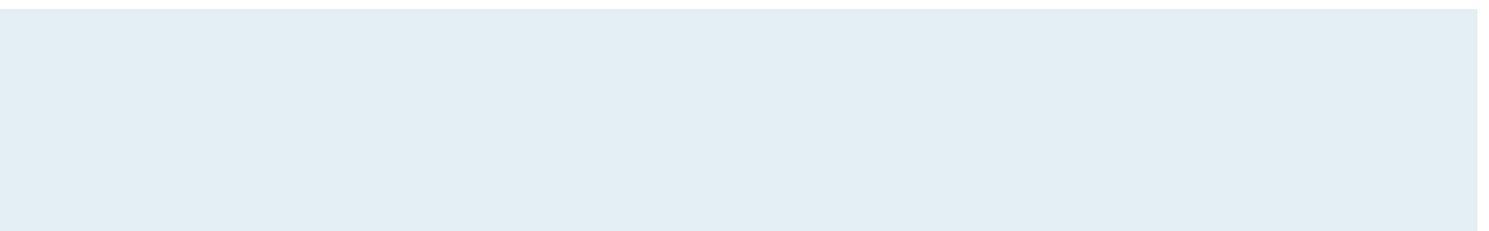




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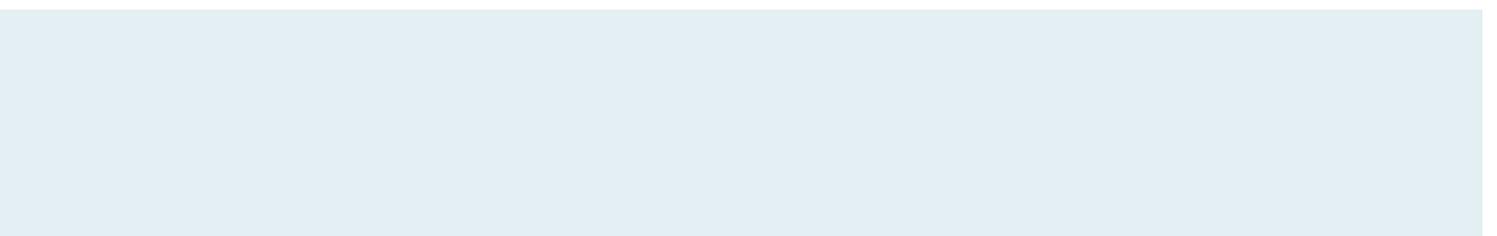
OILCODE COMPLIANCE MANUAL





Australian
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Commission

OILCODE COMPLIANCE MANUAL



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Important notice

The information contained in this manual is not legal advice and should not be relied upon as such. All care has been taken in its preparation, but readers should note that it is intended to provide a general understanding of the subject matter only and is not intended to be used in place of the *Trade Practices Act 1974*, the Trade Practices (Industry Codes—Oilcode) Regulations 2006 (Oilcode) and the Australian Standard on Compliance Programs (AS 3806). This manual reflects the law and legislation as it stands at the date of publication and provides guidance on minimum business conduct and disclosure requirements.

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GLOSSARY

Commission agency	Includes a fuel re-selling agreement under which the retailer sells motor fuel at retail as an agent of the supplier.
Customer	A person engaged in the business of retailing or wholesaling declared petroleum products; or an associate of that person.
Dealer council	An organisation made up of a supplier and a representative body of retailers with whom the supplier has fuel re-selling agreements.
Declared petroleum product	Any of the following temperature corrected motor fuels: <ul style="list-style-type: none">• unleaded petrol• a product consisting of a blend of unleaded petrol and ethanol• a product consisting of a blend of unleaded petrol and one or more bio fuels other than ethanol• premium unleaded petrol (other than premium unleaded petrol proprietary product)• diesel fuel other than a diesel proprietary product.
DRA	Dispute resolution adviser
Fuel re-selling agreement	A contractual arrangement (either written, verbal or implied) between a supplier and a retailer that provides for a minimum duration and has the following characteristics: <ul style="list-style-type: none">• 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 substantially or materially associated with a trademark, commercial symbol or advertising owned, used, licensed or specified by the supplier• the retailer is required to pay, or agree to pay, a fee before starting business.

If a commission agency agreement meets the above criteria, except the requirement or agreement to pay a fee, they are specifically identified as 'fuel re-selling agreements' under the Oilcode.

Fuel re-selling business	A business that is subject to, or intended to be subject to, a fuel re-selling agreement.
Retailer	Includes the following: <ul style="list-style-type: none"> • a person who carries on a business of selling or supplying petroleum products to end-users • a person who is a retailer under a fuel re-selling agreement • a person who, otherwise than as a retailer, participates in a fuel re-selling agreement as a retailer.
Spot sale	A sale by wholesale of a declared petroleum product to an uncontracted customer by a wholesale supplier of the declared petroleum product.
Supplier	Includes the following: <ul style="list-style-type: none"> • a person who is a supplier under a fuel re-selling agreement • a person who, otherwise than as a supplier, participates in a fuel re-selling agreement as a supplier.
Temperature corrected	The assessment of the volume of a declared petroleum product by reference to the number of litres that the declared petroleum product occupies, or would occupy, at a temperature of 15°C.
Term contract	A contract between a customer and a wholesale supplier that sets out the price at which, and the conditions under which, the customer will buy a declared petroleum product for a fixed period.
Terminal gate price (TGP)	The price for a wholesale sale of a declared petroleum product that is worked out on a temperature corrected basis and expressed in cents per litre.
Wholesale supplier	A person who sells declared petroleum products by wholesale from a wholesale facility.

ABOUT THE OILCODE



Background and scope

On 1 March 2007 the Australian Government implemented the Trade Practices (Industry Codes—Oilcode) Regulations 2006 (the Oilcode). The Oilcode forms a part of the Downstream Petroleum Reform Package, which comprises the:

- repeal of the *Petroleum Retail Marketing Sites Act 1980*
- repeal of the *Petroleum Retail Marketing Franchise Act 1980*
- prescription of the mandatory Oilcode under s. 51AE of the *Trade Practices Act 1974* (the Act).

Purpose

The Oilcode:

- regulates the conduct of suppliers, distributors and retailers in the downstream petroleum retail industry
- encourages greater transparency of terminal gate pricing and fuel re-selling agreements and greater certainty for industry participants regarding supply of petroleum products and tenure under fuel re-selling agreements
- provides an effective and relatively inexpensive way to resolve disputes between suppliers, distributors or retailers.

Once prescribed by the Australian Government under the Act, an industry code of conduct has the force of law. As a prescribed mandatory industry code of conduct, the Oilcode is binding on all participants in the downstream petroleum retail industry.

For this reason, the ACCC has produced this compliance manual to help all interested parties to identify and understand their rights and responsibilities under the Oilcode.

Structure of the Oilcode

The Oilcode is divided into the following parts:

Part 1: Preliminary

Part 2: Terminal gate price and related arrangements

Part 3: Fuel re-selling business

Part 4: Dispute resolution scheme

Part 1 deals with the name of the code, monitoring and review processes, definitions used in the Oilcode and application of the Oilcode.

Part 2 covers terminal gate price arrangements, including the rights and responsibilities of wholesale suppliers and their customers in relation to their wholesale transactions. It deals specifically with requirements for access to petroleum products and transaction disclosure, including the posting of prices, the provision of certain transaction documentation and obligations relating to the safe transportation of petroleum products.

Part 3 covers the relationship between suppliers and retailers involved in a fuel re-selling business. In particular, it creates rights and responsibilities for parties to fuel re-selling agreements including:

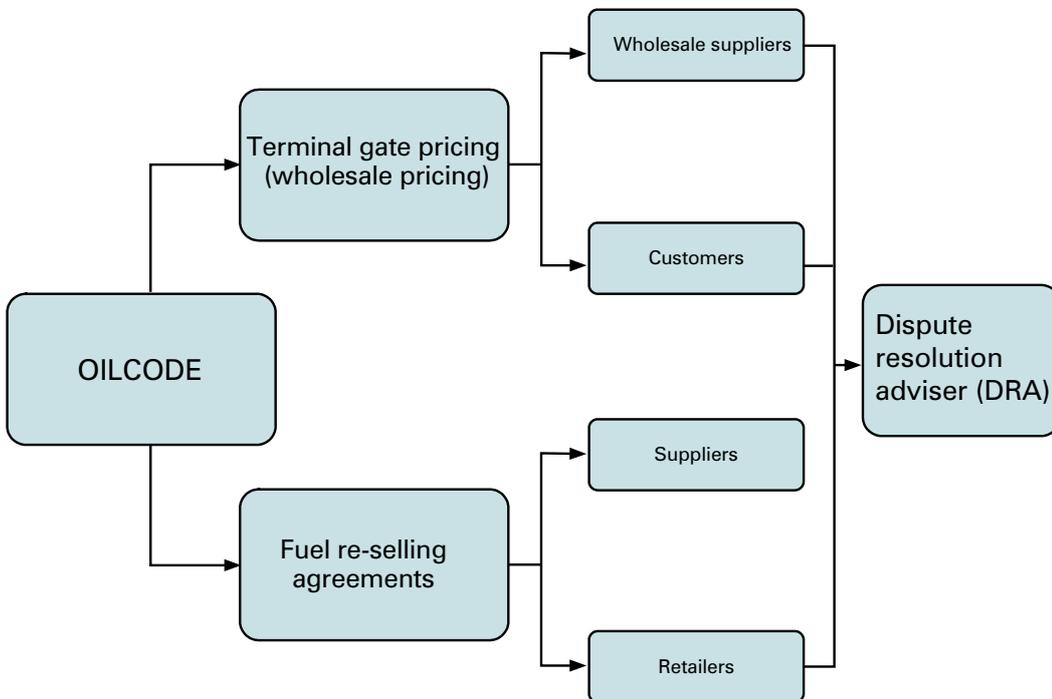
- disclosure both before entering and during a fuel re-selling agreement
- requirements in relation to the duration of such agreements
- the provision of certain conditions in relation to fuel re-selling agreements (e.g. a cooling-off period)
- requirements concerning the transfer, renegotiation and variation of fuel re-selling agreements
- the processes for termination of fuel re-selling agreements.

Part 3 is designed to help parties make more informed decisions when entering, renewing or transferring a fuel re-selling agreement and to set in place formal structures in business dealings.

Part 4 aims to improve the operating environment for all industry participants by providing access to a cost-effective and timely dispute resolution scheme as an alternative to litigation.

It sets out the different rights and responsibilities of parties in dispute about the wholesale supply of a declared petroleum product and about other matters including fuel re-selling agreements. The Oilcode provides for the appointment of a dispute resolution adviser (DRA) to assist parties in resolving their disputes. Below is a figure to help you understand the basic structure of the Oilcode.

Figure 1 Basic structure of the Oilcode



HOW DOES THIS MANUAL WORK?

This manual sets out the rights and obligations of industry participants in relation to the Oilcode. It has been designed to reflect the structure of the Oilcode.



Compliance programs

Compliance programs are an important part of risk management, and can be a good tool to assist businesses to comply with laws and regulations. This compliance manual is designed to help businesses comply with the Oilcode.

The following section is a brief introduction to some general compliance concepts. These concepts should be kept in mind when reading the manual.

Compliance with prescribed mandatory codes such as the Oilcode is more likely to be effective when relevant provisions have been identified and systems put in place to ensure ongoing conformance with these regulations.

How do you know what parts of the manual apply to you?

You will need to ask yourself a number of questions to determine what parts of the Oilcode apply to you as a participant in the downstream petroleum retail industry.

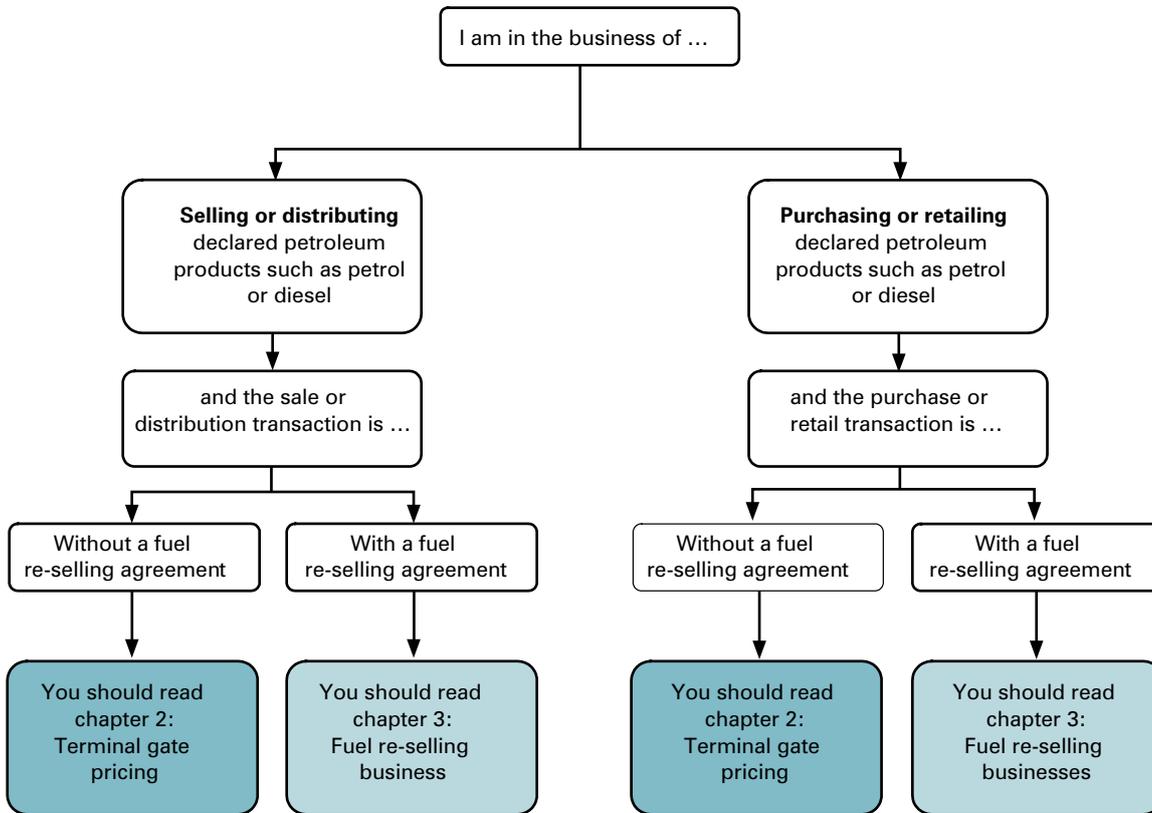
Answering these questions will direct you to parts of the manual dealing specifically with your rights and obligations under the Oilcode. Familiarising yourself with these sections of the manual will help you to fulfil your obligations under the code.

The way you conduct your business

You have different rights and obligations under the Oilcode depending on where you are in the downstream petroleum retail industry supply chain. These rights and obligations will also vary depending on the way in which you conduct your business.

Figure 2 on the following page will help you identify more easily what parts of this manual are most relevant to you and your business.

Figure 2 What parts of the Oilcode are most relevant to you?



Do you sell, supply or distribute declared petroleum products?

Industry participants at the top of the supply chain (e.g. wholesale suppliers of declared petroleum products) have a number of rights and responsibilities under the Oilcode.

Industry participants who sell, supply or distribute declared petroleum products have different rights and responsibilities depending on how they transact business with their customers and retailers.

- **Without a fuel re-selling agreement**

If you sell, supply or distribute declared petroleum products to your customers **without a fuel re-selling agreement**, you should read chapter 2, 'Terminal gate price and related arrangements'. This chapter broadly outlines what is required of a wholesale supplier in relation to the disclosure of terminal gate pricing and arrangements with their customers.

- **With a fuel re-selling agreement**

If you sell, supply or distribute declared petroleum products to your customers **under a fuel re-selling agreement**, you should read chapter 3, 'Fuel re-selling businesses'. This chapter outlines requirements in relation to fuel re-selling agreements and disclosure obligations under such agreements.

- **With and without a fuel re-selling agreement**

If you sell, supply or distribute declared petroleum products both with and without a fuel re-selling agreement with different customers or retailers, you should familiarise yourself with both chapters 2 and 3.

Do you purchase or retail declared petroleum products?

Industry participants who are broadly in the business of purchasing or retailing petroleum products (e.g. distributors and service station owners) also have a number of rights and responsibilities under the Oilcode, depending on the type of transaction.

- **Without a fuel re-selling agreement**

If you purchase or retail declared petroleum products **without a fuel re-selling agreement**, you should read chapter 2, 'Terminal gate price and other arrangements'. This chapter outlines what wholesale suppliers are required to do about terminal gate pricing disclosure and arrangements with their customers.

- **Under a fuel re-selling agreements**

If you purchase or retail declared petroleum products **under a fuel re-selling agreement** from your suppliers, you should also read chapter 3, 'Fuel re-selling businesses'. This chapter outlines requirements in relation to fuel re-selling agreements and disclosure obligations relating to such agreements.

- **With and without a fuel re-selling agreement**

If you purchase or retail declared petroleum products both **with** and **without** a fuel re-selling agreement, you should read both chapters 2 and 3.

Resolving disputes

Businesses, no matter what they do, are almost invariably required at some point to deal with a dispute whether it is with a customer or another business.

The Oilcode provides the downstream petroleum retail industry with a cost-effective and timely dispute resolution scheme as an alternative to litigation. The Oilcode provides for the appointment of a dispute resolution adviser (DRA), who helps to resolve disputes between parties.

The dispute resolution scheme applies to disputes arising:

- when a wholesale supplier fails to supply a declared petroleum product to a customer
- between the parties to a fuel-re-selling agreement
- in relation to any of the provisions of the Oilcode about terminal gate price arrangements or a fuel re-selling business.

Chapter 4, 'Dispute resolution scheme', outlines dispute resolution under the Oilcode in more detail.

What if someone doesn't comply with the Oilcode and the Act?

A breach of the Oilcode is essentially a breach of the Trade Practices Act. If someone doesn't comply with the Oilcode, the ACCC or affected individuals may bring civil proceedings in court for relief such as damages or an injunction.

Other parts of the Act may also be relevant in some circumstances. The Act prohibits conduct that is misleading or unconscionable. Chapter 5, 'What if you don't comply?', provides more detail about non-compliance with the Oilcode and liability for breaches of the Act.

Other statutory obligations

Participants in the downstream petroleum retail industry should be aware that they may need to comply with other laws and regulations—whether Commonwealth or state—including:

- fuel standards (e.g. quality)
- terminal gate pricing (e.g. in Victoria and Western Australia)
- occupational health and safety.

More information about other statutory obligations can be found in chapter 6, ‘Other statutory obligations’.

1. COMPLIANCE

Compliance programs are good risk-management tools, and setting one up may help your business to comply with the Oilcode and avoid breaching the law.



A breach of the Oilcode is a breach of the *Trade Practices Act 1974* and failure to comply with the provisions of the Oilcode may result in another party bringing legal action against your business. Compliance programs are good risk management tools, and setting up one may help your business to comply with the Oilcode and avoid breaching the law.

Too often management only actively considers—and devotes resources to—the compliance risks of their business when a crisis occurs. The consequences of failing to adequately manage trade practices risks have long been recognised. However, not only may companies face damages, injunctions and a variety of ancillary and remedial orders if they breach the Oilcode or the Act, they may also have to contend with significant distractions to business management and damage to brand reputation.

Prevention is always better than a cure. When businesses fail to have a compliance program, or when their compliance program is ineffective, they are essentially relying on others to bring that failure to their attention. It is far better for the business itself to discover the breach and rectify the problem before someone else does it for them.

The ACCC publications *Corporate trade practices compliance programs* (for medium to large businesses) and *Small business guide to trade practices compliance programs* provide further information on designing and implementing general trade practices compliance programs. These documents should be read in conjunction with Australian Standard 3806: *Compliance programs* and Australian Standard 4269: *Complaints handling*.

1.1 Compliance programs

The Oilcode requires downstream petroleum retail industry participants to comply with a number of obligations. An effective compliance program will help you to ensure you meet these obligations successfully.

The benefits of such compliance programs include:

- minimising the risk of breaching the Oilcode
- minimising the risk of breaching other sections of the Act
- minimising the risk of breaching other statutory obligations
- helping parties to improve business practices and procedures
- minimising the risk to an organisation of costly court action
- promoting a culture of compliance within the organisation
- assisting the organisation to remain or to become a good corporate citizen.

Every organisation's circumstances are different and no generic compliance program can apply to businesses across the board. Depending on the size and risk profile of the organisation, a compliance program can be as simple as implementing a few systems or procedures and providing all relevant staff with training tailored to the regulatory risks of the organisation.

Typically an effective compliance program will include:

- adequate resources to meet the requirements of the Oilcode that apply to the organisation
- the day-to-day operational requirements of a compliance program
- a monitoring and continuous improvement.

1.2 Developing an Oilcode compliance program

The implementation and management elements of a compliance program will not be the same for all organisations because of their differing size, structure and activities.

Firms with responsibilities under the Oilcode may want to consider using Australian Standard 3806 to guide them when setting up an Oilcode compliance program. They may also want to consider integrating compliance with the Oilcode into their existing compliance system, if they have one.

The following steps might be useful to consider when developing an Oilcode compliance program:

- Giving someone responsibility for implementing the Oilcode

A compliance program is more likely to be effective when a person within the organisation is given specific responsibility for ensuring compliance with the Oilcode. This person should be knowledgeable about the Oilcode, willing to be responsible for owning it, have sufficient authority to implement the compliance program and be both an internal and external contact point on Oilcode issues.

In the small business environment, a compliance officer may be a director of the company or a person appointed by a director to ensure that the business complies with its Oilcode obligations.

- Developing an Oilcode compliance plan

An Oilcode compliance plan is a ‘roadmap’, a blueprint, to assist you to set up and implement your compliance program. Typically such a plan would include:

- operational practices and procedures to be developed
- roles and responsibilities of relevant people
- resources needed
- priorities
- implementation dates
- monitoring dates (if required).

- Identifying and allocating resources for Oilcode compliance

Resources necessary to set up and maintain an effective compliance program typically include:

- the creation of a position of Oilcode compliance officer
- access to external advice and specialised skills (e.g. legal)
- adequate reference material.

- Identifying your obligations under the Oilcode

Firms should systematically work through the Oilcode and determine which aspects of it apply to them. Wholesale suppliers for terminal gate pricing transactions and suppliers for fuel re-selling agreements may wish to consider setting up an Oilcode compliance committee, particularly if their organisation is large. The required skills mix on such a committee could include staff with legal, accountancy, information technology and field expertise.

- Developing Oilcode compliance procedures

It is not enough to have a compliance program ‘on paper’. A compliance program must be incorporated into the business and become part of the way the business functions. It is important to develop well-documented procedures (e.g. operating policies and procedures, work instructions and training) so that all employees are aware that systems are in place to ensure compliance with the Oilcode.

- Implementing compliance procedures

Implementing Oilcode compliance procedures include:

- identifying the appropriate business units and line managers
- allocating responsibilities for implementing procedures
- determining resources needed
- setting timeframes for implementation
- checking that implementation has occurred.

- Dealing with Oilcode complaints

Firms with a number of responsibilities should have a visible and accessible complaints-handling system so that all Oilcode compliance failures can be captured and rectified quickly. Early detection can prevent problems from escalating. A complaints-handling system can also identify whether there are any systemic issues with Oilcode compliance, allowing appropriate remedial action to be taken. An existing complaints-handling mechanism could be extended to include Oilcode complaints to avoid duplication. Initially, it may not be clear that a complaint specifically relates to the Oilcode.

In terms of visibility and accessibility, if an Oilcode compliance officer is responsible for dealing with complaints their contact details should be readily available to those who are likely to raise complaints or inquiries (e.g. retailers).

- Keeping records

Record keeping is necessary to both monitor and provide evidence of a business’ compliance with the Oilcode and other applicable legislation.

A firm’s Oilcode compliance records could typically include:

- established procedures
- action taken on issues/interpretations
- allocation of roles and responsibilities for compliance
- training records
- information on compliance performance (including compliance reports)
- complaints and communications from the organisation’s interested parties
- resolution of complaints
- details of compliance failures and corrective and preventive actions
- results of reviews and audits of the compliance program and actions taken.

- Monitoring, identifying and rectifying compliance failure

Monitoring of compliance performance can include:

- compliance failures
- instances where critical control point requirements are not met
- instances where compliance inspections are not performed as scheduled.

It is important that an Oilcode compliance officer develops effective feedback systems to be able to identify Oilcode compliance failures. Feedback on a business' compliance performance can come from various sources, including employees and customers (e.g. through a complaints hotline or a complaints-handling system). As noted earlier, it is important that an Oilcode compliance officer's role and contact details are highly visible to these sources.

If you have an Oilcode compliance program in place, it may be prudent to have the program audited periodically to ensure that it remains up-to-date and effective in assisting your business to comply with the law. Having such a review conducted by an external party may produce a more objective assessment of the program.

1.3 Checklist for an effective compliance program

- Has someone been given overall responsibility for Oilcode compliance?
 - Does that person have sufficient ‘clout’—or access to a person with the authority—to ensure that Oilcode obligations are carried out?
 - Has a compliance plan been developed covering such things as:
 - roles and responsibilities of people implementing various aspects/procedures in relation to the compliance program
 - timelines when Oilcode obligations are to be carried out
 - resources to be applied in the compliance program
 - priorities
 - how compliance obligations will be embedded in operational practices and procedures
 - processes for identifying, reporting and responding to compliance failures?
- Has the compliance officer systematically worked through the Oilcode to determine what aspects of the Oilcode apply to your organisation and in what circumstances?
- Have workable Oilcode procedures, practices, documentation or processes been developed for those circumstances where the Oilcode applies?
- Has a system (e.g. responsibilities and timelines) to implement these procedures, practices, documentation or processes been put in place?
- Has a visible and accessible means to deal with complaints from fuel buyers been set up? Does the person dealing with complaints have the appropriate negotiation/dispute resolution skills and authority to deal with complaints?
- Has the compliance officer set up an Oilcode record keeping system?
- Has the compliance officer set up a monitoring program to ensure compliance with procedures, practices, documentation or processes?
- Does your program include procedures for continual improvement (e.g. audits and preferably external reviews)?

2. TERMINAL GATE PRICE AND RELATED ARRANGEMENTS

The Oilcode provides a nationally consistent approach to TGP arrangements.



2.1 What is terminal gate pricing?

The terminal gate price (TGP) is the price for a wholesale sale of a declared petroleum product (such as unleaded petrol or diesel) worked out on a 15°C temperature-corrected basis and expressed in cents per litre.

The Oilcode provides a nationally consistent approach to TGP arrangements. This approach improves transparency in the wholesale pricing of declared petroleum products and allows customers to access these products at the TGP.

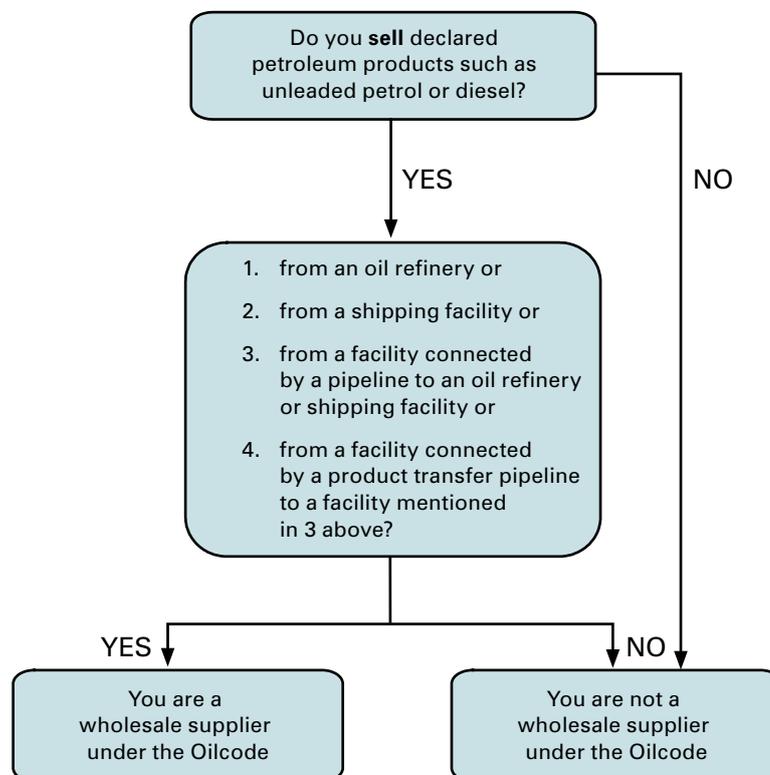
This chapter applies to both wholesale suppliers of declared petroleum products and their customers.

2.2 Who is a wholesale supplier?

A wholesale supplier is a person who sells declared petroleum products such as unleaded petrol and diesel by wholesale from a wholesale facility such as an oil refinery, a shipping facility, a facility connected by a product transfer pipeline to an oil refinery or a shipping facility, or a facility connected by a pipeline to this latter facility.

Figure 3 will help you work out whether you are a wholesale supplier under the Oilcode.

Figure 3 Are you a wholesale supplier?

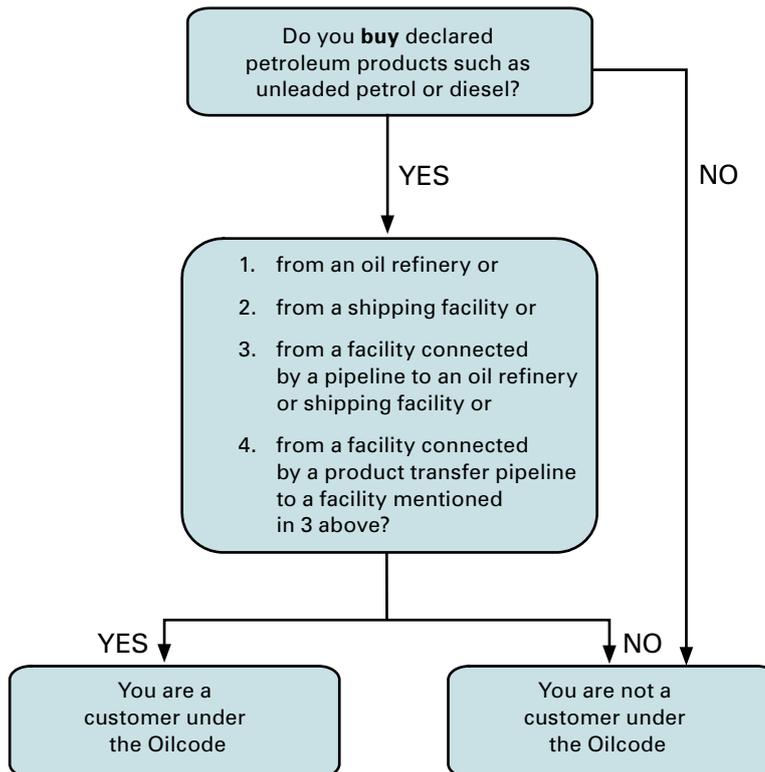


2.3 Who is a customer?

A customer is a person engaged in the business of retailing or wholesaling declared petroleum products or an associate of that person. In the context of this manual a customer does not mean a member of the public purchasing fuel at a service station.

Figure 4 will help you to work out whether you are a customer under the Oilcode.

Figure 4 Are you a customer?



2.4 Disclosing the terminal gate price

The Oilcode specifies that all wholesale suppliers must publicly advertise the TGP each day for the wholesale sale of declared petroleum products (e.g. a sale by a refiner to a retailer or a distributor). A wholesale supplier must make their terminal gate prices available to the public each day on an internet website or, if this is not possible, from a telephone or facsimile service operated by or for the wholesale supplier.

The only exception to this advertising requirement is when one or more related body corporate entities are selling declared petroleum products by wholesale from a wholesale facility.

Under these circumstances, only one of the related body corporate entities is required to post a TGP under the Oilcode. A posting by one of the related body corporate entities will satisfy this requirement for the group of companies.

The Oilcode further specifies that a wholesale supplier may post more than one TGP a day; however, this may only be done if it is made it is clear that only one price is in effect at any time and that the new price supersedes all other prices previously identified on that day.

2.5 Setting the terminal gate price

A wholesale supplier must not include any amount imposed for, or in relation to, an additional service in a posted TGP. Charges for additional services must be identified separately from the posted TGP in your sales documents. However, the wholesale supplier may:

- charge the posted TGP minus an amount subtracted as a discount
- provide an additional service and charge the posted TGP plus an additional amount added for the service.

2.6 Terminal gate price arrangements in the states and territories

Wholesale suppliers should also be aware that Western Australian and Victorian state legislation on TGP arrangements may impose additional obligations.

Further information about Western Australian or Victorian legislation is available by contacting the relevant state authorities.

2.7 Required documentation

At the time of delivery

At the time of delivery a wholesale supplier must provide to the customer a document that acknowledges the sale of the declared petroleum product. This document must include at least the following:

- a) the kind of product supplied
- b) the volume of product supplied worked out on a temperature corrected basis
- c) the total price charged per litre worked out on a temperature corrected basis
- d) the posted TGP applicable at the time of the transaction.

If the customer has already accessed the information in (c) or (d) from the wholesale supplier via telephone, fax or website, the information in (c) or (d) does not have to be included in the documentation at the time of delivery.

Within 30 days of delivery

Within 30 days of delivery a wholesale supplier must provide a document to the customer that both acknowledges the sale and includes further specific information about the sale.

This information must include the:

- name of the wholesale supplier
- name of the customer
- date of the transaction
- kind of declared petroleum product supplied
- volume of declared petroleum product supplied, worked out on a temperature corrected basis
- posted TGP applicable at the time of the transaction
- total price charged for the sale, worked out on a temperature corrected basis.

If the customer has requested additional services with the supply, the document must include:

- a description of each service
- the price charged for each service.

When a discount has been provided, the document must include:

- the amount of the discount
- the way in which the discount was applied.

2.8 Making products available at the TGP

The Oilcode includes a general requirement that a wholesale supplier must offer its declared petroleum products for sale at the posted TGP. Depending on the type of sale transaction, there are different obligations. Such obligations may vary depending on whether the transaction is being conducted under a written agreement (entered into before or after the commencement of the Oilcode) or whether the transaction is conducted outside a formal agreement, such as a spot sale.

Term contracts in force before 1 March 2007

For term contracts—i.e. where the price and purchase conditions are set for a fixed period—in force before 1 March 2007: if a customer asks a wholesale supplier to offer the option of buying a declared petroleum product at the posted TGP or at a price derived from that price, and it would not disadvantage the wholesale supplier, the supplier must make that offer. However, a customer may only make one such request and it must be made within 60 days of 1 March 2007.

Term contracts entered into after 1 March 2007

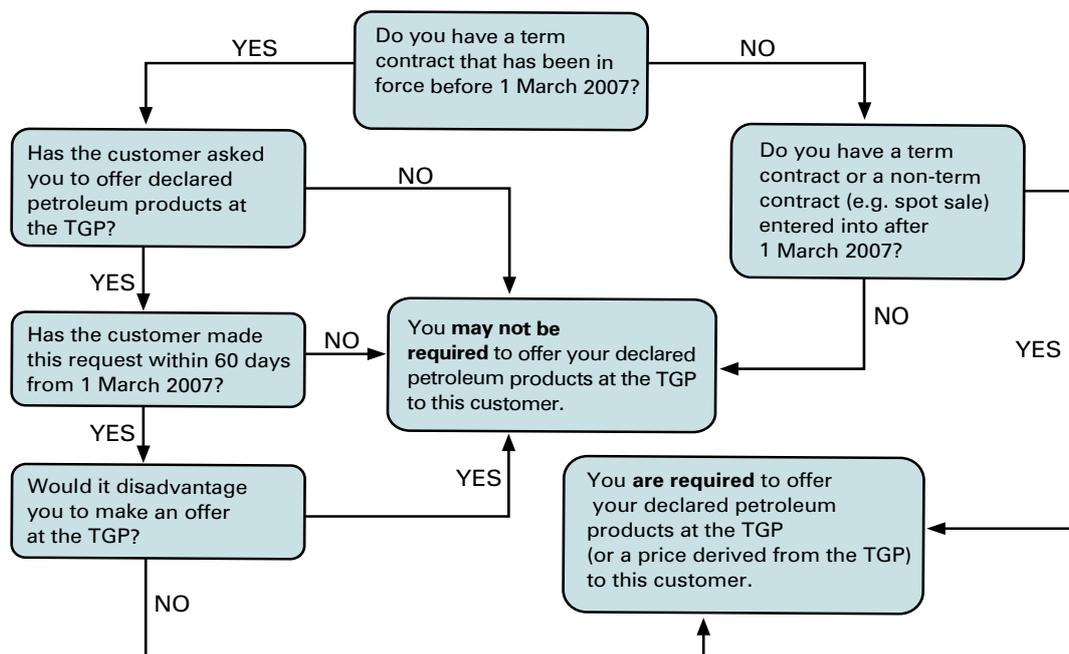
For term contracts entered into after 1 March 2007: a wholesale supplier must offer the customer the option of buying the declared petroleum product at the posted TGP or at a price derived from that price.

Non-term contracts entered into after 1 March 2007

For non-term contracts (spot sales) entered into after 1 March 2007: a wholesale supplier must make the customer an offer to purchase the declared petroleum product at the posted TGP or a price derived from that price. For example, this could apply where an uncontracted customer makes a spot purchase of a declared petroleum product.

Figure 5 will help you to determine whether you may be required to offer your declared petroleum products to a customer at your posted TGP.

Figure 5 Have you made your products available at the TGP?



2.9 Refusal to supply

Generally, a wholesale supplier must not refuse to supply its declared petroleum products to a customer. However, there are exceptions to this rule. A wholesale supplier is able to refuse to supply a declared petroleum product to a customer where it is not unreasonable to do so.

Specifically, a wholesale supplier is not required to supply a customer where:

- it does not have sufficient supplies¹ or
- it has a reasonable belief that the customer is unable to pay for the supply or
- it has a reasonable belief that the customer is unable to receive or transport the declared petroleum product in compliance with all occupational, health and safety requirements applicable to the customer.

The parties may involve the DRA directly in resolving disputes for failure to supply with a view to a timely resolution. This is discussed in more detail in chapter 4, 'Dispute resolution scheme'.

¹ This does not require you to supply a declared petroleum product to a customer as a spot sale if you only have sufficient supplies to meet the requirements of your contract customers. Your refusal to supply the declared petroleum product, because it would breach the contracts with the contract customers, would be a reasonable refusal to supply.

2.10 Health and safety requirements

Under the Oilcode, wholesale suppliers and customers have certain health and safety responsibilities. Wholesale suppliers must ensure that road vehicles they or their contractors use to transport the product are:

- suitable to load at their facilities
- capable of transporting the product safely.

They must also ensure that vehicles used are clearly marked as suitable to load and carry the product, and that each driver carries evidence that they are competent to operate the vehicle.

Equally, customers purchasing declared petroleum products from a wholesale supplier have obligations in relation to the transportation of such products. Customers must ensure that vehicles under their control which are used to transport a declared petroleum product are:

- suitable to load at the wholesale supplier's facilities
- capable of transporting the product safely
- clearly marked as suitable to load and carry the product.

They must also ensure that each driver carries evidence that they are competent to operate the vehicle.

Information regarding specific health and safety requirements can be obtained from the relevant state or territory authorities. A list of these authorities and their contact details can be found on the National Transport Commission website (www.ntc.gov.au).

2.11 Disputes in relation to terminal gate pricing

Where there is a dispute about failure to supply a declared petroleum product, the parties may involve the DRA directly with a view to a timely resolution.

If a supplier fails to supply a customer with a declared petroleum product, the customer may notify the DRA and ask them to attempt to resolve the dispute; they also may provide details and evidence of their complaint to the DRA.

The DRA may then seek copies of the wholesale supplier's records regarding the failure to supply. The wholesale supplier must comply with the DRA's request and give the records to the DRA as soon as practicable but within six hours of the request.

This is discussed in more detail in chapter 4, 'Dispute resolution scheme'.

2.12 Checklist for wholesale suppliers—TGP

- Are you a wholesale supplier?

You are a wholesale supplier if you sell declared petroleum products by wholesale from a wholesale facility. For further information, see page 23 and figure 3.

- How do you set your TGP?

Have you ensured that your TGP:

- is worked out on a 15°C temperature-corrected basis
- is expressed in cents per litre
- does not include any additional costs (e.g. costs for delivery)?

- Do you post your TGP on a website or make it available by phone or fax each day?

- Do you operate in Western Australia or Victoria?

If so, are you aware of the relevant state TGP legislation?

For further information about Western Australian or Victorian legislation, contact the relevant state authorities.

- Have you provided the required documentation?

Upon delivery of declared petroleum products supplied at the TGP, did you provide documentation detailing:

- the kind of declared petroleum product supplied
- the volume of declared petroleum product on a temperature corrected basis
- the total price charged in cents per litre calculated on a temperature corrected basis
- the posted TGP at the time of transaction?

Note: Information required in the last two dot points above are not required in the document if posted on the website or provided by phone or fax.

- Did you provide information detailing the following information within 30 days of delivery of declared petroleum products supplied at the TGP:

- your name
- the customer's name
- the date of the transaction
- the kind of declared petroleum product supplied
- the volume of declared petroleum product supplied, calculated on a temperature-corrected basis

- the posted TGP applicable at the time of the transaction
- the total price charged for the sale of the declared petroleum product, calculated on a temperature-corrected basis
- if the customer has requested additional services with the supply of the declared petroleum product including:
 - a description of each service
 - the price charged for each service
- if the wholesale supplier gives a discount as part of the supply of the declared petroleum product including:
 - the amount of the discount
 - the way in which the discount was applied?

Have you made your declared petroleum products available at the posted TGP?

The Oilcode generally requires that a wholesale supplier must offer their declared petroleum products for sale at the posted TGP. Obligations in this respect differ depending on the type of transaction of sale.

Such obligations may vary depending on whether the transaction is being conducted under a written agreement (entered into before or after the commencement of the Oilcode) or whether the transaction is conducted outside a formal agreement such as a spot sale.

Further information about requirements in relation to making your declared petroleum products available at the posted TGP is available at page 27 of this manual.

Have you refused supply of a declared petroleum product to a customer?

You may refuse to supply declared petroleum products at the TGP if:

- you do not have sufficient supplies
- you have a reasonable belief that the customer is unable to pay for the supply
- you have a reasonable belief that the customer is unable to receive or transport the declared petroleum product in compliance with all applicable occupational, health and safety requirements, or
- in the circumstances it is not unreasonable for you to refuse to supply the customer.

Note: You may be required to provide details of your refusal to supply to the DRA.

What are my requirements in relation to health and safety?

If you are a wholesale supplier, do you have procedures in place and supporting documentary evidence to ensure that each vehicle you or your customers use are:

- suitable to load at your facilities
- capable of transporting the product safely

- clearly marked as suitable to load and carry the product
- driven by someone who carries evidence that they are competent to operate the vehicle?
- ☐ What if I receive a complaint about my TGP?
 - Do you have a complaints handling system in place to follow?
 - Have you had a complaint from a customer regarding your TGP arrangements?
 - Have you tried to work it out with your customer?
- ☐ If the complaint escalates into a dispute, do you follow the processes set out in chapter 4, 'Dispute resolution scheme'.

2.13 Checklist for customers—TGP

The following applies to customers who purchase a declared petroleum product from a wholesale supplier who sells declared petroleum products by wholesale from a wholesale facility such as an oil refinery, a shipping facility, a facility connected by a product transfer pipeline to an oil refinery or a shipping facility, or a facility connected by a pipeline to this latter facility.

Are you a customer?

A customer is a person engaged in the business of retailing or wholesaling declared petroleum products or an associate of that person (for further information see page 24).

Have you been offered for sale a declared petroleum product at the TGP?

- If you are on a term contract in operation before 1 March 2007, are you aware that you can, within 60 days after 1 March 2007, request your wholesale supplier to make you an offer to purchase that product at the posted TGP price (or a price which takes into account discounts or charges for additional services) and that the supplier must make that offer?
- If you are entering into a term contract after 1 March 2007 has your supplier given you the option to purchase that product at the posted TGP price or a price which takes into account discounts or charges for additional services?
- In the case of non-term contracts (e.g. spot sales) after 1 March 2007, has your supplier made you an offer to purchase the declared petroleum product at the posted TGP or a price derived from that price?

Further information about requirements in relation to making your declared petroleum products available at the posted TGP is available at page 27 of this manual.

What if a wholesale supplier refuses to supply me at the TGP?

If you are refused supply you should attempt to find out what are the reasons for being refused supply.

A supplier cannot unreasonably refuse to supply you a declared petroleum product by wholesale. However, the supplier is not required to supply the product to you if they:

- do not have sufficient supplies of the declared petroleum product that they can reasonably provide to meet your requirements or
- reasonably believe that you are unable to pay for the supply or
- reasonably believe that you are unable to receive or transport the declared petroleum product in compliance with all occupational, health and safety requirements.

What if I have a complaint about terminal gate price arrangements?

Where you have a complaint about TGP—e.g. where there has been a problem getting supply—you should first try sort it out with the wholesale supplier. When this does not work, there are provisions in the Oilcode to refer the matter for resolution as discussed in chapter 4, 'Dispute resolution scheme'.

Where your wholesale supplier fails to supply a declared petroleum product to you it is open to you to notify the DRA that a dispute exists and ask them to attempt to resolve the dispute. If you notify the DRA you must, within a reasonable time, tell them:

- the nature of the complaint
- the parties to the dispute
- the expected effect on you of the disputed conduct
- give the DRA evidence to support the complaint.

The DRA may make a non-binding determination about the dispute.

- ❑ What are my requirements in relation to health and safety?

You must ensure that vehicles used to transport any declared petroleum product are:

- suitable to load at the facilities
- capable of transporting the product safely
- clearly marked as suitable to load and carry the product
- driven by a competent driver carrying evidence that they can operate the vehicle.

Information regarding the specific details of health and safety requirements can be obtained from the authority appointed in the relevant state or territory. A list of appointed authorities and their contact details can be found at the National Transport Commission website (www.ntc.gov.au).

3. FUEL RE-SELLING BUSINESSES

The Oilcode establishes minimum standards for various parties involved in a fuel re-selling business. This part of the Oilcode aims to help parties make more informed decisions when entering, renewing, extending or transferring a fuel re-selling agreement and to set in place formal business dealing structures.



3.1 What is a fuel re-selling agreement?

A fuel re-selling agreement is a contractual arrangement (either written, verbal or implied) between a supplier and a retailer. It has the following characteristics:

- one party (the supplier) grants another party (the retailer) the right to conduct a fuel re-selling business
- the supplier is able to exert substantial control over the operation of that business¹
- the fuel re-selling business will be associated with a trademark, commercial symbol or advertising that is owned, used, licensed or specified by the supplier
- the retailer is required to pay, or agree to pay, a fee before starting business.²

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.

It must also be noticed that the Oilcode does not apply to a fuel re-selling agreement for which the supplier reasonably believes that the amount of fuel that will be sold by a retailer will be less than an average of 30 000 litres for each month of the term of the agreement. If the supplier has such belief, they must give the retailer a written statement setting out the grounds for this at least three days before entering the agreement.

3.2 Who is a supplier?

A supplier includes the following:

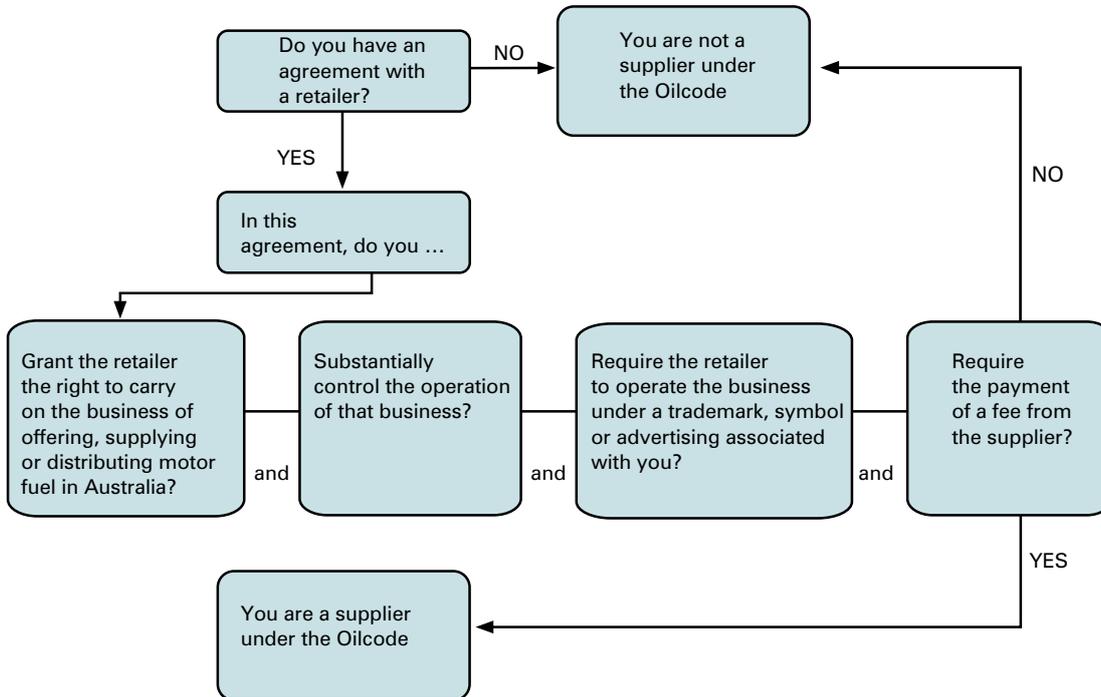
- (a) a person who is a supplier under a fuel re-selling agreement
- (b) a person who, otherwise than as a supplier, participates in a fuel re-selling agreement as a supplier (e.g. an agent).

Figure 6 on the following page will help you determine whether you are supplier under a fuel re-selling agreement.

1 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.

2 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, equipment or supplies needed to start a business or to continue business under the fuel re-selling agreement.

Figure 6 Are you a supplier under a fuel re-selling agreement?



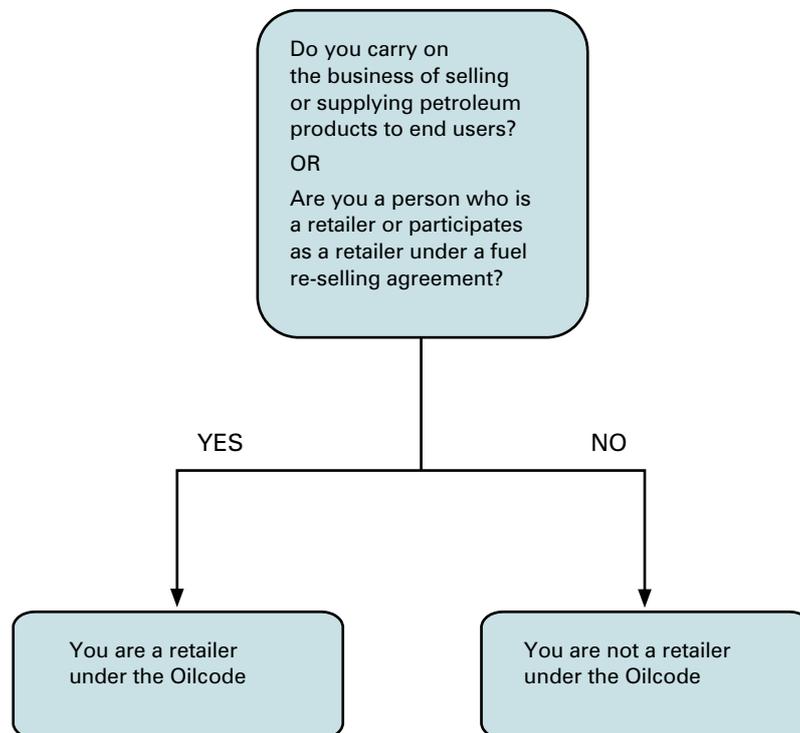
3.3 Who is a retailer?

A retailer includes the following:

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

Figure 7 on the following page will help you determine whether you are a retailer for the purposes of the Oilcode.

Figure 7 Are you a retailer?



3.4 Disclosure requirements for a fuel re-selling agreement

The Oilcode requires suppliers to provide a disclosure document to a retailer. A disclosure document allows a supplier to give a retailer adequate information to help them make a reasonably informed decision about an agreement or to give them current information which is relevant to the operation of their retail business.

Documentation: Trade Practices Act requirements

The Trade Practices Act prohibits misleading and deceptive conduct and unconscionable conduct (including against small businesses). Discussion on these legislative requirements can be found in Chapter 5, 'What if you don't comply?'. It is also important to ensure that the documents you provide comply with these provisions.

Creating disclosure documents

Generally, a supplier must create and maintain a disclosure document for the purposes outlined in the Oilcode. More specifically, a supplier must create and maintain a disclosure document within three months after the end of every financial year. There is also a general requirement that a director or executive officer of the supplier must sign this disclosure document.

Content and layout of disclosure documents

Under the Oilcode a disclosure document must be created in a specific format. The requirements of such a format depend generally upon the duration of the fuel re-selling agreement. For more information about the requirements for the duration of agreements see page 45.

Fuel re-selling agreements of at least five years

Fuel re-selling agreements that specify duration of at least five years must be in accordance with the form set out in annexure 1.

Fuel re-selling agreements less than five years

When the duration is less than five years, must be in accordance with the form set out in annexure 2.

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

Giving disclosure documents

Suppliers must give a copy of their current disclosure document to:

- a person who proposes to become a retailer or
- a person the supplier has consented to be a transferee in relation to a fuel re-selling agreement or
- a retailer who proposes to renew or extend a fuel re-selling agreement.

A supplier must not seek a non-refundable deposit for giving a person or retailer its current disclosure document.

Supplier's obligations

Where a person proposes to **become** a retailer, the supplier must give that person a copy of the Oilcode and the relevant disclosure document at least 14 days before that person:

- enters into a fuel re-selling agreement or an agreement to do the same or
- pays non-refundable money to the supplier or their associate in connection with such agreements.

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

Giving additional information

Where a supplier has given a shorter form disclosure document (annexure 2) and the retailer asks the supplier to provide them with certain information as outlined below, a supplier must provide 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 the 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 the supplier's 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 the supplier's 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 the supplier)
- 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 the 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.

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

3.5 Specific disclosure requirements before entering into a fuel re-selling agreement

A supplier must not 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 if it has not received from the other party a written statement that they had received, read and had a reasonable opportunity to understand the disclosure documents and the Oilcode.

A supplier must not enter into³ a fuel re-selling agreement before receiving a statement, signed by the prospective retailer, indicating 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.

A supplier can require that the prospective retailer provides a statement under (a).

³ This does not apply to the renewal or extension of a fuel re-selling agreement.

3.6 Conditions of a fuel re-selling agreement

The Oilcode provides that suppliers must provide their retailers with certain rights in relation to the fuel re-selling agreements. These conditions are outlined below:

Cooling-off period

The Oilcode provides that a prospective retailer is entitled to a cooling-off period of seven days after entering into a **new** fuel re-selling agreement (not a renewal, extension or transfer) or paying any money under the agreement, whichever occurs earlier.

In the event that the retailer terminates the agreement within the cooling-off period, the supplier must fully refund all money paid by the retailer under the agreement within 14 days. However, the supplier may deduct any reasonable expenses from the amount to be repaid.

Provision of lease or leasing arrangement documentation

When the retailer leases premises from a supplier for a fuel re-selling business, the supplier must give the retailer a copy of the lease or the agreement to lease within one month after the document is signed by the parties.

Similarly, when a retailer occupies premises leased by a supplier, the supplier is required to provide a copy of the lease to the retailer within one month after occupation, or give to the retailer a copy of the documents that gives the retailer a right to occupy the premises within one month of the signing. The supplier must also give the retailer written details of the conditions of occupation within one month after occupation.

Association of retailers

A supplier is prohibited from inducing a retailer not to form an association for a lawful purpose. A supplier is also prohibited from inducing a retailer not to associate with other retailers for a lawful purpose.⁴

Prohibition on general release from liability

A fuel re-selling agreement entered into after 1 March 2007 must not contain, or require a retailer to sign, a general release of a supplier's liability towards the retailer. However, this does not prevent a retailer from settling a claim against a retailer on terms that include a general release from liability towards the retailer for the claim after entering into a fuel re-selling agreement.

⁴ It is unlawful for retailers to meet with other retailers who are competitors for the purpose of fixing, controlling or maintaining the price that they will charge for a product.

Marketing and other cooperative funds

If a fuel re-selling agreement requires a retailer to pay money to a marketing fund, a supplier must:

- prepare an annual financial statement of the fund's receipts and expenses within three months of the end of the financial year
- have the statement audited by a registered company auditor within three months of the end of the financial year to which it relates (unless 75 per cent of the supplier's retailers in Australia, who contribute to the fund, agree that this is not required)
- if the retailer requests it, give a copy of the statement to the retailer within 30 days of the request.

Disclosure of materially relevant facts

If a supplier's disclosure document does not include a matter mentioned below, the supplier must tell a retailer or prospective retailer about it within a reasonable time (but not more than 14 days) after the supplier becomes aware of it.

Such matters include:

- a change in the supplier's majority ownership or control
- court proceedings by a public agency, alleging:
 - a breach of a fuel re-selling agreement or
 - a contravention of trade practices law or
 - a contravention of the *Corporations Act 2001*, or regulations made for that Act or
 - unconscionable conduct or
 - misconduct or
 - an offence of dishonesty
- a judgment in criminal or civil proceedings, identifying any of the matters mentioned above
- an award in an arbitration against the supplier in Australia, identifying any of the matters mentioned above
- a court enforceable undertaking given by the supplier to a public agency, identifying any of the matters mentioned above
- a judgment against the supplier under:
 - section 127A or 127B of the *Workplace Relations Act 1996* or
 - section 106 of the *Industrial Relations Act 1996* (New South Wales) or
 - section 290 of the *Workplace Relations Act 1997* (Queensland)other than a judgment in relation to the unfair dismissal of an employee
- a civil proceeding in Australia against the supplier by the lesser of:
 - 10 per cent or 10 of the supplier's retailers in Australia or

- any judgment that is entered against the supplier in Australia, and is not discharged within 28 days, for at least:
 - a small proprietary company—\$100 000 or
 - any other company—\$1 000 000
- a judgment that is entered against the supplier in a matter mentioned in:
 - paragraph 4.2(a) of the disclosure document that is in accordance with annexure 1 or
 - paragraph 3.2(a) of the disclosure document that is in accordance with annexure 2
- the supplier becoming an externally administered body corporate (the supplier must also tell the retailer the name and address of the administrator, controller or liquidator).

You must also tell the retailer:

- the names of the parties to the proceedings
- the name of the court or tribunal
- the case number
- the general nature of the proceedings
- the current status of the proceedings
- if the proceedings have been completed, the outcome of the proceedings.

3.7 Making the current disclosure document available

A supplier must provide a 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 retailers exercising their right to request and receive a further disclosure document within the 12-month period.

3.8 Supplier's proprietary fuel card

If a retailer is required to accept a supplier's proprietary fuel card for purchases, and reimbursement for the purchase is payable directly into the retailer's bank account, the supplier must reimburse a retailer for electronic funds transfer (EFT) purchases within three business days after the supplier receives details of the transaction. The supplier must reimburse a retailer within five business days for non-EFT purchases or where reimbursement is not payable directly into the retailer's bank account.

3.9 Duration of fuel re-selling agreements

The Oilcode specifies the required duration for different types of existing and new fuel re-selling agreements.

Fuel re-selling agreements entered into before 1 March 2007

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.

Fuel re-selling agreements entered into on or after 1 March 2007

A fuel re-selling agreement entered into on or after the commencement date of the Oilcode must have a duration of at least five years, unless:

1. The fuel re-selling agreement relates to a retail site owned or leased by the supplier and requires the retailer to buy fuel from the supplier or gives the supplier 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. The supplier 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) the supplier has 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, it 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.

Option to renew

A supplier must honour an option to renew a fuel re-selling agreement entered into before or after the commencement date of the Oilcode. An exception to this requirement is when the 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.

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

- a supplier 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.

Where a supplier and retailer cannot agree on the terms and conditions of the renewal of an agreement, or the supplier fails or refuses to renew an agreement, the DRA may be able to assist the parties to resolve a dispute. For further information about dispute resolution, see chapter 4, 'Dispute resolution scheme'.

Renegotiation or variation of a fuel re-selling agreement

Parties to a fuel re-selling agreement may want the terms of the agreement to be renegotiated or varied.

Specifically, 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 party not seeking the renegotiation
- the matter was not disclosed by the party not seeking renegotiation
- 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.

If a dispute arises in relation to renegotiation, variation or a discretion exercised under a fuel re-selling agreement, the assistance of the DRA may be requested. If the parties are still unable to resolve the issue with assistance from the DRA, the retailer may require that the supplier offer to terminate the fuel re-selling agreement in accordance with the 'termination by supplier—special circumstances procedures of the Oilcode'.

Transfer of the fuel re-selling agreement

The Oilcode provides for the transfer of a fuel re-selling agreement to a third party. A request to transfer a fuel re-selling agreement must be put in writing by the retailer to the supplier.

A supplier will be taken to have given consent to the transfer if they do not object within 42 days of the written notice.

The Oilcode specifies that a supplier must not unreasonably withhold consent to the transfer. However, in a number of circumstances a supplier is permitted under the Oilcode to reasonably withhold their consent to the transfer of a fuel re-selling agreement. These circumstances include when:

- the proposed transferee is unlikely to be able 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 the supplier
- the retailer is in breach of the fuel re-selling agreement and has not remedied the breach.

Generally, the decision as to whether the supplier is able to reasonably withhold consent is in the hands of the supplier themselves. Care should be taken when exercising such discretion to avoid the possibility of exercising discretion unconscionably.

Creating a disclosure document

A person proposing to transfer a fuel re-selling business must create and maintain a disclosure document for the purpose of entering into an agreement to transfer the fuel re-selling business. Such a disclosure document must be signed by the director or executive officer on behalf of the transferor.

Content and layout of disclosure documents

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'.

Giving disclosure documents

A person who proposes to transfer a fuel re-selling business must:

- give a disclosure document to the proposed transferee
and
- 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 to decide whether to consent to the assignment.

If the retailer proposes to transfer the fuel re-selling business back to the supplier, 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 its associates
- necessary to test the reasonableness of financial details mentioned in the disclosure document.

Termination of a 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:

- there has been a breach of the fuel re-selling agreement by the retailer
- special circumstances exist in which 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.

There are also certain obligations in relation to the expiry of agreements to finalise the commercial relationship between the parties.

Termination by supplier: breach by retailer

Where a supplier seeks to terminate the fuel re-selling agreement due to a breach of the fuel re-selling agreement by the retailer, the supplier must first give the retailer reasonable notice of their intention to terminate the agreement because of the breach. The supplier must then notify the retailer of what they require to remedy the breach and allow the retailer reasonable time to remedy the breach. The supplier is not required to allow more than 30 days.

If the breach is remedied within the prescribed timeframe, the supplier must not proceed with the termination as a result of that breach unless the special circumstances outlined below apply.

If the parties are still unable to reach agreement, the DRA may assist them to reach an agreement.

Termination by supplier: special circumstances

The Oilcode sets out the special circumstances under which a supplier is not required to provide a retailer with the right to remedy a breach before proceeding to terminate a fuel re-selling agreement.

Such circumstances include where the retailer:

- fails to hold a licence required to carry on a fuel re-selling business
- becomes bankrupt, insolvent or externally administered
- voluntarily abandons the fuel re-selling business
- is convicted of a serious offence
- operates the fuel re-selling business or an associated business in a way that is fraudulent or endangers public health or the environment
- agrees to terminate the agreement early
- breaches a provision of the agreement (otherwise than by behaviour described in the above dot points) at least three times
- is likely, by continuing to occupy the site to which the fuel re-selling agreement relates, to cause substantial damage to the premises, business or reputation of the supplier
- for a commission agency—fails to bank money owed to the supplier under the commission agency agreement.

The supplier may also terminate a fuel re-selling agreement relating to particular retail premises if the government compulsorily acquires the land or the sale of motor fuel at the premises is prohibited by a law relating to the use of land.

Termination by supplier of a fuel re-selling agreement that does not specify a minimum duration and the initial upfront investment is less than \$20 000

Where a supplier intends to terminate a fuel re-selling agreement that does not have a minimum duration and the initial upfront investment for the agreement is less than \$20 000, the supplier must give the retailer at least 30 days notice.

The supplier must also offer to buy or nominate a buyer for a reasonable quantity of the retailer's saleable stocks of:

- motor fuel
- merchandise
- equipment

supplied under the fuel re-selling agreement, obtained under the supplier's operational specifications or obtained with the supplier's approval during the term of the agreement. The retailer must also make reasonable efforts to sell the stock and equipment.

If the parties are unable to reach agreement on appropriate compensation for termination under this section, the DRA may be of assistance.

Agreed early termination

If the retailer and supplier agree to terminate a fuel re-selling agreement before it expires, the supplier must notify the retailer that:

- the retailer has rights under the fuel re-selling agreement
- the supplier will negotiate an arrangement with the retailer to terminate those rights by consent
- the retailer should seek independent financial and legal advice about any offer made by the supplier.

The supplier must also offer to pay costs relating to the termination of the fuel re-selling agreement, which may include, depending on the terms of the agreement, a proportional refund of any fees paid, for the remaining period under the fuel re-selling agreement, to the supplier by the retailer.

The supplier must also offer to buy or nominate a buyer for a reasonable quantity of the retailer's saleable stocks of:

- motor fuel
- merchandise
- equipment

supplied under the fuel re-selling agreement, obtained under the supplier's operational specifications or obtained with the supplier's approval during the term of the agreement. The retailer must also make reasonable efforts to sell the stock and equipment.

If the parties are unable to reach agreement on appropriate compensation for termination under this section, the DRA may be of assistance.

Expiry of the fuel re-selling agreement

The retailer and the supplier must discuss the commercial arrangement settlement procedures that will apply upon the expiry of a fuel re-selling agreement at least 60 days before expiration occurs.

On expiry, the supplier must also offer to buy or nominate a buyer for a reasonable quantity of the retailer's saleable stocks of:

- motor fuel
- merchandise
- equipment

supplied under the fuel re-selling agreement, obtained under the supplier's operational specifications or obtained with the supplier's approval during the term of the agreement. The retailer must also make reasonable efforts to sell the stock and equipment.

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 business⁵ 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.⁶

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 into⁷ 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

7 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?'

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?'.

4. DISPUTE RESOLUTION SCHEME

Even though parties may have systems in place to comply with the Oilcode, disputes can and do arise. This chapter outlines the dispute resolution scheme under the Oilcode.



Firms should consider setting in place an in-house dispute resolution system. This system should include visible and accessible complaints-handling procedures to deal with disputes effectively and efficiently. There are many reasons why it is better for a dispute to be handled in-house rather than to have an external party assist to resolve the dispute.

Where disputes cannot be resolved in-house, the dispute resolution scheme in the Oilcode may be engaged. The key objective of this scheme is to provide the downstream petroleum retail industry with an effective and relatively inexpensive way of resolving disputes. This scheme includes the appointment of the dispute resolution adviser (DRA).

4.1 What disputes are covered by the Oilcode's dispute resolution scheme?

The Oilcode's dispute resolution scheme covers disputes:

- where a wholesale supplier fails to supply a declared petroleum product to a customer
- arising between the parties to a fuel re-selling agreement
- arising in relation to any provisions covering terminal gate pricing and related arrangements, or fuel re-selling agreements.

4.2 What disputes are not covered by the dispute resolution scheme?

The dispute resolution scheme cannot be used to resolve a dispute about whether a retailer:

- no longer holds a licence that the retailer requires to conduct a fuel re-selling business
- has become bankrupt, insolvent under administration or an externally administered body corporate
- has voluntarily abandoned the fuel re-selling business
- has been convicted of a serious offence
- has agreed to the termination of a fuel re-selling agreement.

The scheme does not apply to disputes relating to pricing issues such as allegations of predatory pricing activities and concerns about below cost selling of declared petroleum products. These are more serious allegations that are dealt with in other parts of the Act.

Role of the dispute resolution adviser

The role of the DRA is to assist the parties to resolve disputes that arise under the Oilcode. The extent of the DRA's involvement will depend on the nature of the dispute. An important feature of the DRA is that the DRA may make non-binding determinations for industry disputes under the Oilcode.

Further information about the role of the DRA can be found on the Oilcode website at www.oilcodedra.com.au or by calling (02) 9283 9208.

The remainder of this chapter will outline the dispute resolution scheme and the procedures to be followed to resolve disputes under the Oilcode.

4.3 Resolving disputes unrelated to supply of declared petroleum products

With respect to disputes unrelated to failure to supply declared petroleum products, the Oilcode requires that the parties involved must attempt to agree about how to resolve the dispute, unless the DRA is satisfied that there is no reason to attempt negotiation.

If the parties attempt to agree about how to resolve the dispute:

- the parties may agree to refer the matter to a person to provide mediation or other assistance or
- if the parties cannot agree to refer the matter:
 - the parties must notify the DRA that they cannot agree
 - the DRA must appoint a person to provide mediation or other assistance within seven days after it has been notified.

The person providing mediation or other assistance must decide:

- the time for providing the mediation or assistance
- a place in Australia for providing the mediation or assistance.

The parties must try to resolve the dispute with the assistance of the person appointed.

In trying to resolve the dispute, a party may, with the agreement of the person appointed, be advised or otherwise assisted by another person.

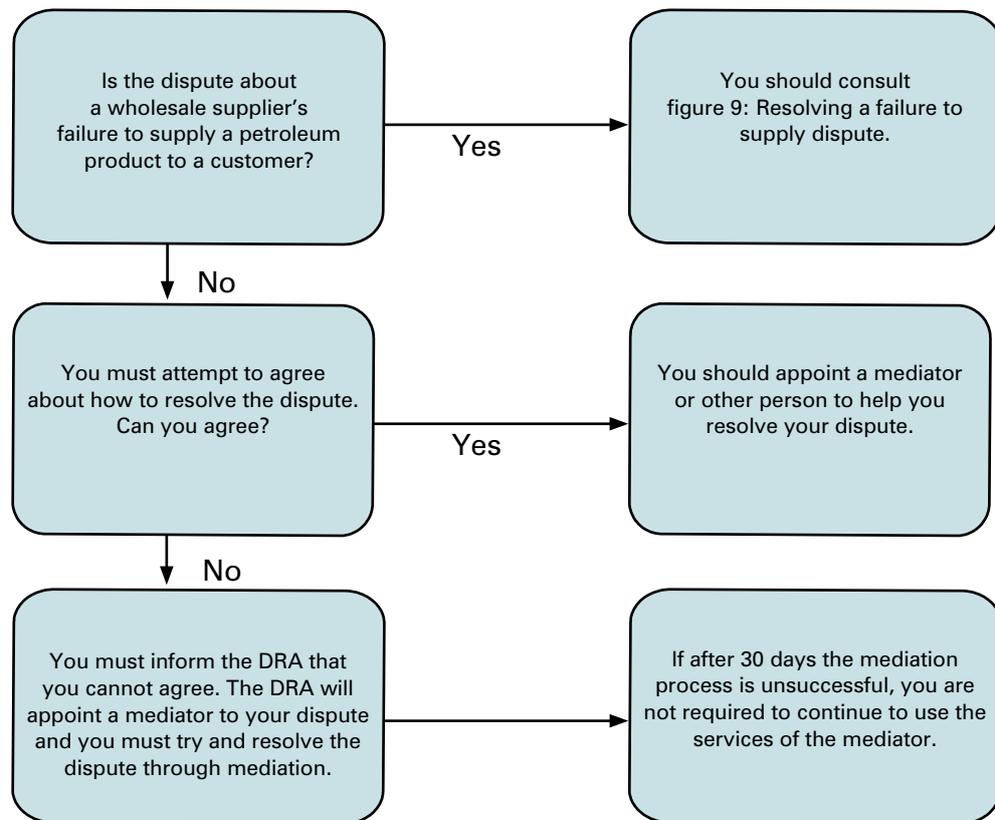
The parties to the dispute are the only persons authorised by the Oilcode to enter into any agreement necessary to settle the dispute.

If the person appointed to resolve the dispute thinks that the matters in dispute may apply more generally, they may attempt to reach a general resolution to those matters, including by:

- asking the supplier to raise the matters with its dealer council (i.e. a body made up of a supplier and a representative body of retailers with whom the supplier has fuel re-selling agreements) or
- dealing with other disputes that have features in common with the matter for which the person is appointed.

Figure 8 on the following page may assist you to work out how to resolve, or attempt to resolve, disputes.

Figure 8 Dispute resolution procedure



4.4 Disputes about supply of a declared petroleum product—advice about supply

Where a wholesale supplier's supply of a declared petroleum product has been interrupted, or there is a shortfall of supply, the wholesale supplier may inform the DRA of:

- the location of the wholesale facility at which the interruption or shortfall has occurred
- the declared petroleum product affected by the interruption or shortfall
- the expected duration of the interruption or shortfall
- the reason the interruption or shortfall has occurred.

If you are a wholesale supplier and you believe that you will be unable to supply for any of the above reasons, you may wish to have a procedure in place to contact the DRA advising of the relevant circumstance so that the DRA has adequate information to deal with allegations of a failure or refusal to supply.

4.5 Disputes about supply of a declared petroleum product

The Oilcode takes into consideration the potential for commercial damage that may flow as a consequence of a failure to supply declared petroleum products. Of course, the Trade Practices Act broadly covers refusal to deal; however, due to the potential upset to business upon a failure to supply, the Oilcode gives the DRA the power to become involved in failure to supply disputes.

Where the parties are in dispute about failure to supply, the retailer or wholesale supplier may notify the DRA that the dispute exists and ask the DRA to attempt to resolve the dispute.

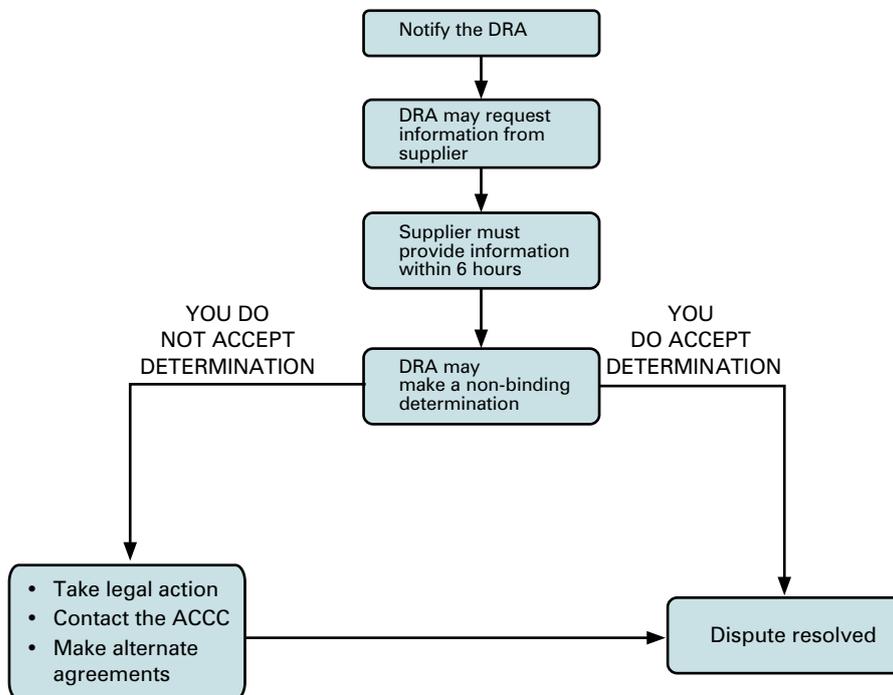
If the retailer or wholesale supplier notifies the DRA, they must, within a reasonable time, give the DRA evidence to support the complaint. This material includes the:

- nature of the complaint
- parties to the dispute
- expected effect on the complainant of the disputed conduct.

If the wholesale supplier has not already provided information to the DRA about their failure to supply, the DRA may ask them to provide, as soon as practical but within six hours, specific records regarding their failure to supply the declared petroleum product to the retailer or relating to other matters relating to supplying declared petroleum products. This requirement reflects the urgency of supply issues.

The DRA may then make a non-binding determination about the dispute. Figure 9 will help you to determine how to resolve, or attempt to resolve, a dispute about failure to supply issues.

Figure 9 Resolving a failure to supply dispute



4.6 Cost of the dispute resolution scheme

The Oilcode specifies that, unless otherwise agreed, the parties are equally liable for the costs of mediation or other assistance to resolve the dispute. The parties are also liable to pay their own costs of attending mediation.

4.7 Who to contact when you have a dispute

If you are involved in a dispute with your supplier, you should first determine whether they have any internal mechanisms (e.g. a complaints-handling policy) in place to resolve such matters.

Your second port of call should be the dispute resolution adviser or a mediator. Additional sources of assistance include legal and business advisers, accountants or industry associations.

The ACCC considers enforcement action when it believes that:

- there has been a breach of the Trade Practices Act and the Oilcode
- there is a public interest in doing so.

If the ACCC believes that your dispute is of a private contractual nature, it may recommend that you try mediation or seek independent legal advice.

For further information on the dispute resolution scheme, contact the DRA or ACCC Infocentre.

4.8 Preparing for mediation and what to expect

Mediation is essentially a well managed negotiation. It is wise to prepare for mediation, so that you are able to present your argument and weigh up your options. It is important during mediation to state your requirements and concerns clearly so that everyone understands what you need and why.

It may be helpful to consider:

- your rights and obligations in relation to the dispute
- the main issues you would like to discuss, and why they have not been resolved to date
- what you would like to see happen
- what you are prepared to do to achieve an outcome
- how the dispute might be resolved if mediation is not successful— this could include possible alternatives such as changing how you do things or going to court, what costs are involved in each option, and how realistic the alternatives are.

At the end of the mediation, the terms of any agreement reached may be recorded in an agreement between the parties.

4.9 Alternatives to mediation

Although mediation is an effective way to resolve disputes, it may not always be the most appropriate action.

Any action taken under the Oilcode dispute resolution scheme does not affect the right of a party to a dispute to bring their own legal proceedings. In addition, the dispute resolution scheme does not prevent anyone from approaching the ACCC directly.

When a retailer or a supplier believes there has been a serious breach of the Oilcode, the affected party may be entitled to claim damages, or to obtain court orders to stop the contraventions or other orders, such as those requiring changes to the agreement. Industry participants should seek legal advice on these issues.

Court action can be costly and time consuming; it can damage relationships and there is no guarantee that it will provide the desired outcome. Given these aspects of court action, it may be more practical to try to resolve the dispute through the Oilcode dispute resolution scheme.

However, if you decide to bring legal proceedings against another party, remember that if you lose the case, you may be liable for some or all of the other party's costs as well as your own. Pursuing court action should only be considered after obtaining independent legal advice.

You should also seek an opinion on your prospects of success in any legal action.

If you are unsure about the suitability of mediation, ask the ACCC, the DRA or your legal adviser.

4.10 Checklist for resolving disputes

□ How do I try to resolve my dispute?

Figure 10 suggests a path you may wish to follow in the event of a dispute.

Where appropriate, it may be beneficial to attempt to resolve the dispute yourself. The dispute may have arisen out of a lack of understanding, which discussion with the other party may easily be clarified and resolved.

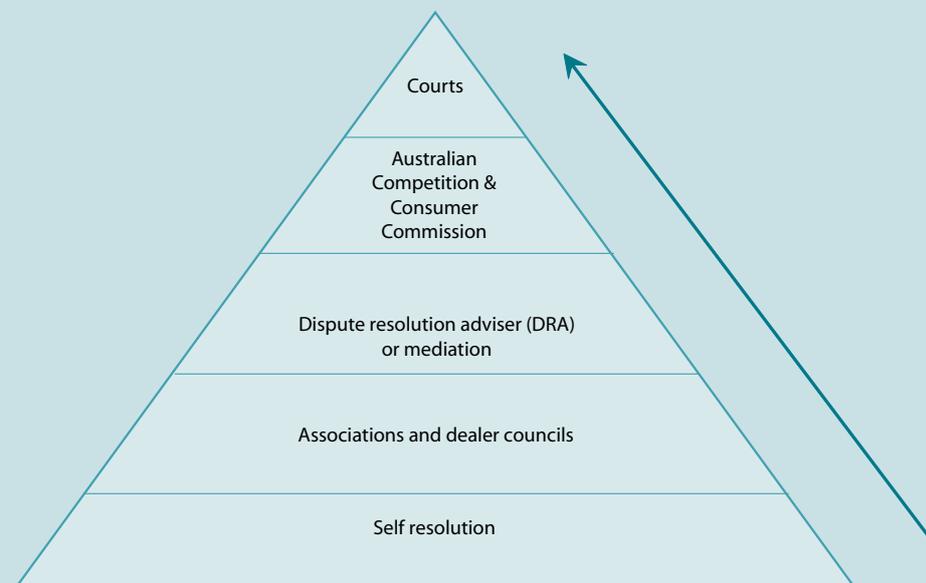
If this does not work, your next step may be to approach your industry association or dealer council for advice on how to best resolve the dispute. These groups are well placed in the industry and may provide you with assistance.

Following this, you may wish to lodge a complaint with the DRA, who will assess your dispute and provide a non-binding determination in a timely and cost-effective way. The DRA's contact details are (02) 9283 9208 or info@oilcodedra.com.au.

The ACCC may be your next port of call after the DRA. The DRA will refer a complaint on to the ACCC if they believe that the ACCC is best suited to assess the dispute. However, this does not prevent you from approaching the ACCC directly.

Court action may be appropriate in some circumstances. You should discuss any possible court action with your legal adviser.

Figure 10 Dispute resolution path



Disputes about failure to supply

- Do I have a complaint about failure to supply?
- Have I raised my concerns with the wholesale trader?
- Have I contacted my industry association or dealer council for advice?
- If I am still unable to resolve the problem, have I:
 - advised the DRA that a dispute exists?
 - asked the DRA to attempt to resolve it?
- Have I, within a reasonable time, told the DRA the:
 - nature of the complaint?
 - parties to the dispute?
- Have I, within a reasonable time, given the DRA evidence to support the complaint?
- I am still unable to resolve the dispute; have I:
 - contacted the ACCC?
 - obtained legal advice?

Other disputes

- Have I raised my concerns with the other party (e.g. my supplier) first?
- Have I used all the appropriate channels (e.g. referred the matter to a complaints/disputes officer at a senior level)?
- Have I made the following clear to the other party:
 - the nature of my particular problem?
 - my desired outcome?
 - the alternatives I will consider if the matter is unresolved to my satisfaction?
- What is my next course of action if my complaint is still unresolved? Should I contact:
 - my dealer council
 - the dispute resolution adviser
 - my solicitor
 - my industry association
 - the ACCC?

- ❑ In determining what action to take, have I considered the following:
 - costs (including of the process relative to the amount in dispute)
 - the complexity of the issues in dispute
 - the relationship between the parties, including:
 - whether there is a desire or need for an ongoing relationship
 - the relative bargaining strengths of the parties
 - whether outcomes need to be flexible
 - the attitude of the parties towards negotiation (with each other)
 - whether there is a need for a binding determination, and whether it will need to be enforced externally
 - the extent to which the dispute involves expert or legal issues?
- ❑ If I am going to have the dispute mediated, have I fully prepared for mediation?

5. WHAT IF YOU DON'T COMPLY?

Failure to comply with the Oilcode amounts to a breach of the *Trade Practices Act 1974* (Cwlth).



5.1 Who is liable for a breach of the Trade Practices Act?

A corporation may be liable for a breach of the Trade Practices Act if it:

- breaches the Act
- attempts to breach the Act
- assists another party to breach the Act
- induces another party to breach the Act
- is a party to the contravention of the Act
- is knowingly concerned with a breach of the Act.

5.2 What if you believe you are in breach of the Oilcode?

If you believe you may be in breach of the Oilcode, you should:

- immediately stop the activity
- seek advice
- attempt to resolve any disputes
- provide a remedy to the affected parties
- review how the breach came about
- put in place an effective compliance program to avoid future recurrences.

If you fail to comply with the Oilcode, you are in breach of s. 51AD of the Trade Practices Act. The Act provides for a number of sanctions and orders including:

- injunctions to stop the conduct
- compensation and damages
- orders for corrective advertising.

The ACCC can institute legal proceedings against you if you breach the Oilcode and/or the Trade Practices Act. Section 87B of the Act confers upon the ACCC the ability to accept formal administrative undertakings in which the parties agree to certain actions, such as stopping the offending conduct or reviewing a compliance program (or, in the absence of such a program, setting one up). If a s. 87B undertaking is breached, the Federal Court of Australia may make enforcement and compensation orders.

In addition to action by the ACCC, the Trade Practices Act also makes provision for other affected parties to take legal action for a breach of the Oilcode and/or the Act.

Moreover, if you are found to be in breach of the Act and the Oilcode, you may also face a number of commercial consequences—e.g. poor publicity may have a detrimental effect on your company's or your own business.

5.3 The ACCC and the Oilcode

The ACCC administers s. 51AD of the Act, which prohibits contraventions by corporations of an applicable industry code (such as the Oilcode).

Although the ACCC records and assesses every complaint it receives, not all complaints are pursued. The information obtained from individual complainants is recorded on the ACCC's complaints database; it may be used to establish a pattern of behaviour by a particular industry participant or by a particular part of an industry.

The ACCC may give priority to matters of complaint that:

- show a blatant disregard for the law
- will cause significant public detriment
- provide outcomes that will have educational or deterrent effects
- include unconscionable conduct against small business
- will clarify the reach and meaning of the Act.

The ACCC is likely to direct disputes to the DRA at first instance. However, if an industry participant has blatantly disregarded the Oilcode or the Act, the ACCC may take immediate action.

The ACCC is not responsible for Oilcode or petroleum industry policy. As part of its policy responsibilities, the Department of Industry, Tourism and Resources (DITR) provides policy advice and support to the Australian Government on downstream petroleum retail industry matters. Further information on the role of DITR is available on its website (www.industry.gov.au).

5.4 Breaches of other provisions of the Trade Practices Act

The Trade Practices Act covers much more than the Oilcode. Its objective is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. Two main types of behaviour regulated by the Act include misleading and deceptive conduct and unconscionable conduct.

Misleading conduct

The Trade Practices Act prohibits conduct that misleads or is likely to mislead. Even omission of materially important facts may be a breach of these provisions.

Prudent practice to avoid breaching this provision includes:

- being able to substantiate claims
- ensuring that your documentation is correct.

Unconscionable conduct

Section 51AC of the Trade Practices Act prohibits unconscionable conduct against a small business. In determining unconscionable conduct, a court may take the following factors into account:

- the parties' relative commercial strengths
- whether undue influence was exerted
- whether the contract exceeded what was reasonably necessary to protect the legitimate interests of the supplier

- whether the small business consumer was able to understand the documentation
- the cost and circumstances under which the small business could acquire the supplies elsewhere
- whether the supplier's conduct is consistent with its conduct in similar transactions with its other customers
- whether the supplier unreasonably failed to disclose any intended future conduct which might affect the interests of the business
- whether there was evidence of disclosure, good faith and willingness to negotiate and, most relevantly,
- the requirements of any applicable industry code.

The parties' relative commercial strengths

In determining unconscionability, the courts may look to the relative commercial strengths—e.g. an oil major that has a commercial relationship with a small downstream retailer.

Whether undue influence was exerted

Undue influence generally refers to one party unconsciously using their position of influence over another party to obtain a benefit.

If the parties are not in a recognised relationship of presumed influence, the affected party would have to prove that they were actually influenced by the other party to such an extent that their act was not of their own free or voluntary will.

Once a relationship of influence has been established, the onus lies on the person accepting the benefit under the transaction to establish that the other party exercised their own free and voluntary will in entering into the transaction.

Whether the contract exceeded what was reasonably necessary for the legitimate interests of the supplier

One of the matters which a court takes into account in determining unconscionable conduct in a supply transaction is whether the retailer, as a result of the supplier's conduct, is required to comply with conditions that are not reasonably necessary to protect the supplier's legal or commercial interests.

An example of such a condition might involve penalty provisions in an agreement that imposes obligations upon a party disproportionate to the loss or damage caused by the breach.

Whether the small business consumer was able to understand the documentation

In determining whether conduct has been unconscionable, the courts may also consider whether the smaller party was able to understand the content of documents used. This may also relate to whether a supplier's conduct was misleading or deceptive. The compliance message here is that your disclosure documentation should be:

- understandable (which might require the use of plain language)
- correct and capable of being substantiated (e.g. claims about the profitability of a fuel re-selling business).

Related to the above is whether the smaller party was advised to seek independent advice when they have not understood the document. In some circumstances—such as language difficulties, inexperience or lack of business acumen—one party may not be able to understand the agreement.

Suppliers under the Oilcode are required to ensure that their prospective fuel retailers either seek independent advice or sign a certificate stating that they decided not to seek advice on the operation of the agreement before they entered into the agreement. It is critical that procedures are in place to ensure compliance with this provision.

The cost and circumstances under which the small business could acquire the supplies elsewhere

When determining unconscionability the courts may also look at whether the weaker party had to supply or acquire goods or services at prices and terms substantially different from those available from or to similar parties, and whether these differences could be commercially justified.

Whether the supplier's conduct is consistent with its conduct in similar transactions with its other customers

The competition provisions of the Act focus on setting the scene for parties to negotiate prices and terms of contracts. However, the fact that some traders can negotiate better deals than others does not necessarily indicate unconscionability. In most cases, there will be valid commercial reasons for the differences in prices and terms. When there are no such reasons and a weaker party is paying considerably more than other parties for similar transactions, or if other excessive terms are imposed, the court may find the conduct to be unconscionable.

This may be particularly relevant in situations where a small business is required, by contract or otherwise, to obtain supply from a specific source. In these circumstances, if such a requirement were unfairly exploited by the larger party to charge commercially unrealistic prices for supplies, such conduct may raise concerns.

Whether the supplier unreasonably failed to disclose any intended future conduct which might affect the interests of the business

Where a supplier is aware of some future event that may adversely affect the commercial viability of the smaller party, this information may be taken into account to determine unconscionability.

Whether there was evidence of disclosure, good faith and willingness to negotiate

The courts may take into account whether a supplier has acted in good faith when determining whether such conduct is unconscionable. Acting in good faith may include whether the supplier has acted reasonably in all the circumstances, was willing to negotiate on fair terms and whether there was transparency during negotiations.

The requirements of any applicable industry code

In determining unconscionability under s. 51AC of the Act, the courts may take into account whether the industry code requirements were observed. To reduce this risk, a larger party to a transaction may need to demonstrate that it has an effective Oilcode compliance system in place.

This particular element indicates the importance of ensuring compliance with the Oilcode.

5.5 Penalties imposed by the Federal Court of Australia

A breach of the consumer protection provisions of the Trade Practices Act, as distinct from failing to comply with the Oilcode, may attract maximum fines of:

- 10 000 penalty units (currently \$1.8 million) for companies
- 2 000 penalty units (currently \$360 000) for individuals.

The Federal Court can impose these penalties listed if the ACCC brings proceedings under other provisions of the Trade Practices Act. These penalties do not apply simply for failing to comply with the Oilcode.

Additionally, breaching the criminal consumer protection provisions of the Act is a criminal offence. These offences are strict liability; it is not necessary to prove that you had intent to breach these provisions for you to be found to have committed the offence.

More generally, as noted above, provisions in the Trade Practices Act prohibit unconscionable conduct. Unconscionable conduct is specifically prohibited under Part IVA of the Trade Practices Act, which is designed to help small businesses that find themselves victims of harsh or unfair behaviour by larger businesses. Section 51AC of the Act specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

Remedies available to a person who suffers loss or damage as a consequence of a breach of s. 51AC include:

- damages
- remedial orders (e.g. corrective advertising or community service)
- injunctions.

Pecuniary penalties (i.e. fines) are not available for breaches of the unconscionable conduct provisions.

5.6 Further information

The ACCC has produced a number of publications about matters such as misleading, deceptive and unconscionable conduct. For further information please, visit the ACCC website (www.accc.gov.au) or contact the ACCC Infocentre on **1300 302 502**.

5.7 Checklist—Oilcode and Trade Practices Act

If you believe that someone may be in breach of the Oilcode or the Trade Practices Act:

- Have you raised your problem with the other party and tried to fix the problem with them first?
- Can you supply evidence to the ACCC that the other party has failed to comply with the provisions of the Oilcode?
- Have you considered your rights and obligations in relation to misleading and deceptive conduct or unconscionable conduct?

6. OTHER STATUTORY OBLIGATIONS

When preparing an Oilcode compliance system, you may need to take other statutory obligations into account.



You should also be aware that related legislation and regulations exists in your particular state or territory, which may include, but not be limited to, the following:

Fuel standards	<ul style="list-style-type: none"> • <i>Quality Standards Act 2000</i> (Cwlth) • <i>Fuel Quality Standards Regulations 2001</i> (Cwlth) • Fuel Standard (Petrol) Determination 2001 (Cwlth)
Terminal gate pricing	<ul style="list-style-type: none"> • <i>Petroleum Products Pricing Act 1983</i> (WA) • <i>Petroleum Products (Terminal Gate Pricing) Act 2000</i> (Vic.) • Petroleum Products (Terminal Gate Pricing) Regulations 2001, No. 72 (Vic.)
Occupational health and safety	<ul style="list-style-type: none"> • <i>Road Transport Reform (Dangerous Goods) Act 1995</i> (Cwlth) • The Road Transport Reform (Dangerous Goods) Regulations (Cwlth) 1997

6.1 Competent authorities for land transport and technical inquiries

If you need technical advice on the application of the *Road Transport Reform (Dangerous Goods) Act 1995* you should approach the relevant competent authority in your state or territory. If the matter covers more than one state or is for an extended period, it will normally be referred to the Competent Authorities Panel (excluding explosives matters).

Competent authorities for road transport are appointed by the minister responsible for this function in each state and territory. Information about the road or rail transportation of dangerous goods should be directed to the competent authorities listed in the 'ACCC contacts' section of this manual.

6.2 Checklist for other statutory obligations

- Have you or your compliance officer checked whether you have any obligations additional to the Oilcode under the above requirements?
- If so, have you developed and implemented procedures to ensure that these obligations are met?
- Do you undertake regular checking to ensure that these procedures are met?

ANNEXURE 1: DISCLOSURE DOCUMENT FOR RETAILER OR PROSPECTIVE RETAILER—LONG FORM

The following pages give a recommended format for the long form disclosure document for retailer or prospective retailer from annexure 1 to the Oilcode.



DISCLOSURE DOCUMENT FOR RETAILER OR PROSPECTIVE RETAILER

[See Oilcode subsection 15(1)]

Supplier's name	Supplier's business address
Supplier's ABN, ACN or ARBN	Supplier's phone number
Date of disclosure document	
<p>This disclosure document contains some of the information you need in order to make an informed decision about whether to enter into a fuel re-selling agreement.</p> <p>Entering into a fuel re-selling agreement is a serious undertaking.</p> <p>A fuel re-selling agreement is legally binding on you if you sign it.</p> <p>You are entitled to a waiting period of 14 days before you enter into the agreement.</p> <p>If the agreement is a new fuel re-selling agreement (not a renewal, extension or transfer), you will be entitled to a seven-day 'cooling-off' period after signing the agreement, during which you may terminate the agreement without cost.</p> <p>Take your time, read all the documents carefully, talk to other retailers and assess your own financial resources and capabilities to deal with the requirements of the fuel re-selling business.</p> <p>You should make your own inquiries about the agreement and the business of the agreement.</p> <p>You should get independent legal, accounting and business advice before signing the fuel re-selling agreement. You should also seek advice on the federal, state or territory and local laws that apply to it.</p> <p>It is often prudent to prepare a business plan and projections for profit and cash flow.</p> <p>You should also consider educational courses, particularly if you have not operated a business before.</p> <p>You should contact the appropriate industry association.</p>	

.....
 Director / Executive Officer

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2. Supplier details

2.1	Supplier's name	
	Supplier's ABN, ACN or ARBN	
	Address of supplier's registered office	
	Address of supplier's principal place of business in Australia	
2.2	Name under which the supplier carries on business in Australia relevant to the fuel re-selling agreement	
2.3	Name, ABN, ACN, ARCN, address and principal place of business of each associate of the supplier that is a body corporate (if any)	
2.4	Name and address of each associate of the supplier that is not a body corporate (if any)	
2.5	Name, position held and qualifications for each director, secretary, executive officer, or partner of the supplier who is likely to have management responsibilities for the supplier's business operations in relation to the fuel re-selling agreement (if any)	

3. Business experience

- 3.1 A summary of the relevant business experience of the last 10 years of each person other than an executive officer mentioned in 2.5.
- 3.2 A summary of relevant business experience of the supplier in the last 10 years, including:
- (a) length of experience in:
 - (i) operating a petroleum retailing business and
 - (ii) offering other fuel re-selling agreements that are substantially the same as the fuel re-selling agreement and
 - (b) whether the supplier has offered re-selling agreements for other businesses and, if so:
 - (i) a description of each such business and
 - (ii) the length of time the supplier offered agreements for each such business.

4. Litigation

4.1 Are there:

- (a) current proceedings, or proceedings finalised in the previous three years, by a public agency, criminal or civil proceedings or arbitration, relevant to the fuel re-selling agreement against the supplier in Australia alleging:
- (i) breach of a fuel re-selling agreement or
 - (ii) contravention of trade practices law or
 - (iii) contravention of the *Corporations Act 2001* or
 - (iv) unconscionable conduct or
 - (v) misconduct or
 - (vi) an offence of dishonesty.

If yes for any of the above, provide details (where relevant) for each:

The names of the parties to the proceedings	
The name of the court, tribunal or arbitrator	
The case number	
The general nature of the proceedings	
The current status of the proceedings	
The date of order or undertaking under s. 87B of the Act	
The penalty or damages assessed or imposed	

- (b) proceedings against the supplier under
- (i) ss. 127A or 127B of the *Workplace Relations Act 1996* or
 - (ii) s. 106 of the *Industrial Relations Act 1996* of New South Wales or
 - (iii) s. 290 of the *Workplace Relations Act 1997* of Queensland.

If yes for any of the above, provide the following details (where relevant) for each:

The names of the parties to the proceedings	
The name of the court, tribunal or arbitrator	
The case number	
The general nature of the proceedings	
The current status of the proceedings	
The date of order or undertaking under s. 87B of the Act	
The penalty or damages assessed or imposed	

4.2 The supplier or a director of the supplier has:

- (a) in the last 10 years been convicted of a serious offence or an equivalent offence outside Australia or
- (b) in the last five years being subject to final judgment in civil proceedings for a matter mentioned in 4.1(a).

If yes for any of the above, provide the following details (where relevant) for each:

The names of the parties to the proceedings	
The name of the court, tribunal or arbitrator	
The case number	
The general nature of the proceedings	
The current status of the proceedings	
The date of order or undertaking under s. 87B of the Act	
The penalty or damages assessed or imposed	

(c) in the last 10 years have been bankrupt, insolvent, under administration or an externally administered body corporate in Australia or elsewhere.

If yes, provide the details (where relevant) set out below:

The names of the persons who are bankrupt, insolvent under administration or externally administered	
The period of the bankruptcy, insolvency under administration or external administration	

5. Payment to agents

5.1 The name of the person who is not an officer, director or employee of the supplier who is paid an amount in connection with the introduction or recruitment of a retailer
(insert name/s)

6. Existing fuel re-selling agreements

6.1 For each of the last three years and for each of the following events, the number of fuel re-selling businesses of the supplier for which the event happened:

	Details of events of each of the last three years	Year 1	Year 2	Year 3
(a)	Fuel re-selling agreement transferred			
(b)	Fuel re-selling business ceased to operate			
(c)	Fuel re-selling agreement terminated by supplier			
(d)	Fuel re-selling agreement terminated by retailer			
(e)	Fuel re-selling agreement not renewed when expired			

(f)	Fuel re-selling business bought back by supplier			
(g)	Fuel re-selling agreement terminated and acquired by the supplier			

Note: An event may be counted more than once if more than one paragraph applies to it.

6.2 The supplier is taken to comply with item 6.1 if the supplier supplies details as far as the supplier is aware that relate to events that happened before the Oilcode commenced.

7. Intellectual property

7.1 Trade mark used to identify, and other significant and material intellectual property to the fuel re-selling agreement:

(a) Description of the intellectual property:

	Description
Trade marks	
Patents	
Designs	
Copyright	

(b) Details of the retailer's rights and obligations in connection with the use of the intellectual property:

	Retailer's rights	Retailer's obligations
Trade marks		
Patents		
Designs		
Copyright		

(c) Whether the intellectual property is registered in Australia. If yes, provide details:

	Registered?	Registration date	Registration no.	Place of registration
Trade marks	Yes/No			
Patents	Yes/No			
Designs	Yes/No			
Copyright	Yes/No			

(d) Is there any judgment or pending proceedings that could significantly affect ownership or use of the intellectual property? Yes/No

If yes, provide the following details:

- (i) name of court or tribunal
- (ii) matter number
- (iii) summary of claim or judgment

(e) If the intellectual property is not owned by the supplier who owns it? Provide details:

(f) Details of any agreement that significantly affects the supplier’s right to use or give others the right to use the intellectual property. If agreement exists, provide details below:

(i) Parties to the agreement	(ii) Nature and extent of limitation	(iii) Duration of agreement	(iv) Conditions under which agreement may be terminated

7.2 The supplier is taken to have complied with 7.1 for any confidential information if it is listed below.

(a) General description	(b) Summary of conditions for use

8. Territory

8.1 (a) Is the fuel re-selling agreement for an exclusive territory? Yes/No

(b) Is the fuel re-selling agreement limited to a particular site? Yes/No

8.2 Provide the following details for the territory:

	Question	
(a)	Whether other retailers may operate a fuel retail business	Yes/No
(b)	Whether the supplier or an associate of the supplier may operate a fuel retail business	Yes/No
(c)	Whether the supplier or an associate of the supplier may establish other fuel re-selling systems	Yes/No
(d)	Whether the retailer may operate a fuel retail business outside the territory	Yes/No
(e)	Whether the supplier may change the territory	Yes/No

9. Supply of goods or services to a retailer

9.1 For the supplier's requirements for the supply of goods or services to a retailer, provide the following details:

(a)	Any requirement for the retailer to maintain a level of inventory or acquire an amount of goods or services	
(b)	Restrictions on acquisition of goods or services by the retailer from other sources	
(c)	Ownership by the supplier or an associate of the supplier of an interest in any supplier from which the retailer may be required to acquire goods or services	
(d)	The obligation of the retailer to accept goods or services from the supplier	
(e)	The supplier's obligation to supply goods or services to the retailer	
(f)	Whether the retailer will be offered the right to be supplied with the whole range of the goods or services of the fuel re-selling system	
(g)	Conditions under which the retailer can return goods, and to whom	
(h)	Conditions under which the retailer can obtain a refund for services provided by the supplier, and from whom	
(i)	Whether the supplier may change the range of goods or services, and if so, to what extent	
(j)	Whether the supplier or an associate of the supplier will receive a rebate or other financial benefit from the supply of goods or services to suppliers, and whether any rebate or financial benefit is shared, directly or indirectly, with retailers	
(k)	Conditions that apply if the supplier cannot supply the goods or services	
(l)	How the supplier deals with motor fuel losses	

Note: Before a requirement is made under (b) or (c), the supplier may notify, or seek authorisation from, the Australian Competition and Consumer Commission (see Part VII of the Trade Practices Act).

10. Supply of goods or services by a retailer

10.1 For the supplier’s requirements for supply of goods or services by a retailer, provide the following details:

(a)	Restrictions on the goods or services that the retailer may supply	
(b)	Restrictions on the person(s) to whom the retailer may supply	
(c)	Whether the retailer must supply the whole range of goods or services of the fuel re-selling system	

Note: Before a requirement is made under paragraph (a) or (b), the supplier may notify, or seek authorisation from, the Australian Competition and Consumer Commission (see Part VII of the Trade Practices Act).

11. Sites

11.1 The policy of the supplier or an associate of the supplier for selection of the site to be occupied by the retailer under the fuel re-selling agreement.

11.2 Has the site for the fuel re-selling agreement been subject to a fuel re-selling agreement operated during the past three years under a fuel re-selling agreement between the supplier and another retailer? Yes/No

If yes, provide details of:

(a)	The fuel re-selling business	
(b)	The circumstances in which the previous retailer ceased to operate	
(c)	The profitability of the fuel re-selling business	
(d)	Any limitations on the basis and reliability of the calculation for (c)	

11.3 Has the site for the fuel re-selling agreement been operated in the last year for the retail sale of motor fuel by the supplier? Yes/No

If yes, provide details of:

(a)	Name of business and vendor	
(b)	Whether the vendor was a retailer, agent or employee of the supplier or an associate of the supplier	

Note: The details mentioned in 11.2 and 11.3 may be in a separate document and may be made available for inspection at a time and place mentioned in the disclosure document.

12. Marketing or other cooperative funds

12.1 Does the supplier or an associate of the supplier control or administer a marketing or cooperative fund to which the retailer may be required to contribute? Yes/No

If yes, provide the following details:

(a)	Who contributes to the fund	Eg, retailer, supplier, outside supplier	
(b)	Must the supplier contribute to the fund in relation to the business owned or operated by the supplier that is substantially the same as business to be owned or operated by the retailer?	Yes/No	If yes, is the contribution worked out the same way as for a retailer?
(c)	How much must the retailer contribute to the fund? Must other retailers contribute at a different rate?	Detail Yes/No	
(d)	Who controls or administers the fund?	Detail	
(e)	Is the fund audited? If so, by whom and when? Include name of auditor and date when fund was audited.	Yes/No Name Date of audit	
(f)	Can the fund's financial statements be inspected by or be given to the retailer?	Yes/No	
(g)	What expenses can the funds be used for?	Detail	
(h)	Fund's expenses for last financial year, including: Production Advertising Administration Other stated expenses		
(i)	Does the supplier or its associates supply goods or services which the fund pays and if so, the details of the goods or services.	Yes/No Detail	
(j)	Must the supplier spend part of the fund on marketing, advertising or promoting the retailers business?	Yes/No	

13. Payments

Pre-payments

13.1 Does the supplier require a payment before the fuel supply re-selling agreement is entered into? Yes/No

If yes, provide the following details:

(a)	Why is the money required?	
(b)	How is the money to be applied?	
(c)	Who will hold the money?	
13.2 The conditions under which a payment will be refunded		

Establishment costs

13.3 The following are details of the range of costs to start operating a fuel re-selling business based on current practice:

	Expenditures	13.4(a) Description of payment	13.4(b) Amount or formula used to calculate payment (if amount not easily calculable, provide upper and lower limits)	13.4(c) To whom paid	13.4(d) When payable	13.4(e) Whether refundable; if so, under what conditions
(a)	Real property, including property type location and building size					
(b)	Equipment fixtures, other fixed assets, construction, remodelling, leasehold improvements, decorating costs					
(c)	Inventory required to begin operation					
(d)	Security deposits, utility deposits, business licenses, insurance and other prepaid expenses					

(e)	Additional funds, including working capital required by the retailer before operations begin					
(f)	Other payments by a retailer to begin operation					

Other payments

13.6 Are there any isolated or recurring payments by the retailer to the supplier or their associate, or to be collected by the supplier or an associate of the supplier for another person? Yes/No

If yes, provide the following details:

Description of payment	Amount or formula used to calculate payment (if amount not easily calculable, provide upper and lower limits)	When payable	Whether refundable; if so under what conditions	To whom paid

14. Financing

14.1 Does the supplier or its associate or agents offer financing arrangements to the retailer for the establishment or operation of the fuel re-selling business? Yes/No

If yes, provide the material conditions of each financial arrangement (including but not limited to):

(a)	The requirement on the retailer to provide a minimum amount of unborrowed working capital for the fuel re-selling business	
(b)	The requirement on the retailer to meet a stated debt to equity ratio to carry out the business	

15. Supplier’s obligations

15.1 The table below sets out a summary of the supplier’s obligations under the fuel re-selling agreement (either summarise the conditions or refer to the conditions in the fuel re-selling agreement).

Note: You must include information about training and operating a dealer council.

(a) Before the fuel re-selling business starts:

Obligations	Summary of obligations or, reference to the relevant condition/s of the fuel re-selling agreement

(b) During the operation of the fuel re-selling business:

Obligations	Summary of obligations

16. Retailer’s obligations

16.1 The table below sets out a summary of the retailer’s obligations under the fuel re-selling agreement (either summarise the conditions or refer to the conditions in the fuel re-selling agreement). You must provide for the following information:

	Obligations	Summary of obligations or reference to the relevant condition/s of the fuel re-selling agreement
(a)	Site selection and acquisition	
(b)	Requirements for starting the fuel re-selling business	
(c)	Site or unit development	
(d)	Training before and during operating fuel re-selling business	
(e)	Opening the fuel re-selling business	
(f)	Complying with standards or operating manuals	
(g)	Using intellectual property	
(h)	Warranties and customer service	
(i)	Territorial development and sales quotas	
(j)	Maintenance and appearance of premises	
(k)	Insurance	
(l)	Marketing	
(m)	Indemnities	

(n)	Participation requirements for retailer directors, management or employees	
(o)	Records and reports	
(p)	Inspections and audit	

17. Pricing policy, motor fuel delivery and payment

17.1 In relation to the pricing policy, motor fuel delivery and payment, provide the following details:

	Subject matter	Details
(a)	The class of buyer in which the supplier places the retailer	
(b)	Other classes of buyer, also supplied by the supplier, in an area in which those buyers are likely to compete significantly for the retailers trade in motor fuel	
(c)	Conditions of payment for motor fuel, including terms of credit, if applicable	
(d)	Conditions that apply to delivery of motor fuel, including: <ul style="list-style-type: none"> (i) what notice the supplier must be given of a delivery requirement (ii) when motor fuel is normally delivered 	
(e)	Financial support paid by the supplier or an associate of the supplier to the retailer, including: <ul style="list-style-type: none"> (i) how it is paid (ii) conditions for its payment and (iii) when it may be changed or withdrawn 	
(f)	Conditions of the fuel re-selling agreement (if any) that allow the supplier to review or change the system of pricing its goods or services	
(g)	When and where the retailer can obtain information about motor fuel pricing	

17.2 Other classes of buyer in the retailer's area also supplied by the supplier may have different conditions of supply.

17.3 (For commission agency arrangements, include a statement about how the agency commission is worked out and how it can be changed.)

18. Business plan

18.1 The retailer is required to prepare a business plan to the following specifications:

- (a) (Include a statement of the rights and obligations of the supplier and retailer under the business plan.)

	Requirement	Details
(b)	When must the business plan be prepared?	
(c)	How must the business plan be prepared?	
(d)	What information must be included in the business plan?	
(e)	If the plan is to include projections or forecasts by the supplier, what are the details of the facts and assumptions on which the projections or forecasts are based?	

19. Supplier proprietary fuel card

19.1 The following conditions apply to the use of the supplier’s proprietary fuel cards (if any):

	Conditions	Details
(a)	Level of repayment, including card capping arrangements, merchant service fees and other merchant fees	
(b)	Procedure for repayment	
(c)	Equipment requirements	
(d)	The supplier’s right (if any) to vary the fuel card system	

20. Variation

20.1 The following are details of the right (if any) of the supplier to vary a term of the agreement, or to vary any document by reference, without the consent of the retailer:

	Variation	Details
(a)	How the right may, or may not be exercised	
(b)	Details of the rights of the retailer as a consequence of the variation	

21. Summary of other conditions of the agreement

- 21.1 Indicate whether the agreement is for a commission agency or other arrangement.
- 21.2 Indicate how long the current business format of the agreement has been used and how it has been developed.
- 21.3 If the retailer is required to use the supplier’s computer system, provide a summary of the rights and responsibilities of the supplier including the extent to which the retailer may be excluded from use of the computer system.

21.4 The table below sets out the relevant conditions of the fuel re-selling agreement:

	Condition	Summary of condition or reference to the relevant condition/s of the fuel re-selling agreement
(a)	Term of the fuel re-selling agreement	
(b)	Variation	
(c)	Renewal or extension	
(d)	Conditions the retailer must meet to renew or extend the fuel re-selling agreement	
(e)	Termination by the supplier	
(f)	Termination by the retailer	
(g)	Arrangements (including the retailer's goodwill, if any) on termination or expiry	
(h)	The retailer's obligations when a fuel re-selling agreement is terminated, expires or is not renewed	
(i)	The supplier's rights to sell its business	
(j)	Transfer of a fuel re-selling business (including selection criteria for retailers)	
(k)	Mediation and conciliation	
(l)	Option or right of first refusal, if any, for the retailer or the supplier to buy the fuel re-selling business	
(m)	The supplier's right, if any, to inspect financial and other records of the fuel re-selling business	
(n)	Confidentiality of the retailer's records	
(o)	Death or disability of the retailer or a director or shareholder of the retailer	
(p)	Details of the role, operation or establishment of any dealer council including rules of operation	
(q)	Restrictions on the retailer's operation of other businesses during or after the term of the fuel re-selling agreement	
(r)	Operations manual	
(s)	Choice of governing law	

22. Statements

- 22.1 Re-selling motor fuel is subject to Commonwealth and state or territory laws, including laws about environmental management that can impose substantial obligations on the supplier and the retailer.
- 22.2 The retailer will be exposed to market risks and rewards.

23. Obligation to sign related agreements

- 23.1 The table below sets out in summary any requirements in the fuel re-selling agreement for the retailer to enter into any of the following agreements:

	Agreement	Details
(a)	A lease, sublease, licence or other agreement by which the retailer can occupy the premises of the fuel re-selling business	
(b)	A chattel lease or hire purchase agreement	
(c)	An agreement under which the retailer gains ownership of, or is authorised to use, any intellectual property	
(d)	A security agreement, including a guarantee, mortgage, security deposit, indemnity, loan agreement or obligation to provide a bank guarantee to a third party	
(e)	A confidentiality agreement	
(f)	An agreement not to carry on business within an area or for a time after the fuel re-selling agreement is terminated	

24. Earnings information

- 24.1 Is earnings information to be given? Yes/No (If yes, this information must be based on reasonable grounds.)

If yes:

- 24.2 Earnings information may be given in a separate document attached to this disclosure document.
- 24.3 Earnings information includes information from which historical or future financial details of a fuel re-selling business can be assessed.

If no:

- 24.4 (Include the following statement:)

The supplier does not give earnings information about the fuel re-selling business. Earnings may vary between businesses. The supplier cannot estimate earnings information for a particular fuel re-selling business.

24.5 If the information includes projections or forecasts it must include the following details:

	Subject matter	Details
(a)	The facts and assumptions on which the projection or forecast is based	
(b)	The extent of inquiries or research undertaken by the supplier and any other complier of the forecast	
(c)	The period to which the projection or forecast relates	
(d)	An explanation of the choice or period covered by the projection or forecast	
(e)	Whether the projection or forecast includes depreciation, salary for the retailer and the cost of servicing loans	
(f)	Assumptions about interest and tax	

25. Financial details

25.1 (Insert the following statement:)

As at the end of the last financial year (insert), it is the opinion of the directors that there are reasonable grounds to believe that the supplier will be able to pay its debts as and when they fall due.

.....¹

Director

25.2 The financial reports for each of the last two completed financial years, prepared by the supplier in accordance with ss. 295 to 297 of the *Corporations Act 2001* have been attached (attach).

25.3 **Note:** 25.2 does not apply when:

- (a) the statement under 25.1 is supported by an independent audit provided by a registered company auditor within 12 months after the end of the financial year to which the statement relates and
- (b) a copy of the independent audit report or statement is provided with the statement under 25.1.

¹ Statement must be signed by at least one director (25.1).

26. Updates

- 26.1 Include any information given under s. 29 of the Oilcode that has changed between the date of the disclosure document and the date the disclosure document is given under the Oilcode.

27. Other relevant disclosure information

- 27.1 Attached is a copy of the proposed fuel re-selling agreement, and any other proposed agreement for activities mentioned in subs. 6(1)(b) of the Oilcode (attach).
- 27.2 Attached is a copy of the Oilcode (attach).
- 27.3 Attached is any other information (attach any information that the supplier wants to give as long as it does not contradict other information required to be given).

28. Receipt

(A receipt should have the following wording:)

To.....(insert name of supplier)

I.....(insert name of retailer) hereby acknowledge receipt of this disclosure document which I, the retailer, may keep for my records.

.....

Retailer

...../...../.....

ANNEXURE 2: DISCLOSURE DOCUMENT FOR RETAILER OR PROSPECTIVE RETAILER—SHORT FORM

The proceeding pages give a recommended format for the short form disclosure document for retailer or prospective retailer from annexure 2 to the Oilcode.



DISCLOSURE DOCUMENT FOR RETAILER OR PROSPECTIVE RETAILER

[See Oilcode subsection 15(2)]

Supplier's name	Supplier's business address
Supplier's ABN, ACN or ARBN	Supplier's phone number
Date of disclosure document	
<p>This disclosure document contains some of the information you need in order to make an informed decision about whether to enter into a fuel re-selling agreement.</p> <p>Entering into a fuel re-selling agreement is a serious undertaking.</p> <p>A fuel re-selling agreement is legally binding on you if you sign it.</p> <p>You are entitled to a waiting period of 14 days before you enter into the agreement.</p> <p>If the agreement is a new fuel re-selling agreement (not a renewal, extension or transfer), you will be entitled to a seven-day 'cooling off' period after signing the agreement, during which you may terminate the agreement without cost.</p> <p>Take your time, read all the documents carefully, talk to other retailers and assess your own financial resources and capabilities to deal with the requirements of the fuel re-selling business.</p> <p>You should make your own inquiries about the agreement and the business of the agreement.</p> <p>You should get independent legal, accounting and business advice before signing the fuel re-selling agreement. You should also seek advice on the federal, state or territory and local laws that apply to it.</p> <p>It is often prudent to prepare a business plan and projections for profit and cash flow.</p> <p>You should also consider educational courses, particularly if you have not operated a business before.</p> <p>You should contact the appropriate industry association.</p>	

.....
 Director/Executive Officer

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Clause no.	Title
2	Supplier details
3	Litigation
4	Intellectual property
5	Territory
6	Marketing or other cooperative funds
7	Payments
8	Supplier's obligations
9	Retailer's obligations
10	Pricing policy, motor fuel delivery and payment
11	Business plan
12	Supplier proprietary fuel card
13	Variation
14	Statements
15	Financial details
16	Receipt

2. Supplier details

2.1	Supplier's name	
	Supplier's ABN, ACN or ARBN	
	Address of supplier's registered office	
	Address of supplier's principal place of business in Australia	
2.2	Name under which the supplier carries on business in Australia relevant to the fuel re-selling agreement	
2.3	Name, ABN, ACN, ARCN, address and principal place of business of each associate of the supplier that is a body corporate (if any)	
2.4	Name and address of each associate of the supplier that is not a body corporate (if any)	
2.5	Name, position held and qualifications for each director, secretary, executive officer, partner of the supplier who is likely to have management responsibilities for the supplier's business operations in relation to the fuel re-selling agreement (if any)	

3. Litigation

3.1 Are there:

- (a) current proceedings, or proceedings finalised in the previous three years, by a public agency, criminal or civil proceedings or arbitration, relevant to the fuel re-selling agreement against the supplier in Australia alleging:
- (i) breach of a fuel re-selling agreement or
 - (ii) contravention of trade practices law or
 - (iii) contravention of the *Corporations Act 2001* or
 - (iv) unconscionable conduct or
 - (v) misconduct or
 - (vi) an offence of dishonesty.

If yes for any of the above, provide details (where relevant) for each:

The names of the parties to the proceedings	
The name of the court, tribunal or arbitrator	
The case number	
The general nature of the proceedings	
The current status of the proceedings	
The date of order or undertaking under s. 87B of the Act	
The penalty or damages assessed or imposed	

- (b) proceedings against the supplier under
- (i) s. 127A or 127B of the *Workplace Relations Act 1996* or
 - (ii) s. 106 of the *Industrial Relations Act 1996* of New South Wales or
 - (iii) s. 290 of the *Workplace Relations Act 1997* of Queensland

If yes for any of the above, provide the following details (where relevant) for each:

The names of the parties to the parties to the proceedings	
The name of the court, tribunal or arbitrator	
The case number	
The general nature of the proceedings	
The current status of the proceedings	
The date of order or undertaking under s. 87B of the Act	
The penalty or damages assessed or imposed	

3.2 The supplier or a director of the supplier has:

- (a) in the last 10 years been convicted of a serious offence or an equivalent offence outside Australia or
- (b) in the last five years subject to final judgment in civil proceedings for a matter mentioned in 3.1(a)

If yes for any of the above, provide the following details (where relevant) for each:

The names of the parties to the parties to the proceedings	
The name of the court, tribunal or arbitrator	
The case number	
The general nature of the proceedings	
The current status of the proceedings	
The date of order or undertaking under s. 87B of the Act	
The penalty or damages assessed or imposed	

- (c) in the last 10 years have been bankrupt, insolvent, under administration or an externally-administered body corporate in Australia or elsewhere.

If yes, provide the details (where relevant) set out below:

The names of the persons who are bankrupt, insolvent under administration or externally administered	
The period of the bankruptcy, insolvency under administration or external administration	

4. Intellectual property

4.1 Trade mark used to identify, and other significant and material intellectual property to the fuel re-selling agreement:

(a) Description of the intellectual property:

	Description
Trade marks	
Patents	
Designs	
Copyright	

(b) Details of the retailer’s rights and obligations in connection with the use of the intellectual property:

	Retailer’s rights	Retailer’s obligations
Trade marks		
Patents		
Designs		
Copyright		

(c) Whether the intellectual property is registered in Australia. If yes, provide details:

	Registered?	Registration date	Registration no.	Place of registration
Trade marks	Yes/No			
Patents	Yes/No			
Designs	Yes/No			
Copyright	Yes/No			

(d) Is there any judgment or pending proceedings that could significantly affect ownership or use of the intellectual property? Yes/No

If yes, provide the following details:

- (i) name of court or tribunal
- (ii) matter number
- (iii) summary of claim or judgment

(e) If the intellectual property is not owned by the supplier, who owns it? Provide details:

- (f) Details of any agreement that significantly affects the supplier's right to use or give others the right to use the intellectual property. If agreement exists, provide details below:

(i) Parties to the agreement	(ii) Nature and extent of limitation	(iii) Duration of agreement	(iv) Conditions under which agreement may be terminated

- 4.2 The supplier is taken to have complied with 4.1 for any confidential information if it is listed below.

(a) General description	(b) Summary of conditions for use

5. Territory

- 5.1 (a) Is the fuel re-selling agreement for an exclusive territory? Yes/No
 (b) Is the fuel re-selling agreement limited to a particular site? Yes/No
- 5.2 Provide the following details for the territory:

	Question	
(a)	Whether other retailers may operate a fuel retail business	Yes/No
(b)	Whether the supplier or an associate of the supplier may operate a fuel retail business	Yes/No
(c)	Whether the supplier or an associate of the supplier may establish other fuel re-selling systems	Yes/No
(d)	Whether the retailer may operate a fuel retail business outside the territory	Yes/No
(e)	Whether the supplier may change the territory	Yes/No

6. Marketing or other cooperative funds

- 6.1 Does the supplier or an associate of the supplier control or administer a marketing or cooperative fund to which the retailer may be required to contribute? Yes/No

If yes, provide the following details:

(a)	Who contributes to the fund?	E.g. retailer, supplier, outside supplier	
(b)	Must the supplier contribute to the fund in relation to the business owned or operated by the supplier that is substantially the same as business to be owned or operated by the retailer?	Yes/No	If yes, is the contribution worked out the same way as for a retailer?

(c)	How much does the retailer contribute to the fund? Must other retailers contribute at a different rate?	Detail Yes/No
(d)	Who controls or administers the fund?	Detail
(e)	Is the fund audited? If so, by whom and when? Include name of auditor and when fund was audited.	Yes/No Name Date of audit
(f)	Can the fund's financial statements be inspected by or be given to the retailer?	Yes/No
(g)	What expenses can the funds be used for?	Detail
(h)	Fund's expenses for last financial year including: Production Advertising Administration Other stated expenses	
(i)	Does the supplier or its associates supply goods or services which the fund pays and if so, the details of the goods or services?	Yes/No Detail
(j)	Must the supplier spend part of the fund on marketing, advertising or promoting the retailers business?	

7. Payments

Prepayments

7.1 Does the supplier require a payment before the fuel re-selling agreement is entered into? Yes/No

If yes, provide the following details:

(a)	Why is the money required?	
(b)	How is the money to be applied?	
(c)	Who will hold the money?	
7.2	The conditions under which a payment will be refunded	

Establishment costs

7.3 The following are details of the range of costs to start operating a fuel re-selling business based on current practice:

	Expenditures	7.4(a) Description of the payment.	7.4(b) Amount of the payment or formula used to work out the payment*	7.4(c) To whom is payment made?	7.4(d) When the payment is due?	7.4(e) Whether the payment is refundable and, if so, under what conditions?
(a)	Real property, including property type location and building size.					
(b)	Equipment fixtures, other fixed assets, construction, remodelling, leasehold improvements, decorating costs.					
(c)	Inventory required to begin operation.					
(d)	Security deposits, utility deposits, business licenses, insurance and other prepaid expenses.					
(e)	Additional funds, including working capital required by the retailer before operations begin.					
(f)	Other payments by a retailer to begin operation.					

* Or if the amount cannot be easily worked out, the upper and lower limits.

Other payments

7.6 Are there any isolated or recurring payments by the retailer to the supplier or their associate, or to be collected by the supplier or an associate of the supplier for another person? Yes/No

If yes, provide the following details:

Description of payment	Amount or formula used to calculate payment (if amount not easily calculable, upper and lower limits)	When payable?	Whether refundable; if so under what conditions?	To whom paid?

8. Supplier’s obligations

8.1 (a) The table below sets out a summary of the supplier’s obligations under the fuel re-selling agreement.

Note: You must include information about training and operating a dealer council.

(i) Before the fuel re-selling business starts:

Obligations	Summary of obligations or, reference to the relevant condition/s of the fuel re-selling agreement

(ii) During the operation of the fuel re-selling business:

Obligations	Summary of obligations

9. Retailer’s obligations

9.1 The table below sets out a summary of the retailer’s obligations under the fuel re-selling agreement. You must provide for the following matters:

	Obligations	Summary of obligations or, if the fuel re-selling agreement is attached, the relevant conditions of the fuel re-selling agreement
(a)	Site selection and acquisition	
(b)	Requirements for starting the fuel re-selling business	
(c)	Site or unit development	
(d)	Training before and during operating fuel re-selling business	

(e)	Opening the fuel re-selling business	
(f)	Complying with standards or operating manuals	
(g)	Using intellectual property	
(h)	Warranties and customer service	
(i)	Territorial development and sales quotas	
(j)	Maintenance and appearance of premises	
(k)	Insurance	
(l)	Marketing	
(m)	Indemnities	
(n)	Participation requirements for retailer directors, management or employees	
(o)	Records and reports	
(p)	Inspections and audit	

10. Pricing policy, motor fuel delivery and payment

10.1 In relation to the pricing policy, motor fuel delivery and payment, provide the following details:

	Subject matter	Details
(a)	The class of buyer in which the supplier places the retailer	
(b)	Other classes of buyer, also supplied by the supplier, in an area in which those buyers are likely to compete significantly for the retailer's trade in motor fuel	
(c)	Conditions of payment for motor fuel, including terms of credit, if applicable	
(d)	Conditions that apply to delivery of motor fuel, including: <ul style="list-style-type: none"> (i) what notice the supplier must be given of a delivery requirement (ii) when motor fuel is normally delivered 	
(e)	Financial support paid by the supplier or an associate of the supplier to the retailer including: <ul style="list-style-type: none"> (i) how it is paid and (ii) conditions for its payment and (iii) when it may be changed or withdrawn 	
(f)	Conditions of the fuel re-selling agreement (if any) that allow the supplier to review or change the system of pricing its goods or services	
(g)	When and where the retailer can obtain information about motor fuel pricing	

- 10.2 A statement to the effect that: Other classes of buyer in the retailer’s area also supplied by the supplier may have different conditions of supply.
- 10.3 (For commission agency arrangements, include a statement about how the agency commission is worked out and how it can be changed).

11. Business plan

- 11.1 The retailer is required to prepare a business plan to the following specifications:
 - (a) (Include a statement of the rights and obligations of the supplier and retailer under the business plan.)

	Requirement	Details
(b)	When must the business plan be prepared?	
(c)	How must the business plan be prepared?	
(d)	What information must be included in the business plan?	
(e)	If the plan is to include projections or forecasts by the supplier, what are the details of the facts and assumptions on which the projections or forecasts are based?	

12. Supplier proprietary fuel card

- 12.1 The following conditions apply to the use of the supplier’s proprietary fuel card (if any):

	Conditions	Details
(a)	Level of repayment, including card capping arrangements, merchant service fees and other merchant fees	
(b)	Procedure for repayment	
(c)	Equipment requirements	
(d)	The supplier’s right (if any) to vary the fuel card system	

13. Variation

- 13.1 The following are details of the right (if any) of the supplier to vary a term of the agreement, or to vary any document by reference, without the consent of the retailer:

	Variation	Details
(a)	How the right may or may not be exercised	
(b)	Details of the rights of the retailer as a consequence of the variation	

14. Statements

- 14.1 Re-selling motor fuel is subject to Commonwealth and state or territory laws, including laws about environmental management that can impose substantial obligations on the supplier and the retailer.
- 14.2 The retailer will be exposed to market risks and rewards.

15. Financial details

- 15.1 Insert the following statement:

As at the end of the last financial year (insert), it is the opinion of the directors that there are reasonable grounds to believe that the supplier will be able to pay its debts as and when they fall due.

.....¹

Director

- 15.2 The financial reports for each of the last two completed financial years, prepared by the supplier in accordance with ss. 295 to 297 of the *Corporations Act 2001* have been attached (attach).
- 15.3 **Note:** 15.2 does not apply when:
- (a) the statement under 15.1 is supported by an independent audit provided by a registered company auditor within 12 months after the end of the financial year to which the statement relates and
 - (b) a copy of the independent audit report or statement is provided with the statement under 15.1.

¹ Statement must be signed by at least one director (25.1).

16. Receipt

(A receipt should have the following wording:)

To [insert name of supplier]

I (insert name of retailer) hereby acknowledge receipt of this disclosure document which I, the retailer, may keep for my records.

I also acknowledge that I may ask the supplier for the information referred to in the following sections in annexure 1 to the Oilcode:

- Section 3—Business experience
- Section 5—Payments to agents
- Section 6—Existing fuel re-selling agreements
- Section 9—Supply of goods or services to a retailer
- Section 10—Supply of goods or services by a retailer
- Section 11—Sites
- Section 14—Financing
- Section 21—Summary of other conditions of the agreement
- Section 23—Obligation to sign related agreements
- Section 24—Earnings information
- Section 26—Updates
- Section 27—Other relevant disclosure information

.....
Retailer

...../...../.....

ANNEXURE 3: DISCLOSURE DOCUMENT FOR PROPOSED TRANSFEREE

The proceeding pages give a recommended format for the disclosure document for proposed transferee from annexure 3 to the Oilcode.



DISCLOSURE DOCUMENT FOR PROPOSED TRANSFEREE

[See Oilcode subsection 22(1)]

1. Details

1.1	Supplier's name	
	Supplier's ACN or ARBN	
	Supplier's business address	
	Supplier's telephone number	
1.2	Retailer's name	
	Retailer's ACN or ARBN	
	Retailer's business address	
1.3	Name and business or residential address of each director of the retailer	
1.4	A summary of the business experience in the last 10 years of the retailer and each person mentioned in item 1.3, including length of experience in operating the fuel re-selling business	
1.5	Description of the fuel re-selling business and its business address	

1.6 Attached is a copy of:

- (a) the existing fuel re-selling agreement of the retailer
- (b) the lease or agreement to lease, or a summary of the conditions of each lease or agreement to lease, if the retailer leases property for the fuel re-selling business and proposes to transfer the lease.

1.7 The following table provides details of assets of the fuel re-selling business to be transferred to the proposed transferee.

Asset	Details

1.8 Attached is a copy of the profit and loss statements of the retailer or the fuel re-selling business for the last two years.

1.9 The following table is a summary (or references to the relevant conditions of the fuel re-selling agreement, if attached) of obligations that the retailer has in relation to the fuel re-selling business, that are to be assumed by the proposed transferee:

Condition	Details

1.10 The following table is a summary (or references to the relevant conditions of the fuel re-selling agreement, if attached) of any conditions under the existing fuel re-selling agreement for transfer of the agreement:

Condition	Details

1.11 The following are details of each of the retailer’s employees in the fuel re-selling business:

	Subject matter	Employee 1	Employee 2	Employee 3	Employee 4	Employee 5	Employee 6	Employee 7	Employee 8	Employee 9	Employee 10
(a)	Name										
(b)	Position										
(c)	Length of service										
(d)	Rate of pay										
(e)	Outstanding obligations of the retailer										

2. Other relevant disclosure material

2.1 Include any other relevant information the retailer wants to give below.

(Insert)

3. Disclaimer

- 3.1 (a) The information is given by the retailer.
- (b) The supplier does not guarantee the accuracy of the information.

4. Receipt

(The receipt should have the following wording:)

To (insert name of supplier)

I (insert name of proposed transferee) hereby acknowledge receipt of this disclosure document.

.....
Proposed transferee

...../...../.....

ACCC contacts

Infocentre: 1300 302 502

Small business helpline: 1300 302 021

Websites: www.accc.gov.au
www.accc.gov.au/industrycodes

Addresses

National office

PO Box 1199
Dickson ACT 2602

Tel: (02) 6243 1111
Fax: (02) 6243 1199

New South Wales

GPO Box 3648
Sydney NSW 2001

Ph: (02) 9230 9133
Fax: (02) 9223 1092

Victoria

GPO Box 520
Melbourne Vic 3001

Ph: (03) 9290 1800
Fax: (03) 9663 3699

Queensland

Brisbane

PO Box 10048
Adelaide Street Post Office
Brisbane Qld 4000

Tel: (07) 3835 4666
Fax: (07) 3832 0372

Townsville

PO Box 2016
Townsville Qld 4810

Ph: (07) 4729 2666
Fax: (07) 4721 1538

Western Australia

PO Box 6381
East Perth WA 6892

Ph: (08) 9325 0600
Fax: (08) 9325 5976

South Australia

GPO Box 922
Adelaide SA 5001

Tel: (08) 8213 3444
Fax: (08) 8410 4155

Northern Territory

GPO Box 3056
Darwin NT 0801

Tel: (08) 8946 9666 (general)
Tel: (08) 8946 9610 (reception)
Fax: (08) 8946 9600

Tasmania

GPO Box 1210
Hobart Tas 7001

Ph: (03) 6215 9333
Fax: (03) 6234 7796

Dispute resolution adviser (DRA)

Tel: (02) 9283 9208
 Fax: (02) 9264 8268
 Email: info@oilcodedra.com.au
www.oilcodedra.com.au

Department of Industry Tourism and Resources (DITR)

Tel: 1800 024 095
 Email: inquiries@industry.gov.au
www.industry.gov.au

Competent authorities for road and rail transport

Australian Capital Territory

Chief Inspector of Dangerous Goods
 Dangerous Goods Unit
 ACT WorkCover
 PO Box 224
 Civic Square ACT 2608

Tel: (02) 6207 6355
 Fax: (02) 6207 7249
 Email: workcover@act.gov.au
www.workcover.act.gov.au

Victoria

The Manager
 Dangerous Goods Unit
 Victorian WorkCover Authority
 Level 22
 222 Exhibition Street
 Melbourne Vic 3000

Tel: (03) 9641 1551
 Fax: (03) 9641 1552
 Email: info@workcover.vic.gov.au
www.workcover.vic.gov.au

New South Wales

Premises-based activities such as packaging approvals, labelling and classification

State Coordinator
 Dangerous Goods, Substances Team
 WorkCover NSW
 Level 3, 92–100 Donnison St
 Gosford NSW 2250

Tel: (02) 4321 5191
 Fax: (02) 4325 4736
 Email: contact@workcover.nsw.gov.au
www.workcover.nsw.gov.au

All other matters

Manager, Dangerous Goods
 Department of Environment and Conservation
 59 Goulburn Street
 Sydney NSW 2000

Tel: (02) 9995 5555
 Fax: (02) 9995 6618
 Email: d.goods@environment.nsw.gov.au
www.environment.nsw.gov.au

Queensland

Rail transport

Director-General
 Department of Transport
 Transport House
 230 Brunswick Street
 Fortitude Valley Qld 4006

Tel: (07) 3253 4225
 Fax: (07) 3253 4233
 Email: rsau@transport.qld.gov.au
www.transport.qld.gov.au

Road transport

Principal Engineer (Dangerous Goods)
 Qld Department of Transport
 PO Box 673
 Fortitude Valley Qld 4006

Tel: (07) 3253 4035
 Fax: (07) 3253 4453
 Email: dgu@transport.qld.gov.au
www.transport.qld.gov.au

Western Australia

Chief Inspector
Dangerous Goods Safety
Department of Industry and Resources
100 Plain Street
East Perth WA 6004

Tel: (08) 9222 3333
Fax: (08) 9325 3862
Email: online@docep.wa.gov.au
www.docep.wa.gov.au

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Chief Inspector of Dangerous Goods
Dept. of Management and Business
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