



Australian
Competition &
Consumer
Commission

The guide to the Oilcode
for industry participants in the
downstream petroleum retail industry

Australian Competition and Consumer Commission
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Important notice

This guideline gives you basic information. It does not cover the whole of the Competition and Consumer Act, including the Oilcode, and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the Act.

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FOREWORD

Foreword

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 comprising 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* (now the *Competition and Consumer Act 2010* (the Act)).

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

The purpose of the Oilcode is to regulate the conduct of suppliers, distributors and retailers in the downstream petroleum retail industry. The Oilcode encourages 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 provides an effective and relatively inexpensive way of resolving disputes that may arise between suppliers, distributors or retailers.

The ACCC plays an important role in the downstream petroleum retail industry by promoting compliance with the Oilcode and the Act. It achieves this through education, providing access to information and, where necessary, enforcement action.

This guide is one of several ACCC guides for business. It is designed to help you understand your rights and responsibilities under the Oilcode.

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GLOSSARY

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:

- 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:

- one party (the supplier) grants another party (the retailer) the right to conduct a fuel re-selling business and the supplier is able to exert substantial control over the operation of that business

- the fuel re-selling business will be associated with a trademark, commercial symbol or advertising owned, used, licensed or specified by the supplier
- the retailer is required to pay, or agree to pay, a fee before starting business.

If a commission agency agreement meets the above criteria 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:

- (a) a person who carries on a business of selling or supplying petroleum products to end-users
- (b) a person who is a retailer under a fuel re-selling agreement
- (c) 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:

- (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.

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.

INTRODUCTION

Introduction

This publication aims to provide industry participants with a guide to their rights and responsibilities under the Oilcode.

The Oilcode aims to improve transparency in wholesale pricing and access to declared petroleum products, as defined in the Oilcode, at a published terminal gate price.

The Oilcode will also help industry participants make informed decisions when entering, renewing or transferring a fuel re-selling agreement through the disclosure of specific information.

The Oilcode also 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.

This publication examines:

- who the Oilcode applies to
- when the Oilcode will apply
- the rights and responsibilities of industry participants regarding terminal gate pricing and related arrangements
- the rights and responsibilities of industry participants regarding the wholesale supply of declared petroleum products
- the type of information industry participants are entitled to
- the rights and responsibilities of parties when entering, transferring or renewing a fuel re-selling agreement
- the rights and responsibilities when terminating a fuel re-selling agreement
- what to do when things go wrong

- how to contact the Dispute Resolution Adviser
- how to contact the Department of Industry, Tourism and Resources
- how to contact the ACCC

It is important to note that this document is only intended to form a guide for industry participants about their rights and responsibilities under the Oilcode. It is not a substitute for legal advice, nor is it intended to comprehensively encapsulate the rights and/or responsibilities of industry participants under the Oilcode.

Who does the Oilcode apply to?

The Oilcode applies to:

- wholesale suppliers
- sales of declared petroleum products by a wholesale supplier to a customer
- fuel re-selling agreements, including existing agreements, except those where:
 - the supplier reasonably believes that the amount of motor fuel supplied will be less than an average of 30 000 litres for each month for the term of the agreement and
 - at least three days before entering the agreement, the supplier provides the prospective retailer with a written statement setting out the grounds for this belief
- any other retail activities included in the fuel re-selling agreement, or undertaken on the same site by the retailer for the supplier.

Wholesale supply of declared petroleum products

Under the Oilcode a **wholesale supplier** is a person who sells declared petroleum products by wholesale from a wholesale facility. A **wholesale facility** means:

- oil refinery
- shipping facility
- facility connected by a product transfer pipeline to an oil refinery or a shipping facility
- facility connected by a product transfer pipeline to a facility that is connected by a product transfer pipeline to an oil refinery or a shipping facility.

A wholesale supplier must not unreasonably refuse to supply a declared petroleum product to a customer. However, there are certain conditions under which the wholesale supplier is not required to supply a declared petroleum product to a customer. Those conditions include when the wholesale supplier has:

- insufficient supplies
- a reasonable belief that a customer is unable to pay for the supply to meet the customer's requirements
- a reasonable belief that the customer is unable to receive or transport the declared petroleum product in compliance with occupational health and safety requirements
- advertised a minimum amount of declared petroleum product that the supplier will supply as a spot sale (a sale by wholesale to an uncontracted customer).

The wholesale supplier is not required to accept a request for the supply of an amount of the declared petroleum product that is less than the minimum amount.

Health and safety requirements

The Oilcode requires that industry participants comply with all health and safety requirements when transporting declared petroleum products by road. 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 at www.ntc.gov.au.

Terminal gate pricing

The terminal gate price (TGP) is the price for a wholesale sale of a declared petroleum product that is temperature corrected to 15°C and expressed in cents per litre. A posted TGP must not include any amount imposed for (or in relation to) an additional service. Charges for additional services must be identified separately from the posted TGP in a wholesale supplier's sales documents.

However, a wholesale supplier:

- may charge the posted TGP minus an amount subtracted as a discount
- may provide an additional service and may charge the posted TGP plus an additional amount added for or in relation to that service.

Term contracts in force at the commencement date of the Oilcode

For term contracts in force at the commencement date of the Oilcode, if a customer asks the 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 wholesale supplier must make that offer.

However, a customer may only make one such request and it must be made within 60 days of the commencement of the Oilcode.

Term contracts entered into after the commencement date of the Oilcode

For term contracts entered into after the commencement date of the Oilcode, 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

For non-term contracts entered into after the commencement date of the Oilcode, a wholesale supplier must make the customer an offer to buy the declared petroleum product at the posted TGP or a price derived from that price.

Disclosing terminal gate price

The Oilcode specifies that all wholesale suppliers who sell to non-related parties must publicly advertise the TGP each day for the wholesale sale of declared petroleum products, for example a sale by a refiner to a retailer or a distributor.

A wholesale supplier must make its 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 is 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. 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 terminal gate price on a day, however this may only be done where 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.

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 and includes at least:

- (i) the kind of declared petroleum product supplied
- (ii) the volume of the declared petroleum product supplied, on a temperature corrected basis
- (iii) the total price charged per litre on a temperature corrected basis
- (iv) the posted TGP applicable at the time of the transaction

If the customer has access to the information in (iii) or (iv) above from a telephone, a fax or a website operated by or for the wholesale supplier at the time of the sale, the information in (iii) or (iv) does not have to be included in the documentation at the time of delivery.

Within 30 days of delivery

Within 30 days of delivery the wholesale supplier must also provide the customer with a document acknowledging the sale which includes certain further information regarding that sale. The following information must be included in the document acknowledging the sale:

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

- if the customer has requested additional services with the supply:
 - a description of each service
 - the price charged for each service
- if the wholesale supplier has given a discount:
 - the amount of the discount
 - the way in which the discount was applied.

Other statutory obligations

There are a range of other Commonwealth, state and territory statutory obligations that operate concurrently with the Oilcode which may affect industry participants regarding the wholesale supply of petroleum products. For further information about relevant state and territory legislation, industry participants may wish to consult the following Australian Government website that provides links to all Australian state and territory government websites, www.australia.gov.au.

Fuel re-selling agreements

A fuel re-selling agreement is a contractual arrangement between a supplier and a retailer that provides for a minimum duration and has the following characteristics:

- (i) the agreement may be written, verbal or implied **and**
- (ii) 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 **and**
- (iii) the fuel re-selling business will be associated with a trademark, advertising or commercial symbol owned, used, licensed or specified by the supplier **and**
- (iv) the retailer is required to pay, or agree to pay, a fee before starting business (with the exception of a commission agency type fuel re-selling agreement).

If a commission agency agreement meets the above criteria (i), (ii) and (iii) they are specifically identified as ‘fuel re-selling agreements’ under the Oilcode.

The transfer, renewal or extension of a fuel re-selling agreement, a commission agency relationship under the Oilcode or an interest in a fuel re-selling agreement will constitute a fuel re-selling agreement for the purposes of the Oilcode.

However, any of the following commercial relationships do not **of themselves** constitute a fuel re-selling agreement:

- an employer and employee relationship
- a partnership relationship
- a landlord and tenant relationship
- a mortgagor and mortgagee relationship
- a lender and borrower relationship
- a fuel agreement related to a retail site that is not owned or leased by the supplier
- the relationship between the members of a cooperative that is registered, incorporated or formed under state or federal law.

It should be noted that a fuel re-selling agreement may apply to one or more retail sites.

Disclosure requirements of a fuel re-selling agreement

The supplier must create and maintain a disclosure document that ensures adequate information is provided by the supplier to allow the retailer to make a reasonably informed decision on the proposed terms and conditions of the fuel re-selling agreement. The disclosure document must be signed by a director or executive officer of the supplier. The supplier must also give a retailer current information relevant to the operation of their business. The supplier must not seek a non-refundable deposit from the retailer in exchange for a disclosure document.

A supplier must give its current **disclosure document** and a copy of the **Oilcode** in either electronic or hardcopy form to a person who proposes to:

- become a retailer in relation to the supplier at least 14 days before the person enters into the fuel re-selling agreement or pays any non-refundable money to a supplier in connexion with a proposed fuel re-selling agreement or
- renew or extend a fuel re-selling agreement, in relation to the supplier at least 14 days before the fuel re-selling agreement is renewed or extended.

The disclosure document must be in accordance with the form, the order and the numbering set out in the annexure of the Oilcode that relates to that fuel re-selling agreement.

If the agreement is a new fuel re-selling agreement (not a renewal, extension or transfer), the retailer will be entitled to a seven-day 'cooling off' period after signing the agreement or paying money under the agreement, whichever is the earlier.

During this time the retailer may terminate the agreement without cost in certain circumstances (see p. 19 for further details).

The supplier must also create subsequent disclosure documents not later than three months after the end of:

- the financial year in which the supplier enters into the fuel re-selling agreement
- each subsequent financial year in which a fuel re-selling agreement is in force.

A supplier must not enter into a fuel re-selling agreement or receive non-refundable money under a fuel re-selling agreement before receiving a signed statement from the prospective retailer that they have:

- received, read and had a reasonable opportunity to understand the disclosure document and the Oilcode
- been given legal advice from an independent professional adviser about the proposed fuel re-selling agreement, or fuel re-selling business or has declined to seek such advice with respect to the agreement.

A supplier must not renew or extend a fuel re-selling agreement or receive non-refundable money under a fuel re-selling agreement before receiving a written statement from the retailer that they have received, read and had an opportunity to understand the disclosure document from the wholesale supplier and the Oilcode.

There are two types of disclosure documents associated with fuel re-selling agreements that are required to be created and maintained by a supplier under the Oilcode: These include:

- **Long-form disclosure:** a comprehensive level of disclosure required for agreements for five years or more.
- **Short-form disclosure:** a less comprehensive form of disclosure required for agreements for less than five years. However, a retailer may also request the supplier to provide the additional information provided under a supplier's long-form disclosure obligations for agreements with less than five years duration if it chooses to do so.

Long-form disclosure

A supplier proposing to enter, renew or extend a fuel re-selling agreement of **at least five years duration** must provide **long-form disclosure** documentation in accordance with the specific content and layout requirements listed in annexure 1 of the Oilcode. The long-form disclosure document includes issues of relevance to the commercial viability of the fuel re-selling business. You will find a summary list of these disclosure requirements in appendix A of this guide.

Short-form disclosure

A supplier proposing to enter, renew or extend a fuel re-selling agreement **for less than five years** may choose to provide **short-form disclosure** documentation in accordance with the specific content and layout requirements listed in annexure 2 of the Oilcode. The short-form disclosure document includes issues of relevance to the commercial viability of the fuel re-selling business. You will find a summary listing of these disclosure requirements in appendix B of this guide.

Transfer disclosure

A person who proposes to transfer a fuel re-selling agreement must create and maintain a disclosure document in accordance with the specific content and layout requirements listed in annexure 3 of the Oilcode. This short-form disclosure document includes issues of relevance to the commercial viability of the fuel re-selling business. A summary of these disclosure requirements is provided in appendix C of this guide.

The disclosure document must be given to the proposed transferee and to the supplier. The transferor must also give to the supplier details of the consideration for the proposed sale and all details reasonably required by the supplier to decide whether to consent to the transfer. The document must also be signed by a director or an executive officer of the transferor.

An exception to this requirement is if the proposed transferee is the supplier of the fuel re-selling business. If this is the case, the supplier may waive the requirement to be given the disclosure document.

The supplier must provide the proposed transferee with access to information to test the reasonableness of the claims made about the financial details of the fuel re-selling business within the disclosure document of the transferor.

Conditions of a fuel re-selling agreement

A fuel re-selling agreement is subject to the following conditions.

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 its reasonable expenses from the amount to be repaid if the expenses, or the method of calculation of the expenses, have been set out in the agreement.

Supplier to provide a copy of the lease

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 the 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 give the retailer a right to occupy the premises within one month of the signing of those. 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**.¹

¹ It may be 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.

Prohibition on general release from liability

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

Marketing and other cooperative funds

If a fuel re-selling agreement requires a retailer to pay money to a marketing fund, the 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 they are not already mentioned in the disclosure document, the supplier must disclose issues listed in the Oilcode as materially relevant facts within 14 days of the supplier becoming aware of the facts. Materially relevant facts include:

- a change in the majority ownership of the supplier
- details of certain 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.

Making the current disclosure document available

The 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 since the last document was provided.

Supplier's proprietary fuel card

If a retailer must 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 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.

Duration of agreement

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

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

- (i) 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).

- (ii) the supplier and the prospective retailer agree on a different duration for a fuel re-selling agreement where:
- 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 (i) above applies, within nine years after the fuel re-selling agreement commences or
 - the supplier has decided that within five years after the fuel re-selling agreement commences or, if (i) 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 the 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:

- the 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 a retailer and a 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).

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.

Renegotiation or variation of a 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 that is within the control of the other party and
- the matter was not disclosed by the other party and
- the occurrence of that 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 a 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.²

If a dispute arises in relation to renegotiation, variation or a discretion exercised under a fuel re-selling agreement the assistance of the Dispute Resolution Adviser (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 and sets out the circumstances under which it would be reasonable for the supplier to refuse to consent to the proposed transfer.

The circumstances that are considered reasonable for a supplier to refuse the transfer of a fuel re-selling agreement include when:³

- the proposed transferee is unlikely to meet the financial obligations of the fuel re-selling agreement

² 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.

³ Discretion should not be exercised unconscionably.

- the proposed transferee does not meet the selection criteria set out in the disclosure document
- the retailer has not met the disclosure obligations set out in p. 13 of this guide
- 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.

The supplier is taken to have given consent to the transfer if the supplier does not object to the transfer in writing within 42 days.

Termination of fuel re-selling agreement

Termination by supplier: breach by retailer

If a retailer is in breach of the fuel re-selling agreement, a supplier must give the retailer reasonable notice that the supplier proposes to terminate the agreement because of the breach, notify the retailer of what needs to be done to remedy the breach and give the retailer reasonable time to remedy the breach. If the breach is remedied within the prescribed timeframe then the supplier must not proceed with the termination as a result of that breach unless special circumstances apply (outlined below). If the parties are still unable to reach agreement the DRA may be of assistance 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:

- failure to hold a licence that the retailer is required to hold to conduct a fuel re-selling business
- bankruptcy or insolvency
- voluntarily abandonment of the fuel re-selling business

- conviction of a serious offence or
- operating the fuel re-selling business or an associated business in a way that is fraudulent or that endangers public health or the environment.

A supplier may also terminate a fuel re-selling agreement relating to particular retail premises if a Commonwealth, state or territory law relating to the compulsory acquisition of land is invoked 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

A supplier intending to terminate a fuel re-selling agreement that does not specify a minimum duration and the initial upfront investment is less than \$20 000 must give the retailer at least 30 days notice and offer to buy, or nominate a buyer for a reasonable quantity of saleable stocks of motor fuel, merchandise and equipment supplied under the supplier's fuel re-selling agreement or operational specifications, or obtained with the supplier's approval. 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 **and**
- the supplier will negotiate an arrangement with the retailer to terminate those rights by consent **and**
- 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 to the supplier by the retailer.

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

- motor fuel
- merchandise and
- equipment

supplied under the supplier's fuel re-selling agreement, operational specifications or obtained with the supplier's approval.

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

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

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

Dispute resolution scheme

The key objective of the dispute resolution scheme is to provide the downstream petroleum retail industry with a cost-effective and timely dispute resolution scheme as an alternative to litigation. The DRA plays an essential role in facilitating this process.

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-reselling agreement
- in relation to any of the provisions of the Oilcode about terminal gate price arrangements or a fuel re-selling business.

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.

The DRA may make non-binding determinations for industry disputes under the Oilcode. However, it is important to note that the dispute resolution scheme does not prohibit anyone from coming directly to the ACCC or from taking private legal action for a breach of the Oilcode or the Act. Any statement made as part of the dispute resolution procedures under the Oilcode is not admissible in a criminal proceeding or a proceeding for the imposition of a penalty. The only exception to this is for a proceeding in respect of the falsity of the statement.

Disputes about supply of a declared petroleum product: failure to supply

The parties may involve the DRA directly in resolving disputes for failure to supply 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
- ask the DRA to attempt to resolve the dispute and
- provide details and evidence of their complaint to the DRA.

In this situation, the DRA may 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.

Disputes other than a failure to supply

With respect to disputes that do not relate to a failure to supply declared petroleum products, the Oilcode requires that the parties 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 how to resolve the dispute, they may agree to appoint a person to mediate or provide assistance in resolving the dispute. The person appointed must in turn inform the DRA of arrangements they have put in place to assist the parties to resolve the dispute.

Alternatively, if the parties cannot agree to refer the matter, the parties must notify the DRA of this, and the DRA must appoint a person to provide mediation or other assistance to resolve the dispute. If the DRA appoints a person to mediate the dispute or provide assistance, the parties must try to resolve the dispute with the help of the person appointed. Either party to the dispute may, with the agreement of the person appointed by the DRA, involve another party to assist or provide advice.

Only the original parties to the dispute may enter into an agreement to resolve the dispute.

The DRA may comment on any advice provided by the person they appointed to mediate or assist the parties to resolve the dispute. The DRA may also choose to make a non-binding determination about the dispute. If a resolution cannot be reached within 30 days of the start of arrangements to resolve the dispute, the parties may choose to stop using the services of the person appointed by the DRA.

Conditions of using the dispute resolution scheme

The dispute resolution scheme cannot be used to resolve a dispute as to 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 or
- has agreed to the termination of the fuel re-selling agreement.

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

If you want to lodge a dispute or seek further information about the Dispute Resolution Adviser visit www.oilcodedra.com.au.

Legal recourse

Any action taken under the dispute resolution scheme of the Oilcode does not affect the right of a party to a dispute to bring their own legal proceedings.

When a retailer or a supplier believes that there has been a serious breach of the Oilcode the affected party may be entitled to damages, court orders to stop the contraventions or other orders, such as orders requiring changes to the agreement.

Industry participants should seek legal advice from a solicitor on these issues.

However, legal action can be costly, time consuming, relationship damaging and without guarantee that the court will provide the desired outcome. Often, it may be more practical to try to resolve the dispute through the dispute resolution scheme provided by the Oilcode.

Note that the scheme does not prevent anyone from approaching the ACCC directly, nor from taking other forms of private legal action.

The role of the ACCC in relation to the Oilcode

The ACCC administers:

- section 51AD of the Act that prohibits contraventions by corporations of an applicable industry code, such as the Oilcode
- section 22 of Schedule 2 of the Act that allows the courts, when determining whether conduct is unconscionable, to consider the requirements of any applicable industry code, including the Oilcode.

The ACCC also:

- educates industry participants about their rights and obligations under the Oilcode
- provides guidance to industry and raises awareness of the Oilcode among industry participants
- where necessary, enforces the provisions of the Oilcode and other relevant provisions of the Act by seeking remedies available under the Act.

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 and 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 complaints that:

- involve a blatant disregard for the law
- will cause significant public detriment
- include unconscionable conduct against small business

The ACCC may take action to:

- clarify the reach and meaning of the Oilcode and the Act
- achieve an outcome that will have an educational or deterrent effect.

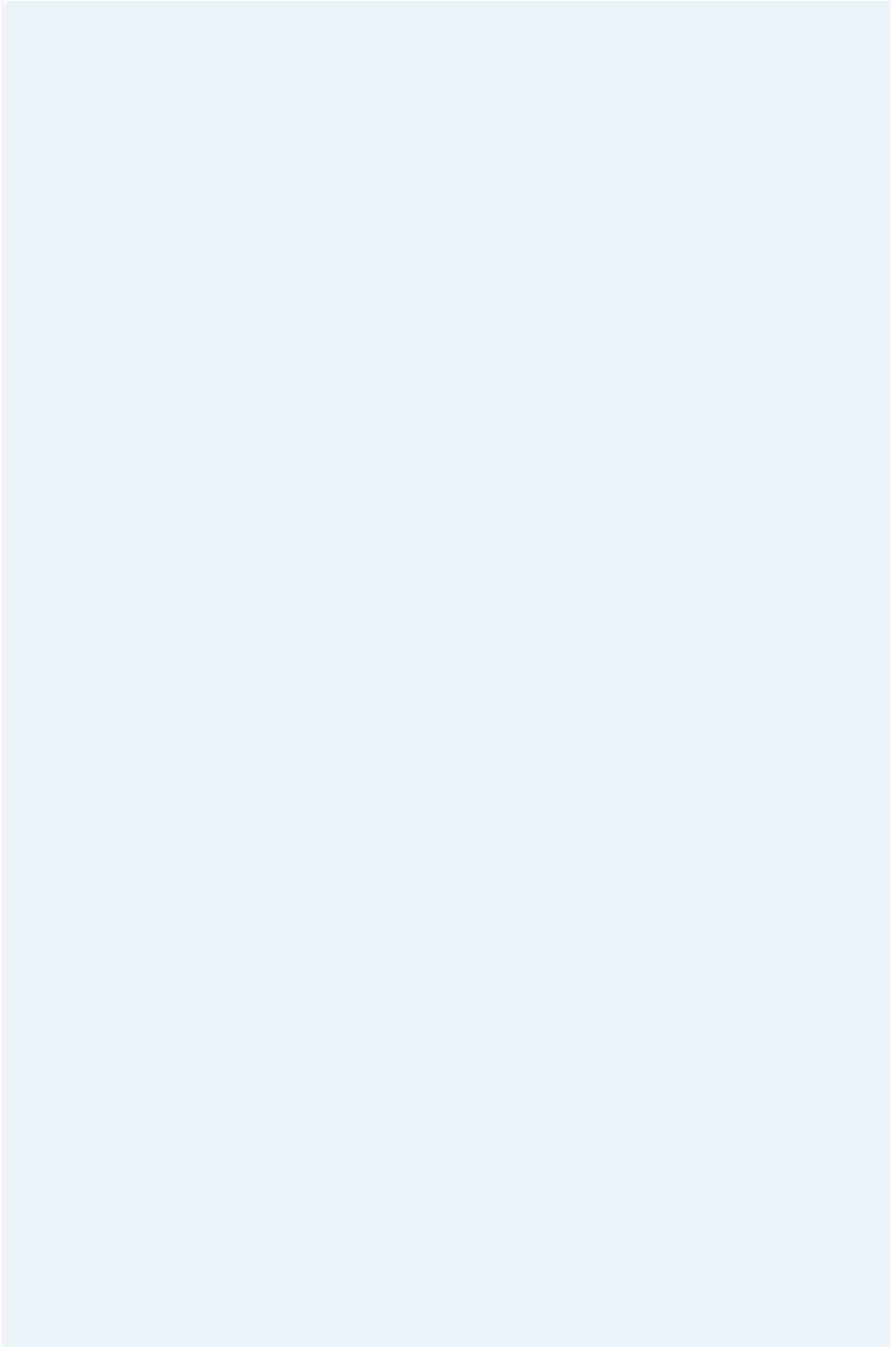
The ACCC is likely to direct disputes to the DRA at first instance. However, if an industry participant has blatantly disregarded the Oilcode or the Act, then the ACCC may take immediate action.

As part of its policy responsibilities the Department of Resources, Energy and Tourism (RET) provides policy advice and support to the Australian Government on issues relating to the retail petroleum industry. You can find further information regarding the role of RET at www.ret.gov.au.

Developing a compliance program

The ACCC encourages all industry participants to develop a trade practices compliance program as a mechanism to reduce the risk of breaching the Oilcode and the Act and to quickly remedy any breach that may have occurred.

For further information on how to develop an effective compliance program, refer to the ACCC's *Small business guide to trade practices compliance programs* at the ACCC website, www.accc.gov.au.



APPENDIX A

Appendix A

APPENDIX A: long-form disclosure

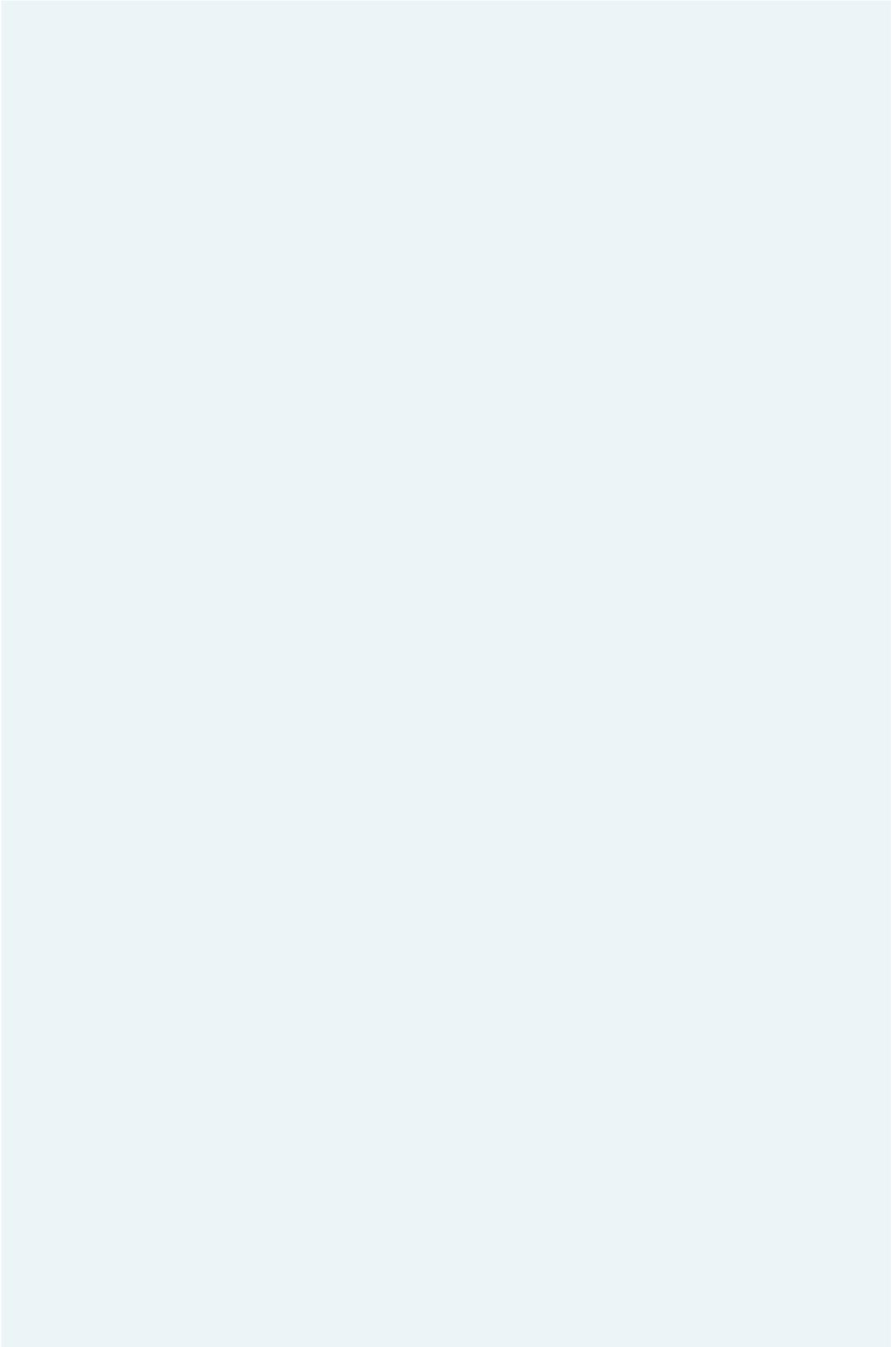
A supplier proposing to enter, renew or extend a fuel re-selling agreement of at least five year's duration must provide long-form disclosure documentation in accordance with the specific content and layout requirements listed in annexure 1 of the Oilcode. The long-form disclosure document includes the following issues of relevance to the commercial viability of the fuel re-selling business:

- details of the supplier, including the qualifications of each director, secretary, executive officer or partner of the supplier who is likely to have management responsibilities for the fuel re-selling agreement
- a summary of the relevant business experience of the people running the fuel re-selling business
- details of litigation over the last three years against the supplier including proceedings that involve criminal, trade practices and industrial relations proceedings
- payments made to agents who introduce or recruit retailers
- details of existing fuel re-selling agreements
- details of any intellectual property significant to the fuel re-selling agreement system such as trade marks, patents, designs or copyright
- whether the fuel re-selling business is for an exclusive or non-exclusive territory or limited to a particular site
- whether other retailers may operate a fuel retail business in the designated territory

- ☑ whether the supplier may operate or establish other fuel re-selling systems within the designated territory
- ☑ whether a retailer may operate a fuel re-selling business outside the territory
- ☑ whether the supplier may change the territory
- ☑ details of goods and services that the retailer acquires or supplies, including restrictions and obligations on where and what retailers can buy⁴
- ☑ how the supplier will deal with motor fuel losses
- ☑ the supplier's policy on site selection and details on the history of the site
- ☑ details of marketing and cooperative funds
- ☑ details of money that retailers are required to pay before signing the fuel re-selling agreement and when such a payment will be refunded
- ☑ details of establishment costs such as property, equipment, inventory, security deposits, licences, insurance, working capital and other payments
- ☑ details of any financing arrangements that the supplier offers to the retailer or requires the retailer to enter
- ☑ a summary of the conditions of the agreement that deal with both the retailer and supplier's obligations before and during the operation of the fuel re-selling business
- ☑ details of pricing policy, motor fuel delivery and payment
- ☑ a summary of the requirements for the retailer to prepare a business plan including a statement of rights and obligations of the supplier and retailer under the plan
- ☑ a summary of conditions for use of supplier proprietary fuel cards
- ☑ details of the right (if any) of the supplier to vary a term of the agreement or any document adopted by reference, without the consent of the retailer
- ☑ what 'type' of arrangement the fuel re-selling agreement is—commission agency or other
- ☑ how long the current business format of the agreement has been used and how it has developed
- ☑ if the retailer is required to use the supplier's computer system, a summary of the rights and responsibilities of the supplier and the retailer including the extent to which the retailer may be excluded from use of the computer system

⁴ Before some of these requirements are made, the supplier may notify, or seek authorisation from the ACCC (see Part VII of the Competition and Consumer Act).

- ☑ conditions of the fuel re-selling agreement including:
 - termination
 - renewal, extension, variation or expiry
 - selling
 - mediation and conciliation
 - choice of governing law
- ☑ a statement that re-selling of motor fuels is subject to Commonwealth and state or territory laws and that the retailer will be exposed to market risks and rewards
- ☑ a summary of any requirements under a fuel re-selling agreement that requires a retailer to enter into any other agreements such as leases, confidentiality agreements and mortgages
- ☑ earnings information may or may not be given; annexure 1 outlines what information must be included if earnings information is given
- ☑ financial details of the supplier including financial reports and directors statements
- ☑ details of any materially relevant facts that have changed after the disclosure document is completed but before it is actually given to the retailer
- ☑ a copy of the Oilcode, the fuel re-selling agreement, any other proposed activities under the agreement relating to the sale of declared petroleum products and any other information the supplier wants to give that does not contradict the information required
- ☑ a statement that the retailer may keep the disclosure document and a form that the retailer may sign to acknowledge receipt of the disclosure document.



APPENDIX B

Appendix B

APPENDIX B: short-form disclosure

A supplier proposing to enter, renew or extend a fuel re-selling agreement **for less than five years** may choose to provide short-form disclosure documentation in accordance with the specific content and layout requirements listed in annexure 2 of the Oilcode. The **short-form disclosure** document includes the following issues of relevance to the commercial viability of the fuel re-selling business:

- ☑ details of the supplier, including the qualifications of each director, secretary, executive officer or partner of the supplier who is likely to have management responsibilities for the fuel re-selling agreement
- ☑ details of litigation over the last three years against the supplier including proceedings that involve criminal, trade practices and industrial relations proceedings
- ☑ details of any intellectual property significant to the fuel re-selling agreement system such as trade marks, patents, designs or copyright
- ☑ whether the fuel re-selling business is for an exclusive or non-exclusive territory or limited to a particular site
- ☑ whether other retailers may operate a fuel retail business in the designated territory
- ☑ whether the supplier may operate or establish other fuel re-selling systems within the designated territory
- ☑ whether a retailer may operate a fuel re-selling business outside the territory
- ☑ whether the supplier may change the territory
- ☑ details of marketing and cooperative funds

- ☑ details of money that retailers are required to pay before signing the fuel re-selling agreement and when such a payment will be refunded
- ☑ details of establishment costs such as property, equipment, inventory, security deposits, licences, insurance, working capital and other payments
- ☑ a summary of the conditions of the agreement that deal with both the retailer's and supplier's obligations before and during the operation of the fuel re-selling business
- ☑ details of pricing policy, motor fuel delivery and payment
- ☑ a summary of the requirements for the retailer to prepare a business plan including a statement of rights and obligations of the supplier and retailer under the plan
- ☑ a summary of conditions for use of supplier proprietary fuel cards
- ☑ details of the right (if any) of the supplier to vary a term of the agreement or any document adopted by reference, without the consent of the retailer
- ☑ a statement that re-selling of motor fuels is subject to Commonwealth and state or territory laws and that the retailer will be exposed to market risks and rewards
- ☑ financial details of the supplier including financial reports and directors statements a statement that the prospective retailer:
 - may keep the disclosure document
 - ask the supplier to provide the additional information provided under a supplier's long-form disclosure obligations for fuel re-selling agreements
- ☑ a form that the retailer may sign to acknowledge receipt of the disclosure document.

APPENDIX C

Appendix C

APPENDIX C: transfer disclosure

A person who proposes to transfer a fuel re-selling agreement must create and maintain a disclosure document in accordance with the specific content and layout requirements listed in annexure 3 of the Oilcode. The short-form disclosure document includes the following issues of relevance to the commercial viability of the fuel re-selling business:

- details of the supplier
- details of the retailer including the business experience and qualifications of the directors of the retailer
- a description of the fuel re-selling business
- a copy of the existing fuel re-selling agreement
- if the retailer leases the property and proposes to transfer the lease—a copy of any lease agreements or agreements to lease or a summary of the conditions of the lease agreement or agreement to lease
- details of the assets of the fuel re-selling business that will be transferred to the proposed transferee
- profit and loss statements and balance sheets of the fuel re-selling business for the past two years
- a summary of obligations that the retailer has for the fuel re-selling business
- summary of any conditions that must be met to transfer the fuel re-selling business
- details of the retailer's employees

- a statement that the retailer has provided the information contained within the disclosure document and that the supplier does not guarantee the accuracy of the information
- an acknowledgment of receipt of the disclosure document
- any other information that the retailer wants to give.

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