



Australian  
Competition &  
Consumer  
Commission

# 2015 review of the Oilcode

## ACCC submission

13 October 2015

## 1. Introduction

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing and promoting compliance with the *Competition and Consumer Act 2010* (CCA), including the Australian Consumer Law (ACL) and the Oilcode. We achieve this through education, providing access to information and taking enforcement action where necessary.

The Oilcode is prescribed under section 51AE of the CCA. A breach of the Oilcode is a breach of section 51ACB of the CCA.

The objective of the Oilcode is to provide greater transparency of terminal gate pricing and fuel re-selling agreements, greater certainty for industry participants regarding supply of petroleum products and tenure under fuel-selling agreements. The Oilcode also seeks to provide an effective and relatively inexpensive way of resolving disputes that may arise between suppliers, distributors or retailers.

The ACCC is of the view that the Oilcode should be retained but remade. The ACCC believes the Terminal Gate Price (TGP) arrangements allow for transparency in the wholesale sector and should be retained in their current form. We believe the fuel re-selling agreement provisions should be updated to reflect the recent changes made to the Franchising Code of Conduct.

This submission sets out the issues that the ACCC considers limit the efficacy of the Oilcode and makes recommendations about how the Oilcode could be remade to address these issues and improve its efficacy.

## 2. Scope of the Oilcode

The Oilcode regulates the conduct of suppliers, distributors and retailers in the downstream petroleum industry. It came into effect on 1 March 2007.

There are approximately 6,400 petrol retail sites in Australia. The Oilcode applies to the downstream petroleum industry, with different aspects of the Oilcode applying to and affecting groups differently. Small sites averaging sales of less than 30,000 litres of motor fuel per month are not covered.

The TGP requirements (Part 2 of the Oilcode) apply to all wholesale suppliers and where a sale of a declared petroleum product is made by a wholesale supplier to a customer.

The provisions regulating the relationship between parties and potential parties to a fuel re-selling agreement (Part 3) apply only to those entities in, or contemplating entering, a fuel re-selling agreement. The definition of a fuel re-selling agreement largely mirrors the definition of a franchise agreement in the Franchising Code of Conduct. Based on information provided in the ACCC's 2014 petrol monitoring report, Part 3 potentially covers approximately 2,415 retail sites, including businesses operated by franchisees, commission agents and independent retailers.

The dispute resolution scheme (Part 4) applies to participants across the industry, and is available for disputes relating to the TGP arrangements and for parties to fuel re-selling agreements.

### 3. Oilcode related complaints and enquiries

The ACCC has received relatively few Oilcode related complaints and enquiries since the 2008 Oilcode review:

Year	Complaints	Enquiries	Total
2008	6	9	15
2009	2	8	10
2010	3	9	12
2011	2	2	4
2012	5	2	7
2013	2	1	3
2014	-	4	4
2015	5	3	8
<b>Total</b>	<b>25</b>	<b>38</b>	<b>63</b>

Ten of these matters were progressed to an initial investigation. The ACCC assessed each of these complaints on their merits and in a majority of matters, a breach of the Oilcode or the CCA could not be substantiated. Where appropriate, the ACCC referred complainants to the dispute resolution advisor for mediation.

### 4. ACCC compliance activities

The ACCC has separate teams dedicated to industry codes and petrol monitoring. These teams have prepared extensive materials to assist wholesalers and retailers to understand their rights and obligations under the Oilcode and the CCA, including fact sheets and a comprehensive guide to the Oilcode.

The ACCC has a web page devoted to the Oilcode, with a link to the Oilcode and other information about the Oilcode and the Oilcode Dispute Resolution Adviser.

The ACCC offers a free email subscription service (Oilcode Information Network) for people who wish to be kept up-to-date with Oilcode related developments and ACCC activities.

The ACCC also has a dedicated small business helpline for small businesses seeking quick guidance (1300 302 021).

## 5. Issues and recommendations

### Recommendation 1: The Oilcode’s fuel re-selling provisions should be harmonised with the updated Franchising Code of Conduct

**Issue:** *The Oilcode’s fuel re-selling agreement obligations do not reflect the recent amendments to the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (**Franchising Code of Conduct**). The Franchising Code of Conduct includes:*

- *new disclosure obligations for prospective franchisees;*
- *a general obligation of good faith; and*
- *an expanded enforcement regime which allows the ACCC to issues infringement notices and seek penalties for breaches of the Franchising Code of Conduct.*

The Oilcode’s Part 3 fuel re-selling provisions were broadly based upon the Franchise Act and the Franchising Code of Conduct. The Franchising Code of Conduct has since been updated. On 1 January 2015 a new Franchising Code of Conduct came into force. The new Franchising Code of Conduct introduced significant changes to the rights and responsibilities of franchisees, franchisors and potential franchisees. These aspects are detailed and compared with Oilcode rights and obligations in the table below.

Protection	Comments	Franchising	Oilcode
General obligation to act in good faith	The Franchising Code provides that each party to a franchise agreement must act towards another party with good faith (clause 6).	✓	✗
Effect of restraint of trade clause if agreement not extended	The Franchising Code places certain conditions on the effect of a restraint of trade clause after the agreement expires (clause 23).	✓	✗
Significant capital expenditure	The Franchising Code provides that a franchisor cannot require a franchisee to undertake significant capital expenditure (clause 30).	✓	✗
Information statement	The Franchising Code provides that a franchisor must provide an information statement to a prospective franchisee as soon as practicable after they formally apply expresses an interest in acquiring a franchised business (clause 11).	✓	✗
Penalty provisions	The Franchising Code contains a number of penalty provisions	✓	✗
Terminal gate price and related arrangements		✗	✓
Duration of Agreement (tenure)		✗	✓
Requirements before entering into an agreement	The Franchising Code provides that a franchisor must provide a copy of the disclosure document, the code and the franchise agreement. The Oilcode only provides that they must be provided a copy of the disclosure document and the code.	✓	✓

Agreements – cooling off period		✓	✓
Agreements – copy of lease		✓	✓
Agreements – disclosure of materially relevant facts		✓	✓
Association of franchisees/retailers		✓	✓
Marketing and other co-operative funds		✓	✓
Prohibition on release from liability		✓	✓
Transfer of the agreement		✓	✓
Termination		✓	✓
Dispute resolution		✓	✓

Franchisees had surety of tenure before the Oilcode was introduced (under the *Petroleum Retail Marketing Franchise Act 1980*), however commission agents did not. When this protection was extended to commission agents with the introduction of the Oilcode, it was seen as desirable because, without it, commission agents were vulnerable to the commercial decisions of the retail site owners (generally the refiner/marketers, importer/marketers or the supermarkets) and their contractual arrangements could have been terminated with minimal notice and little justification. This vulnerability undermines the incentives of fuel re-sellers to make site specific investments. The ACCC does not have a view on whether this protection remains necessary or appropriate for retailers.

If the Oilcode is retained the ACCC recommends that it be remade to include an expanded enforcement regime and consideration be given to the introduction of increased disclosure obligations and a good faith obligation similar to the Franchising Code of Conduct.

The ACCC notes that some fuel re-selling agreements, for example some commission agent agreements, may not meet the requirements for a franchise agreement in the Franchising Code of Conduct. These retailers would therefore not be covered by the Franchising Code of Conduct if the Oilcode was repealed.

## **Recommendation 2: Retain current TGP arrangements**

***Issue:** The ACCC considers that the Oilcode’s current TGP arrangements may provide useful information to petrol retailers.*

The purpose of the Oilcode’s TGP requirements is to increase the transparency retailers have of wholesale pricing.

Prior to the introduction of the Oilcode, delivery and invoice documentation received by retailers were typically not itemised. This made it more difficult for retailers to determine the actual cost of fuel on a cents per litre basis and made it difficult to compare prices between wholesalers. The Oilcode requires the provision of itemised delivery and invoice documentation.

The ACCC's annual petrol monitoring reports have consistently found that movements in monthly average actual wholesale prices closely tracked movements in monthly average posted TGPs for Sydney, Melbourne, Brisbane, Adelaide and Perth. Therefore, TGPs can be regarded as indicative of average wholesale prices in these cities. This may allow some retailers to gain an understanding of how their actual wholesale purchase price tracks against the average wholesale price paid over time and compare it with the offerings of other wholesalers.

The ACCC notes that its petrol monitoring reports include information on gross indicative retail differences (GIRDs), which are calculated by subtracting average TGPs from average retail prices. While GIRDs are not retail profits because they do not incorporate any other costs, they can be regarded as a broad indicator of gross retail fuel margins. Although the purpose of the Oilcode is to assist retailers, as consumers and motoring organisations are able to observe both retail prices and TGPs, they have the tools to calculate GIRDs in particular locations and compare them with GIRDs in other locations. This enables them to compare the relative margins on fuel in their area with other locations, and to ask questions if their margins are relatively high.

Prior to the introduction of the Oilcode, wholesalers in Victoria and Western Australia were required to publish TGPs. While some wholesalers outside Victoria and Western Australia also published TGPs prior to the introduction of the Oilcode, retailers in those locations were unable to consistently access TGPs. Without the obligation to publish TGPs under the Oilcode, the ACCC considers that some wholesalers outside Western Australia may decide not to publish this information.

We note that there are a number of issues with the current Oilcode TGP requirements which should be considered as part of this review:

- While there is currently no evidence of this occurring, there is a risk that published TGPs could be used as a price signal among wholesalers. Just as retailers gain greater visibility of an individual wholesaler's margin so do competing wholesalers. If this visibility led wholesalers to not engage in price competition, the competitive process would be harmed.
- The number of sales actually made at the published TGP continues to be low. Most fuel retailers value supply certainty and therefore enter into long-term supply arrangements which often include volume discounts. Other than in Western Australia (and previously, Victoria), contract prices do not require reference to TGP.
- While on average over time the published TGPs in the five largest cities are a good reflection of actual wholesale prices, it is unclear how the relationship tracks in regional locations.

On balance, the ACCC recommends that the obligation to publish TGPs be retained as it may provide petrol retailers with increased transparency of the wholesale price of petrol.

### **Recommendation 3: Remake the Oilcode to consolidate the Dispute Resolution Advisor with other mediation advisory services in Australia**

*Issue: The dispute resolution and mediation advisory regime in Australia is complex and provides a number of options to address business to business disputes. The Oilcode's Dispute Resolution Adviser services appear to be underutilised.*

Each of Australia's mandatory industry codes provide for the development of internal dispute resolution procedures and the option to refer an unresolved dispute to mediation. In some circumstances a mediation advisory service is appointed to assist with the administration of the dispute resolution procedure. These include:

- the Dispute Resolution Adviser (Oilcode);
- the Horticulture Mediation Adviser; and
- the Office of the Franchising Mediation Adviser.

Other organisations, such as the Small Business Commissioner Offices, also provide services to assist in the dispute resolution process and can, if required, appoint a mediator.

The ACCC recommends that this system be simplified. We recommend that consideration be given to consolidating mediation advisory services for industry codes prescribed under the CCA to a single entity.<sup>1</sup> For example, the newly established office of the Small Business and Family Enterprise Ombudsman.

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<sup>1</sup> See also Productivity Commission, (2014) Access to Justice Inquiry Report, recommendation 9.3