

3.11 Checklist for retailers—fuel re-selling business

☐ Am I a retailer?

A retailer includes the following:

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

For further information, refer to page 39 and figure 7.

☐ Do I have a fuel re-selling agreement?

A fuel re-selling agreement is a contractual arrangement (written, verbal or implied) between a supplier and a retailer that 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 business⁸ and
- 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.⁹

If a Commission agency agreement meets the above criteria, except the requirement or agreement to pay a fee, it is specifically identified as a fuel re-selling agreement under the Oilcode.

The Oilcode does not apply to fuel re-selling agreements for an amount of fuel less than an average of 30 000 litres per month. For further information see page 37.

☐ What information am I entitled to **before** entering into a fuel re-selling agreement?

Your supplier must give you a copy of the Oilcode and the relevant disclosure document at least 14 days before you:

- enter into a fuel re-selling agreement or an agreement to do the same or
- pay non-refundable money to the supplier or the supplier's associate in connection with such agreements.

⁸ While a traditional franchise or commission agency arrangement would meet this requirement, a 'supply only' or a 'brand and supply only' agreement from an owner-dealer would not.

⁹ Excluding payment for motor fuel at or below the usual wholesale price or payment for the usual wholesale price of motor fuel taken on consignment or payment of market value for purchase or lease of real property, fixtures or supplies needed to start business or to continue business under the fuel re-selling agreement.

❑ What information am I entitled to **after** entering a fuel re-selling agreement?

Where you propose to renew or extend a fuel re-selling agreement, your supplier must give you a copy of the Oilcode and the relevant disclosure document at least 14 days before the fuel re-selling agreement is renewed or extended.

Your supplier must provide you with a current disclosure document within 14 days of you making a written request but you can only request a disclosure document once in any 12-month period. However, a disclosure document provided in accordance with a request under a right of renewal does not prevent you exercising your right to request and receive a further disclosure document within the 12-month period since the last document was provided.

You are also entitled to certain materially relevant facts as your supplier becomes aware of them. If they are not already mentioned in the disclosure document, a supplier must disclose issues listed in the Oilcode as materially relevant facts within 14 days of becoming aware of the facts. Materially relevant facts may include:

- a change in your majority ownership
- details of all criminal and civil legal proceedings
- an award in arbitration against the supplier
- court enforceable undertakings given by the supplier to a public agency, and insolvency matters.

For more detailed information about the requirements to disclose materially relevant facts, refer to page 43.

❑ Does the information the supplier provides have to be in a specific format?

Fuel re-selling agreements that specify a duration of at least five years must be in accordance with the form set out in annexure 1. When the duration is less than five years, they must be in accordance with the form set out in annexure 2. A director or executive officer of your supplier must sign the disclosure documents.

❑ What if I would like additional information?

Where your supplier has given a shorter form disclosure document (annexure 2) and you have asked your supplier to provide you with certain information as outlined below, your supplier must give you a copy of the Oilcode and the relevant disclosure document containing additional information as soon as practicable.

Such information may include:

- information about the business experience of key personnel as specified in the Oilcode
- the name of the agent where your supplier must make payments to an agent in connection with the introduction or recruitment of a retailer
- certain information required under the Oilcode about existing fuel re-selling agreements

- details of your supplier's requirements for the supply of goods or services to you (e.g. if there are any restrictions on your ability to source from other suppliers)
- details of your supplier's requirements for the supply of goods or services by you (e.g. if there are any restrictions on whether you are permitted to supply the whole range of products supplied by your supplier)
- certain details in relation to the site/s to be occupied by you under the agreement
- conditions of financing arrangements offered or required by your supplier
- summary of other conditions of the agreement (e.g. whether the agreement is for a commission agency or other arrangement)
- obligations to sign related agreements (e.g. for a lease or licence)
- earnings information about the fuel re-selling business based upon reasonable grounds
- updates in relation to 'materially relevant facts'
- any other relevant disclosure information.

Your supplier is not required to provide the additional information if it is not reasonable in all the circumstances to give the information.

A disclosure document may contain other information, in a section of the document marked 'Other relevant disclosure information'.

☐ When should I pay a deposit?

There is no hard and fast rule about when you should pay a deposit. However, a provision in the Oilcode prohibits a supplier from seeking a non-refundable deposit in exchange for providing a retailer with its current disclosure document.

In addition, a supplier must not receive non-refundable money in relation to a fuel re-selling agreement if they have not received a written statement from you indicating that you have obtained advice or have declined to seek it (see below).

Note: that the Oilcode provides that a prospective retailer is entitled to a refund from the supplier within 14 days (after reasonable expenses have been deducted) if the prospective retailer exercises their rights under the cooling-off period provisions.

☐ Should I get any advice before entering into a fuel re-selling agreement?

Your supplier must not enter into, extend or renew, or receive non-refundable money for a fuel re-selling agreement or an agreement to do the same if it has not received a written statement from you saying that you have received, read and have had a reasonable opportunity to understand the disclosure documents and the Oilcode. Your supplier must not enter into¹⁰ a fuel re-selling agreement before they have received a statement, signed by you, that you:

- (a) have been given advice about the proposed fuel re-selling agreement, or fuel re-selling business, by:
 - an independent legal adviser or
 - an independent business adviser or
 - an independent accountant or
 - a relevant trade association or
- (b) have been told that you should obtain advice of that kind, but have decided not to seek it.

Under the Oilcode a supplier can require you to provide a statement under (a).

While you are able to waive the requirement to obtain professional advice it is recommended that you obtain such advice before entering into a fuel re-selling agreement.

☐ Are there specific conditions for a fuel re-selling agreement?

The Oilcode prescribes specific conditions for fuel re-selling agreements. These provisions include:

- cooling-off periods
- the provision of lease or leasing arrangement documentation
- the association of retailers
- the prohibition on general release from liability
- marketing and other cooperative funds
- proprietary fuel cards.

Further information about each condition can be found on page 42.

☐ How long should my fuel re-selling agreement go for?

A fuel re-selling agreement entered into before 1 March 2007 must retain the duration specified in that agreement, including any arrangements for renewal of the agreement.

If the agreement was previously covered by the *Petroleum Retail Marketing Franchise Act 1980*, the duration and renewal arrangements must be those specified in that Act.

¹⁰ This does not apply to the renewal or extension of a fuel re-selling agreement.

A fuel re-selling agreement entered into on or after 1 March 2007 must have duration of at least five years, unless:

- (1) The fuel re-selling agreement relates to a retail site owned or leased by you and requires the retailer to buy fuel from you or gives you an entitlement to sell fuel to the retailer. In this circumstance, the agreement must also contain at least one option to renew for at least a further four years (at least nine years in total).
- (2) You and the prospective retailer agree on a different duration for a fuel re-selling agreement where:
 - (a) the site on which the fuel re-selling business is carried on is leased under a lease that will expire within five years after the fuel re-selling agreement commences or, if (1) above applies, within nine years after the fuel re-selling agreement commences or
 - (b) you have decided that within five years after the fuel re-selling agreement commences or, if (1) above applies, within nine years after the fuel re-selling agreement commences, you will:
 - lease, dispose of or operate the retail site associated with the fuel re-selling agreement for a purpose other than the retail sale of motor fuel or
 - the initial upfront investment paid by the prospective retailer, such as for goodwill or 'key money', is less than \$20 000.

☐ What about options to renew a fuel re-selling agreement?

Your supplier must honour an option to renew a fuel re-selling agreement entered into before or after 1 March 2007. An exception to this requirement is when your supplier has decided that the retail site associated with the fuel re-selling agreement is to be disposed of, leased or otherwise used for a purpose other than the retail sale of motor fuel.

If you propose to exercise an option to renew a fuel re-selling agreement, you must request a disclosure document from your supplier at least 60 days and not more than 120 days before the expiration of the current term of the agreement.

When a fuel re-selling agreement is renewed, the Oilcode requires that:

- your supplier must provide the appropriate disclosure document (either long or short depending on the length of the renewal) to you
- any changes to the terms of the conditions of the agreement must be reasonable and in good faith.

If you and your supplier enter into a fuel re-selling agreement for a different duration for reasons other than those provided for within the Oilcode, the agreement is taken to have the duration prescribed under the Oilcode for that type of agreement (i.e. five or at least nine years).

- ❑ What happens if I, or the supplier, want to renegotiate or vary the terms of a fuel re-selling agreement?

You may renegotiate the terms of your fuel re-selling agreement where:

- the operation of the fuel re-selling agreement is substantially affected by a matter within the control of the supplier
- the matter was not disclosed by the supplier
- the occurrence of the matter was not reasonably foreseen either by you or the supplier.

A party to the fuel re-selling agreement may vary a term of the agreement or exercise discretion under the agreement without the consent of the other party if the original fuel re-selling agreement allows for such a right to be exercised unilaterally. It should be noted that in some circumstances the way in which such a term is used by the party relying on that term may be subject to judicial consideration for the purposes of an allegation of unconscionable conduct against that party.

- ❑ What happens if I, or the supplier, want to transfer a fuel re-selling agreement?

The Oilcode provides for the transfer of a fuel re-selling agreement to a third party and sets out the circumstances under which it would be reasonable for your supplier to refuse to consent to the proposed transfer. A request to transfer the agreement must be put in writing to your supplier and your supplier must not unreasonably withhold consent to the transfer.

The circumstances considered reasonable for your supplier to refuse the transfer of a fuel re-selling agreement include when:

- the proposed transferee is unlikely to meet the financial obligations of the fuel re-selling agreement
- the proposed transferee does not meet the selection criteria set out in the disclosure document
- the person proposing to transfer the agreement has not met the disclosure obligations
- the proposed transferee does not agree in writing to comply with the obligations of a retailer under the fuel re-selling agreement
- you have not paid or made a reasonable provision to pay amounts owing to the supplier
- you are in breach of the fuel re-selling agreement and have not remedied the breach.

Your supplier will be taken to have given consent to the transfer if they do not object to the transfer in writing within 42 days.

The Oilcode also requires that a person who proposes to transfer a fuel re-selling business must create and maintain a disclosure document to transfer the fuel re-selling business. Such a disclosure document for the transfer of a fuel re-selling business must be in the form set out in annexure 3.

The transferor of the fuel re-selling business must then:

- (a) give a disclosure document to the proposed transferee and
- (b) give to the supplier:
 - details of the consideration for the proposed sale
 - a copy of the disclosure document
 - all details reasonably required by the supplier for the supplier to decide whether to consent to the assignment.

If the supplier is the proposed transferee in relation to the fuel re-selling business, the supplier may waive the requirement to be given the disclosure document.

The supplier must give to the proposed transferee, or an adviser authorised by the proposed transferee, access to information:

- held by the supplier or their associates
- necessary to test the reasonableness of financial details mentioned in the disclosure document.

☐ What about where I, or the supplier, want to terminate the fuel re-selling agreement?

The Oilcode sets out the specific requirements where parties seek to terminate a fuel re-selling agreement. Such requirements will depend on whether termination is sought due to:

- a breach of the fuel re-selling agreement by the retailer
- special circumstances where the supplier is permitted by the Oilcode to terminate the agreement
- the agreement doesn't have a minimum duration and the initial investment is less than \$20 000
- the parties agree to an early termination.

Further information about the requirements in relation to termination of a fuel re-selling agreement can be found on page 48.

❑ What happens when my fuel re-selling agreement is set to expire?

At least 60 days before the expiry of a fuel re-selling agreement, you and your supplier must discuss the procedures that will apply to settle the commercial arrangements between you.

On expiry of an agreement your supplier must offer to buy or nominate a buyer for a reasonable quantity of saleable stocks of motor fuel, merchandise and equipment supplied under your fuel re-selling agreement, operational specifications or obtained with the supplier's approval.

❑ What happens if I get into a dispute with a supplier?

A DRA is able to assist parties to resolve a dispute about a fuel re-selling agreement. Specifically, the DRA may be able to provide assistance where:

- you and the supplier cannot agree on the terms and conditions of the renewal of an agreement, or the supplier fails or refuses to renew an agreement
- a dispute arises in relation to renegotiation, variation or a discretion exercised under a fuel re-selling agreement. If the parties are still unable to resolve the issue with assistance from the DRA, you may request that the supplier offer to terminate the fuel re-selling agreement in accordance with the termination by supplier-special circumstances procedures of the Oilcode
- the parties are unable to reach agreement on a termination
- the parties are unable to reach agreement on appropriate compensation for termination.

For further information about dispute resolution including the procedures for dispute resolution, see chapter 4, 'Dispute resolution scheme'.

❑ What about other provisions in the Trade Practices Act?

The Trade Practices Act prohibits misleading and deceptive conduct and unconscionable conduct (including against small businesses). Discussions on the requirements of these sections can be found in chapter 5, 'What if you don't comply?'.