

### 3.10 Checklist for suppliers—fuel re-selling business

☐ Am I a supplier?

You are a supplier if you:

- supply under a fuel re-selling agreement, or
- if you, otherwise than as a supplier, participate in a fuel re-selling agreement as a supplier.

For further information, refer to page 37 and figure 6.

☐ 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 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<sup>5</sup> 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.<sup>6</sup>

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.

☐ When do I create a disclosure document?

A supplier must create and maintain a disclosure document for the purposes of issuing to prospective retailers, or when proposing to renew or extend a fuel re-selling agreement. There are also specific requirements to create a disclosure document for the transfer of a fuel re-selling business.

Specifically, a supplier must also create a disclosure document in relation to the agreement not later than three months after the end of the financial year (that is, between 1 July and 30 September each year).

5 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.

6 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.

□ How do I set out a disclosure document?

Fuel re-selling agreements that specify 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, it must be in the form set out in annexure 2. A director or executive officer must sign the disclosure documents.

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

□ When must I give a disclosure document and to whom must I give it?

You must give a copy of your current disclosure document to:

- a person who proposes to become a retailer
- a person to whom you have consented to be a transferee in relation to a fuel re-selling agreement
- a retailer that proposes to renew a fuel re-selling agreement.

Where a person proposes to **become** a retailer, you should provide them with a copy of the Oilcode and the relevant disclosure document at least 14 days before they:

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

Where a person proposes to **renew** or **extend** a fuel re-selling agreement, you should give them a copy of the Oilcode and the relevant disclosure document at least 14 days before the fuel re-selling agreement is renewed or extended.

You must provide your retailer with a current disclosure document within 14 days of a retailer's written request. A retailer can request a disclosure document only once in any 12-month period. However, a disclosure document provided in accordance with a request under a right of renewal does not prevent your retailers exercising their right to request and receive a further disclosure document within the 12-month period.

□ When must I give information in addition to a disclosure document?

Where you have given a shorter form disclosure document (annexure 2) and the retailer asks you to provide them with certain information as outlined below, you must give them 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 you 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 requirements for the supply of goods or services to a retailer (e.g. if there are any restrictions on the retailer's ability to source from other suppliers)
- details of your requirements for the supply of goods or services by a retailer (e.g. if there are any restrictions on whether the retailer is permitted to supply the whole range of products supplied by you)
- certain details in relation to the site/s to be occupied by the retailer under the agreement
- conditions of financing arrangements offered or required by you
- 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' (see below)
- any other relevant disclosure information.

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

☐ What are the 'materially relevant facts' I must disclose?

If they are not already mentioned in the disclosure document, you 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 you
- court enforceable undertakings given by you to a public agency and insolvency matters.

More detailed information about the requirements to disclose materially relevant facts is available on page 43.

You should seek advice from your legal or business advisers regarding any action in relation to the circumstances listed above. You should have procedures in place to ensure that this occurs not only at the time of entering an agreement, but also on an ongoing basis so that your retailers can be kept up-to-date on such matters.

□ What other responsibilities do I have before entering into a fuel re-selling agreement?

Before you enter into, extend or renew, or receive non-refundable money in relation to, a fuel re-selling agreement or an agreement to do the same, you will need to obtain a written statement from the other party indicating that they had received, read and had a reasonable opportunity to understand the disclosure documents and the Oilcode.

You must not enter into<sup>7</sup> a fuel re-selling agreement before you have received a statement, signed by the prospective retailer, that the prospective retailer:

- (a) has 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) has been told that the prospective retailer should obtain advice of that kind, but has decided not to seek it.

You can require the prospective retailer to provide such a statement under (a).

□ When can I 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 you to refuse to consent to the proposed transfer. A request to transfer the agreement must be put in writing to you and you must not unreasonably withhold consent.

Circumstances considered reasonable for refusal to 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
- the retailer has not paid or made a reasonable provision to pay amounts owing to you
- the retailer is in breach of the fuel re-selling agreement and has not remedied the breach

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<sup>7</sup> This does not apply to the renewal or extension of a fuel re-selling agreement.

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

It is also important to note that while the supplier has the right to exercise their discretion in this instance, such discretion should not be exercised unconscionably.

□ Do I have disclosure obligations when I transfer a fuel re-selling agreement?

- If you propose to transfer a fuel re-selling business, you must create and maintain a disclosure document for the purpose of entering into an agreement to transfer the fuel re-selling business. A director or executive officer of the transferor must sign this disclosure document.
- A disclosure document for the transfer of a fuel re-selling business must be in the form set out in annexure 3. A disclosure document may contain other information, in a section of the document marked 'Other relevant disclosure information'.
  - A person who proposes to transfer a fuel re-selling business must:
    - give a disclosure document to the proposed transferee and
    - give to you:
      - details of the consideration for the proposed sale
      - a copy of the disclosure document
      - all details reasonably required by you in deciding whether to consent to the assignment.

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

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

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

□ What are the conditions of a fuel re-selling agreement?

The Oilcode prescribes a number of specific conditions for fuel re-selling agreements. These include provisions in relation to:

- 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 of these conditions can be found on page 42.

□ What are the specific requirements for the duration of a fuel re-selling agreement?

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.

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.

Because the Oilcode is prescriptive about the duration of agreements prior to and after 1 March 2007, it would be prudent to obtain legal advice before that date to ascertain what, if any, amendments need to be made to your fuel re-selling agreements concerning their duration.

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

You 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 you have 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.

A retailer who proposes to exercise an option to renew a fuel re-selling agreement must request a disclosure document from you 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:

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

If the supplier and retailer 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).

If the supplier and retailer agree to terminate a fuel re-selling agreement before it would otherwise expire, the supplier and another retailer may enter into a temporary agreement for that site covering the duration of the agreement. The duration of a temporary agreement may not exceed six months.

☐ What happens if I, or the retailer, want to vary or renegotiate the terms of the fuel re-selling agreement?

The terms of a fuel re-selling agreement may be renegotiated by a party when:

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

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 about where I, or the retailer, 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 does not 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 on the termination of a fuel re-selling agreement can be found on page 48.

❑ Do I have any obligations when the agreement is set to expire?

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

On expiry of an agreement you 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 and operational specifications or obtained with your approval.

❑ What happens if I get into a dispute with a retailer about the fuel re-selling agreement?

The 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 your retailer cannot agree on the terms and conditions of the renewal of 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, the retailer may require you 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?

Suppliers should familiarise themselves with a number of other provisions of the Trade Practices Act. They should become particularly familiar with provisions in the Act prohibiting misleading, deceptive and unconscionable conduct.

You can take preventative measures to minimise the risk of breaching such provisions. For example, you may have a specific procedure to ensure that the contents of your disclosure documents are truthful and that any claims made can be substantiated. You may also wish to have your documents, including your fuel re-selling agreements, examined by a legal professional to ensure that the terms you are setting in such agreements are not unconscionable. Discussions on the requirements of these provisions can be found in chapter 5, 'What if you don't comply?'.