legislative Framework

Prior to the implementation of the Oilcode, the retail sector of the petroleum industry was regulated under the *Petroleum Retail Marketing Franchise Act 1980* and the *Petroleum Retail Marketing Sites Act 1980*. A retailer suggested that these previous legislative arrangements were more effective than the Oilcode. However, the introduction of the Oilcode was specifically undertaken to address shortcomings of those *Acts*, such as their prescriptive nature, failure to keep pace with industry changes, and the lack of minimum terms and conditions for arrangements other than franchise agreements. Further examination of the applicability of these previous *Acts* is considered out of scope of this review.

2.2 Standard contractual terms and conditions

The Oilcode provides standard contractual terms and conditions for fuel re-selling agreements between a supplier and a retailer. These standard contractual terms and conditions help petroleum market participants make informed decisions when entering, renewing or transferring a fuel re-selling agreement.

A supplier and a retailer raised concerns about commission agency agreements not being able to continue to operate if the Oilcode were repealed. However, commission agency arrangements existed in the petroleum industry prior to the introduction of the Oilcode, which would suggest that they would be able to continue if the Oilcode were repealed.

Tenure

The Oilcode requires that fuel re-selling agreements must have a duration of at least five years where an entrance fee of at least \$20,000 is paid.² Fuel re-selling agreements where the entrance fee paid is less than \$20,000 may have an effective duration of 30 days³ unless agreed otherwise.

A retailer raised two related issues regarding the level of protection and certainty provided by the Oilcode's tenure provisions. The first issue was that the effective 30 day minimum tenure for an entrance fee of less than \$20,000 was considered unreasonable. The second issue was that there should be a minimum duration for all fuel re-selling agreements of 10 years, irrespective of the entrance fee paid.

Both of these issues were considered by the 2008 Oilcode Review. In the case of the effective 30 day minimum tenure, the 2008 Review found that tenure should be underpinned by commercial decisions such as the level of entrance fee paid, the commercial viability of a business, and the relationship between the parties.

In regards to the suggestion of a 10 year minimum duration for fuel re-selling agreements, the 2008 Review found that prescribing multi-year tenure without the payment of an appropriate fee was not the aim of the Oilcode. It also noted that implementing this suggestion could devalue existing retailer franchise arrangements, as the higher entry costs may not appear to provide additional benefits, such as securing longer tenure.

² *Competition and Consumer (Industry Codes-Oilcode) Regulation 2006 (Cth)* s 32.

³ This results from the 30 day notice required for termination under s 37(2).

A retailer suggested that where 'goodwill'⁴ is paid upon commencement of a fuel re-selling agreement, it should also be paid upon exit of the fuel re-selling agreement, in particular where the business position has been improved. The payment of goodwill upon exit of a fuel re-selling agreement could be accommodated by Option 3 - Remake the Oilcode outlined in section 3.3. However, it is noted that determining the relative contributions of the retailer and the supplier to improving a business may be difficult.

Disclosure

Under the Oilcode, a supplier must create and maintain a disclosure document that ensures adequate information is provided by the supplier to the retailer at least 14 days before entering into, renewing or extending a fuel re-selling agreement; or the retailer paying a non-refundable deposit to a supplier in connection with a proposed agreement. The disclosure document is intended to allow the retailer to make a reasonably informed decision on the proposed terms and conditions of the fuel re-selling agreement.

A supplier suggested removing the requirement to summarise the provisions of the supplier's obligations and retailer's obligations under the fuel re-selling agreement in the disclosure document to reduce its length and unnecessary complexity. Similarly, the requirement for disclosure of information not applicable to the retailer was suggested to be removed.

These suggestions are consistent with revisions to the Franchising Code of Conduct which has removed the summary requirement. The review of the Franchising Code of Conduct found that the disclosure document is not meant to be a substitute for closely reading the actual agreement, and these provisions make the disclosure document unnecessarily lengthy and complex. This suggestion could be accommodated by Option 3 - Remake the Oilcode.

The supplier further suggested that the current 14 day disclosure period prior to a person entering into a fuel re-selling agreement should be reduced. It is

⁴ Goodwill in accounting is an intangible asset that arises when a buyer acquires an existing business, but pays more than the fair market value of the net assets (total assets minus total liabilities). The goodwill amounts to the excess of the "purchase consideration" (the money paid to purchase the asset or business) over the total value of the assets and liabilities. *Butterworths Australian Legal Dictionary*, p 528.

contended that this could allow a retailer to commence operating from a site at short notice.

It is noted that the disclosure period is intended to allow a retailer sufficient time to make an informed decision which if removed may necessitate some alternative form of protection needing to be considered. This issue and its implications could be accommodated by Option 3 - Remake the Oilcode.

An alternative perspective on the requirements for the disclosure document were put forward by a retailer who suggested that it should include all relevant previous disputes between a supplier and retailers notified under the Oilcode dispute resolution mechanism. It was suggested that this may provide greater transparency to potential retailers and could allow a more fully informed decision by a prospective retailer.

This suggestion was considered by the 2008 Oilcode Review and found that it may have negative unintended consequences. Consequences could include: providing an incentive for suppliers either not to formally recognise a dispute or be vulnerable to campaigns that could discredit them in the marketplace.

Terminal gate pricing

The Terminal Gate Price (TGP) is the price for a wholesale sale of a declared petroleum product expressed in cents per litre. The Oilcode requires a supplier to publicly post a TGP at each terminal. The TGP aims to improve transparency in wholesale pricing, and allows access for all petroleum market participants to petroleum products at the TGP while not negating the ability for participants to negotiate individual supply agreements, nor prevent discounts.

There were differing views on the effectiveness of the TGP. On one hand, a supplier considered that it provided a transparent benchmark and an effective spot price for wholesale fuel market participants negotiating longer term contracts.

On the other hand, a retailer considered that the TGP arrangements do not aid competition in the wholesale petroleum market. The retailer indicated that the TGP did not represent the 'true' wholesale fuel price because of the ability of larger volume buyers to achieve discounts. The retailer suggested that this issue could be addressed by replicating the former Victorian TGP regime. Under the former Victorian TGP regime, the TGP was determined by a specified formula. Wholesale prices, under the Victorian TGP regime, must be

based on the TGP and may include an allowance for discounts or rebates and charges for any of the specified optional services.

The 2008 Oilcode review considered this issue and noted that the objective of the Oilcode was to achieve nationally consistent transparency for the TGP rather than access for all re-sellers to fuel at the same price.

A supplier raised a concern that if the Oilcode did not continue there was the potential for the loss of a transparent wholesale benchmark price if the TGP was no longer published. However, some suppliers published a TGP prior to the Oilcode and accordingly some suppliers may voluntarily resume this practice.

The issue of maintaining a transparent TGP could be accommodated by either Option 2 – Parliamentary roll over in section 3.2 or Option 3 – Remake the Oilcode in section 3.3.

Dispute resolution scheme

The dispute resolution scheme aims to provide downstream petroleum market participants with a cost effective and timely alternative to litigation.

The Oilcode provides for a dispute resolution advisor (DRA) to facilitate mediation and to issue non-binding determinations. Since 2007-08, the DRA has averaged 13 enquiries and 1.5 mediations per year, which is less than one per cent of participants covered by the Oilcode accessing the service.

While low utilisation of the DRA suggests minimal disputes, it is difficult to ascertain whether this is a true representation. Opposing views were provided on the dispute resolution schemes effectiveness. The scheme was either considered to encourage dispute resolution before litigation, or ineffective as it does not provide binding and enforceable outcomes. The loss of the DRA provisions through repealing the Oilcode was met with ambivalent responses from both suppliers and retailers.

The ambivalent response to the DRA may, in part, be due to concerns about its effectiveness and enforceability as outcomes are non-binding. A retailer remarked that in comparison to state based dispute resolution services, such as State Consumer Affairs, the DRA was found to be harder to access, and did not provide as good an advice service.

Alternative proposals may include: greater utilisation of the stated-based small business commissioners, replace the DRA with a fuel retailing ombudsman, or

refer disputes to the Australian Small Business and Family Enterprise Ombudsman for consideration. Improving the DRA arrangements could be accommodated by Option 3 - Remake the Oilcode. The suitability of alternative dispute resolution arrangements will need to be considered in detail at a later stage.

3 Options for the Oilcode

Issues raised during the review consultation process have been taken into account in developing the options for the Oilcode. Three options are proposed for the Oilcode to address the review's terms of reference consistent with the policy context and where relevant the objectives of the Oilcode. The three options are:

1. Repeal the Oilcode
2. Parliamentary roll over of the Oilcode
3. Remake the Oilcode

3.1 Option 1 – Repeal the Oilcode

Unless further legislative action is taken to extend the Oilcode, it would sunset on 1 April 2017 under Part 6 of the *Legislative Instruments Act 2003* (LIA).

It is envisaged that, in accordance with best practice regulation principles, if the Oilcode is no longer required because it is deemed ineffective or irrelevant to current industry operations by the review, it could be actively repealed rather than allowing it to sunset.

The Oilcode could be repealed as a legislative instrument through the automatic and bulk repeal provisions of Part 5A of the LIA on another date prior to 1 April 2017.

The Franchising Code of Conduct regulates the conduct of parties to a franchise agreement where no other mandatory code, such as the Oilcode, applies. Repeal of the Oilcode may see some fuel re-selling agreements

becoming regulated instead by the Franchising Code. The current percentage of franchisee agreements in the retail fuel market is 11.8 per cent.⁵

Given the similarities between the codes in areas such as disclosure requirements and dispute resolution, these fuel franchising parties will be broadly subject to similar regulation as currently under the Oilcode – with the addition of recent reforms to the Franchising Code such as good faith and pecuniary penalty provisions.

However, some protections offered by the Oilcode including the guarantee of tenure under s32 (5) is not provided in the Franchising Code of Conduct. That said, Australian Consumer law provides protections against unconscionable conduct that can extend to business to business transactions.

3.1.1 Benefits

Repealing the Oilcode would align with the government's deregulation agenda, reducing the regulatory burden for businesses through removing associated regulatory business costs for both retailers and suppliers. A further benefit of repealing the Oilcode is that there would no longer be limits on developing improved approaches to fuel re-selling.

3.1.2 Risks

The major risk associated with repealing the Oilcode is that its provisions have provided an effective and transparent framework for petroleum market participants to operate under. This may only become obvious if the Oilcode were repealed.

Examples of risks to the industry from the repeal of the Oilcode may include:

- Loss of wholesale fuel price benchmarking and transparency provided by the TGP.
- Lack of resale price justification for fuel re-selling agreements provided by the TGP.

⁵ Australian Competition and Consumer Commission petrol monitoring report, 2014.

- Potential reintroduction of jurisdictionally based regulation increasing complexity and regulatory costs for national market participants⁶.
- No minimum standard contractual terms and conditions for fuel re-selling agreements⁷.
- Loss of code facilitated dispute resolution mechanisms. However, other alternative dispute resolution services, such as those available under state-based small business commissioners (and soon to be established Australian Small Business and Family Enterprise Ombudsman), will continue to be available.

3.1.3 Costs

There are no regulatory costs associated with the repeal of the Oilcode for market participants. The reduced business cost and burden, is in line with the government's deregulation agenda and any potential regulatory savings would be determined in the RIS.

However, it is not clear whether market participants would need to develop their own alternative fuel re-selling terms and conditions. If so, regulatory costs may be replaced with business costs in the absence of the Oilcode.

3.2 Option 2 – Parliamentary roll over of the Oilcode

If the Oilcode is retained without amendment, the Minister would move a motion for a resolution to defer sunseting of the Oilcode. However, a parliamentary roll over of this type is only appropriate where an instrument is uncontroversial and fit-for-purpose.

This entails both Houses of Parliament passing a resolution to defer the sunseting date of an instrument for a further ten years. Evidence is needed to support the need to retain the instrument, for example where the benefits outweigh the costs and associated risks.

⁶ Except Franchise arrangements, which may be captured under the Franchising Code of Conduct.

⁷ Except Franchise arrangements, which may be captured under the Franchising Code of Conduct.

3.2.1 Benefits

One of the main benefits of this option is that the existing arrangements and regulatory compliance costs are unchanged. The petroleum marketing industry is familiar with the existing Oilcode's contractual terms and conditions and did not raise compliance costs as an issue.

In addition, this option is consistent with the Competition Policy Review's Final Report⁸, which supports industry codes under the *Competition and Consumer Act 2010* (CCA). It also indicated that industry codes play an important role by providing a flexible regulatory framework to set norms of behaviour.

A further benefit of this option is that it does not create the risks identified with Option 1 - Repeal the Oilcode.

3.2.2 Risks

A risk associated with this option is that it does not address any of the stakeholder concerns that are within the policy context and consistent with the Oilcode objectives. However, the level of stakeholder ambivalence toward participating in the Oilcode review does not allow the magnitude of the risks to be ascertained.

Another risk with this option related to the parliamentary process is that a resolution to defer sunseting may be defeated in the Parliament, if amendment is deemed necessary. In this event, urgent action would be required to remake the instrument prior to the instrument sunseting which is not conducive to an optimal outcome. As such, consultation with stakeholders for remaking the instrument could be extremely time constrained and could result in limited opportunity for industry feedback on any potential changes not raised in this review.

3.2.3 Costs

There are no additional costs to parties that are currently covered by the Oilcode.

⁸ The Australian Government 2015, *Competition Policy Review Final Review*, Canberra, section 19.4

3.3 Option 3 – Remake the Oilcode

If the Oilcode is retained and amended, the Minister could seek to have it remade. A remade instrument is a 'new' instrument, which may include desirable or important policy changes to the existing instrument. This would be the case if the review recommends adopting changes to the existing scheme raised by stakeholders.

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

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

3.3.1 Benefits

This option provides an opportunity to address stakeholders concerns within the policy context and consistent with the Oilcode objectives. These include: the removal of the summary of supplier's and retailer's obligations within the disclosure document; adopting a good will provision; and a reduced disclosure period for entering into an agreement under the standard contractual terms and conditions.

It also enables the Oilcode to be better aligned with the revised Franchising Code of Conduct. Remaking the Oilcode may consider the issue of suitable enforcement provisions such as for pecuniary penalties and infringement notices (as per the Franchising Code of Conduct). However, it is important to note that the recent inclusion of such provisions under the Franchising Code was informed by many years of industry experience, numerous Commonwealth and State reviews and other incremental reforms over time before it was deemed necessary.

A further benefit of this option is that it does not create the risks identified with Option 1 - Repeal the Oilcode.

3.3.2 Risks

The main risk of this option is that the introduction of different contractual arrangements may have unintended consequential impacts on current business operating structures.

This option may also be considered as inconsistent with the Australian Government's deregulation agenda if it results in an overall increase in the regulatory cost imposed on market participants. The RIS will detail the impacts on industry and provide the Government with a better indication of the overall cost impact, as this will depend on the proposed changes to the Oilcode.

3.3.3 Costs

Costs were not raised as an issue during consultation on the Issues Paper. However, stakeholders were not in a position to assess the cost of the suggested changes listed above to the Oilcode. While it is acknowledged that some of the changes may reduce costs, there are some changes such as those relating to goodwill and reduce disclosure periods, which may impose unintended costs on market participants.