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Oilcode Review

Final Report

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Table of Contents

1. Introduction	5
2. Policy context	5
2.1. Overview of the Market.....	5
<i>Wholesale</i>	5
<i>Retail</i>	7
2.2. What's the problem?	8
2.3. The Oilcode	9
<i>Terminal gate price and related arrangements</i>	10
<i>Fuel reselling agreements</i>	10
<i>Dispute resolution scheme</i>	11
2.4. 2008 Oilcode Review.....	11
2.5. Competition Policy Review	12
2.6. Regulatory reform.....	13
3. Review Process.....	13
3.1. Scope of the Review.....	13
3.2. Out of Scope Issues	14
4. Analysis of Oilcode Options.....	15
4.1. Repeal the Oilcode	15
<i>Stakeholder views</i>	15
<i>Costs and benefits</i>	15
<i>Contractual Agreements</i>	16
<i>Terminal Gate Pricing</i>	16
<i>Dispute Resolution Services</i>	16
4.2. Retain the Oilcode	17

<i>Stakeholder views</i>	17
<i>Costs and benefits</i>	18
<i>Contractual Agreements</i>	18
<i>Terminal Gate Pricing Arrangements</i>	19
<i>Dispute Resolution Services</i>	19
4.3. Remake the Oilcode	20
<i>Stakeholder views</i>	20
<i>Costs and Benefits</i>	21
<i>Contractual Agreements</i>	21
5. Conclusion	22
6. Recommendations.....	23

1 Introduction

The *Competition and Consumer (Industry Codes–Oilcode) Regulation 2006* (Oilcode) regulates the conduct of suppliers, distributors and retailers in the petroleum marketing industry. The Department of Industry, Innovation and Science has a regulatory requirement, resulting from the 2008 review of the code, to undertake a review of the Oilcode.

The Oilcode is also scheduled for sunset on 1 April 2017. [Sunsetting provisions](#) require a review of the legislative instrument to determine if it remains fit for purpose before it can be remade, retained or repealed.

This Oilcode Review (the Review) examines the ongoing need for the Oilcode and the operation of the code to determine if it provides appropriate regulation of the conduct of participants in the petroleum marketing industry.

The Review is also being considered in the context of broader government processes including the Competition Policy Review and the Government's commitment to regulatory reform and reducing the regulatory burden for individuals and businesses.

2 Policy context

2.1 Overview of the Market

The fuel industry changed considerably between 1980 (when petroleum retailing legislation was first introduced) and 2006 with more independent importers and the supermarket chains entering the market.

Since the Oilcode was last reviewed in 2008 we have seen these trends continue to impact on the industry, albeit at a much slower rate.

Wholesale

In 2008, the four refiner-marketer majors (BP, Caltex, Mobil and Shell) were largely responsible for both refining and importing fuel. In 2007-08, the refiner-marketers were responsible for around 94 per cent of imported petrol,

leaving a 6 per cent share for independent importers.¹ By 2010-11, independent imports had increased to around 40 per cent of unleaded petrol imported into Australia.² However, in 2013-14 this had dropped to around 27 per cent.³ This stems from the closure, and impending closure, of refineries and their conversion to import terminals, resulting in refiner-marketers relying on a greater percentage of imports. In absolute terms, petrol imports by independent importers have increased five-fold since 2007-08.⁴

The growing role of independents is also seen in the wholesale market, where the independent wholesale market share has doubled since 2006-07. While this has been a generally upward trend, it has plateaued in recent years.

The way in which Australia's petroleum market is perceived internationally is changing due to the decline of local integrated refiner marketers and the increasing reliance on imported refined product. The Australian Competition and Consumer Commission (ACCC) has noted that these factors will raise Australia's importance in global trade flows and thus, commodity traders' interest in the downstream petroleum industry.⁵

In 2014, this was borne out with a new entrant in the refining industry through Vitol's purchase of Shell's Geelong refinery and retail business, and the entrance of Puma Energy and Idemitsu Kosan to the wholesale sector in 2013, following such companies as Liberty Oil and United Petroleum. Increasing independent involvement in the sector is likely to lead to the independent wholesaler share of the market increasing in future years.

¹ Australian Competition and Consumer Commission, 2008, [Monitoring of the Australian petroleum industry 2008](#).

² Australian Competition and Consumer Commission, 2011, [Monitoring of the Australian petroleum industry 2011](#).

³ Australian Competition and Consumer Commission, 2014, [Monitoring of the Australian petroleum industry 2014](#).

⁴ Australian Competition and Consumer Commission, 2013, [Monitoring of the Australian petroleum industry 2013](#).

⁵ Australian Competition and Consumer Commission, 2013, [Monitoring of the Australian petroleum industry 2013](#).

Retail

The current retail fuel market consists of a number of different operation types: directly owned and operated; distributor owned operations; independent retailer; franchisee; and commission agent.⁶

The table below shows the makeup of the retail fuel industry by operations type in 2013-14.

Brand	Business operated by					
	Directly owned and operated %	Distributor owned operations %	Independent retailer %	Franchisee %	Commission agent %	Total %
BP	6.5	10.7	9.2	0.3	0.0	26.6
Caltex	1.9	7.3	2.1	1.8	7.3	20.4
Mobil	0.0	0.8	0.0	0.0	0.0	0.8
Shell	0.5	0.0	4.1	0.0	0.0	4.6
Woolworths/Caltex (Co-branded)	12.2	0.0	0.0	0.0	0.0	12.2
Coles Express/Shell (Co-branded)	12.4	0.0	0.0	0.0	0.0	12.4
Specialist retailers	0.0	0.0	1.9	7.9	0.1	9.5
Independent wholesalers	0.0	0.7	3.2	1.8	7.2	13.1
Total	33.5	19.7	20.5	11.8	14.5	100.0

Australian Competition and Consumer Commission, *Percentage of retail sites by brand and business operator, 2013-14*

Distributor owned operations have declined in recent years, while directly owned operations have increased, largely due to the expanding presence of the supermarket chains in that category.

In 2008, the rationalisation of service stations was continuing, including the move to centralised and highway outlets. The impact of the supermarket

⁶ Commission agents generally manage a business owned by a refiner-marketer or independent chain, and are generally compensated in the form of a commission based on the quantity of product sold.

chains was becoming more marked, particularly with the prevalence of 'shopper docket' schemes. Retailers responded to this by introducing new services.⁷ This is a trend that is still present in the market.

The heightened presence of the supermarket chains has seen a focus on convenience store goods sold at service stations, with increasing sales of these goods over the past five years. The sale of non-fuel products is accounting for a larger proportion of profit than fuel and related goods.⁸

Between 2008-09 and 2013-14, the combined market share of supermarket chains and independents increased from 54 to 67 per cent. Individually, large independent chains increased their share of the market dramatically, while the growth of the supermarket chains was more constrained.⁹

During the same period, the share of major oil firms' retail outlets decreased from 48 to 33 per cent.¹⁰

2.2 What's the problem?

Firms with a substantial degree of market power can engage in behaviour that damages the competitive process, restricting the ability of other firms to compete effectively. Most industrialised countries have enacted competition laws with prohibitions against monopolisation or abuse of a dominant market position.

A common feature of competition laws is the principle that firms are entitled, and indeed are encouraged, to succeed through competition even if they achieve a position of market dominance through their success. Laws only prevent firms with substantial market power from engaging in conduct that damages competition.

⁷ Australian Competition and Consumer Commission, 2008, [Monitoring of the Australian petroleum industry 2008](#)

⁸ Magner, L 2014, IBISWorld Industry Report G400, *Fuel Retailing in Australia*, IBISWorld

⁹ Australian Competition and Consumer Commission, 2014, [Monitoring of the Australian petroleum industry Dec 2014](#).

¹⁰ Ibid.

Large firms may enjoy strong bargaining power that can be abused in dealings with their suppliers and business customers. While imbalance in bargaining power is a normal feature of commercial transactions, policy concerns are raised when strong bargaining power is exploited through imposing unreasonable obligations on suppliers and business customers. Such exploitation can traverse beyond accepted norms of commercial behaviour and damage efficiency and investment in the affected market sectors, requiring the law to respond to encourage efficient market outcomes.

2.3 The Oilcode

To address the potential for market power to be exercised by fuel suppliers in their dealings with fuel retailers, the *Competition and Consumer (Industry Codes—Oilcode) Regulation 2006* was established in 2006. The Oilcode was designed to respond to the changes in the market and to facilitate an equitable market environment for petroleum wholesalers and retailers and improve the operating environment for small businesses, which operate as franchisee or commission agents to fuel suppliers. These small businesses had no specific protections, other than those provided by general law.

The Oilcode replaced the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act). The Sites Act restricted the number of retail sites that the prescribed oil companies - BP Australia, Mobil Oil Australia, Caltex Oil Australia and Shell Australia - could own, lease, or operate either directly or on a commission basis. This Act operated concurrently with the Franchise Act, which set out minimum terms and conditions for oil company franchises.

The objectives of the Oilcode are as follows:

- improve transparency in wholesale pricing and access to declared petroleum products at a published terminal gate price
- set minimum standards in relation to contract requirements and tenure
- assist participants to make informed decisions when managing fuel re-selling agreements through the disclosure of specific information
- provide for access to a cost-effective and timely dispute resolution scheme as an alternative to litigation.

The objectives of the Oilcode are outlined in detail in the following provisions of this industry code.

Terminal gate price and related arrangements

The terminal gate price (TGP) is the price at which wholesale suppliers are prepared to sell tanker loads of fuel to wholesale customers at seaboard terminals or refineries on a spot basis. The TGP is quoted for fuel only and includes no added services, such as delivery.

The Oilcode sets out the arrangements for offering a TGP. A wholesale supplier must give a customer the option of purchasing petroleum products at the posted TGP or at a price derived from TGP. The Oilcode requires that the TGP: be expressed in cents per temperature corrected litre; be posted on a website or available through a phone service; be posted each day; and not include any amount for an additional service.

The Oilcode also requires that suppliers provide customers with documentation that acknowledges the sale, including the type and volume of product purchased, the total purchase price and the applicable posted TGP. A wholesale supplier must not unreasonably refuse to supply a declared petroleum product to a customer.

TGP was included in the Oilcode to address a lack of national consistency in TGP arrangements. Western Australia and Victoria mandated TGP arrangements; however there was nothing similar in other states. Introducing TGP arrangements is intended to increase transparency and information for customers of the fuel wholesalers.

Fuel reselling agreements

The Oilcode also covers fuel reselling agreements between suppliers and retailers. It provides standard contractual terms and conditions for wholesale supplier-fuel retailer re-selling agreements for franchise and commission agency arrangements, such as the use of marketing funds and agreement duration.

This section of the Oilcode establishes the requirement for a disclosure document to allow the retailer to make appropriate decisions about agreements (i.e. conduct due diligence before entering an agreement) and establishes conditions for fuel re-selling agreements. It also provides arrangements for terminating a fuel re-selling agreement.

These arrangements are designed to protect and encourage small businesses participating in the industry.

Dispute resolution scheme

The Oilcode allows for the establishment of a dispute resolution adviser (DRA) to provide the industry with an ongoing cost-effective dispute resolution mechanism. It establishes processes for dispute resolution and provides for mediation and assistance.

The dispute resolution scheme was originally established to avoid costly and time consuming court action, which prior to the establishment of the Oilcode was the main recourse available. Resolving a dispute through the courts was beyond the means of many small businesses, putting them at a disadvantage.

2.4 2008 Oilcode Review

The last Oilcode review, in 2008, examined whether the objectives of the Oilcode had been met. The Review concluded that, although the Oilcode had met its objectives, there were some improvements that could be made. The review included recommendations focusing on contract terms and conditions; terminal gate pricing arrangements; dispute resolution and ongoing review.

In particular, the review made recommendations to enhance the disclosure of the contact details of past and current resellers the supplier had an agreement with to potential resellers. This information allows resellers to conduct referee checks on potential suppliers and make an informed decision before entering into any arrangements.

The 2008 Oilcode Review also made recommendations to enhance and provide clarity to the Oilcode's dispute resolution scheme, including ensuring that there is information available to parties in dispute about what factors the dispute resolution advisor may consider in making a non-binding determination.

The 2008 Oilcode Review also recommended adopting a formal dispute definition and notification mechanism, whereby the complainant must tell the respondent the nature of the dispute, the outcomes they are seeking and what action they consider would settle the dispute. In addition, the review recommended that the procurement process for dispute resolution services be streamlined for the Oilcode, the Franchising Code and the Horticulture Code by having a single contract managed by one department, The Treasury.

The government response accepted these recommendations, which have been integrated into the Oilcode. Since amending the Oilcode, the percentage

of these small businesses (franchisees, commission agents) in the retail fuel market has increased from 18 per cent to 26 per cent (see table below).

Percentage of retail sites		
Business operated by		
Total/Year	Franchisee %	Commission agent %
2009	6.1	11.8
2009-2010	12.8	8.3
2010-2011	10.4	14.3
2011-2012	11.2	13.8
2012-2013	11.5	13.9
2013-2014	11.8	14.5

Source: Australian Competition and Consumer Commission, *Monitoring of the Australian Petroleum Industry, 2009-2014*

2.5 Competition Policy Review

In December 2013, the Government announced an independent review of Australia's competition policy. The objective of the Competition Policy Review was to identify competition enhancing microeconomic reforms to drive ongoing productivity growth and improvements in the living standards of all Australians.

The key areas of focus for the Competition Policy Review included: identifying regulations and other impediments to competition across the economy which are not in the broader public interest; examining the competition provisions of the *Competition and Consumer Act 2010* (CCA) and the special protections for small business in the CCA to ensure they are fit for purpose; considering whether the structure and powers of the competition institutions remain appropriate; and reviewing government involvement in markets.

The Review found that industry codes of conduct play an important role under the CCA by providing a flexible regulatory framework to set norms of behaviour. Codes of conduct complement the provisions of the CCA and generally apply to relationships between businesses within a particular industry. Codes also provide a mechanism to implement industry specific dispute resolution frameworks.

2.6 Regulatory reform

The Australian Government is committed to a regulatory reform agenda that enhances productivity and economic growth e.g. through removing unnecessary burden and red tape. A key feature of the agenda includes reducing the regulatory burden for individuals, businesses and community organisations by at least \$1 billion a year. In November 2015, the Government announced that it will strengthen its regulation reform agenda so that it focusses on changes that increase innovation and productivity.

Government policy aims to achieve regulatory savings through the development of effective policy and programmes. The impact of regulation on Australian industries can be minimised by identifying unnecessary or inefficient regulation, considering options to streamline processes, better managing risks and implementing regulation only if necessary.

3 Review Process

3.1 Scope of the Review

As part of the Review, the Department released the Oilcode Review Issues Paper in December 2014, which canvassed the key areas of the Oilcode for public consultation. Stakeholders were requested to comment on specific aspects of the Oilcode including:

- Is the Oilcode a necessary piece of legislation?
- Were the changes from the 2008 Oilcode Review effective?
- Are the terminal gate pricing arrangements suitable against their objective, to improve transparency in wholesale market pricing?
- Are the contractual terms and conditions of the Oilcode appropriate?
- Is the dispute resolution scheme effective for those who use it?

Based on the responses to the Issues paper, the Department released the Oilcode Review Options Paper in September 2015. The following three options were considered:

- Repeal the Oilcode
- Retain the Oilcode (i.e. remake the Oilcode without substantive changes)

- Retain the Oilcode (i.e. may include substantive changes).

Four submissions were received in response to the Options Paper, including submissions from two peak industry bodies representing the views of the majority of fuel suppliers and retailers. This included a submission from the Australian Convenience and Petroleum Marketers Association (ACAPMA); a national peak body representing the interests of the petroleum distribution and petrol retail businesses, whose members comprise 90 per cent of Australia's fuel distribution and storage businesses.¹¹ A submission was also received from the Australian Institute of Petroleum (AIP) on behalf of the four major refiner-marketer companies, who supply around 90 per cent of the transport fuels market.¹² A confidential submission was also received from a large independent petroleum company and the ACCC, which is responsible for promoting and enforcing compliance with the CCA, Australian Consumer Law and the Oilcode.

3.2 Out of Scope Issues

Some issues raised by key stakeholders in the formulation of the 'Issues' and 'Options' papers have previously been considered prior to the establishment of the Oilcode or during the 2008 Oilcode Review. Due to previous consideration afforded these issues, they are considered to be out of scope for the purposes of this review. Examples of out of scope issues include:

- The applicability of legislation predating the Oilcode, including the provisions of the Petroleum Retail Marketing Franchise Act 1980 and Petroleum Retail Marketing Sites Act 1980;
- The 30 day notice for termination under section 37(2) for the purchase of goods under \$20,000;
- Altering or lessening the current ten year minimum duration for all fuel re-selling agreements;
- Payment of 'goodwill' at the initiation and cessation of contracts;

¹¹ ACAPMA, [About Us](#), accessed 13 January 2016.

¹² AIP, [About AIP](#), accessed 13 January 2016.

- Mandatory provisions of a 'disclosure document' including all relevant previous disputes between a supplier and retailers notified under the dispute resolution mechanism (potential for unforeseen consequences); and
- Changes to the current arrangements around mandatory posting of TGP for the purposes of transparency.

4 Analysis of Oilcode Options

4.1 Repeal the Oilcode

Unless further legislative action is taken to extend the Oilcode, it would sunset on 1 April 2017 under Part 6 of the *Legislative Instruments Act 2003* (LIA). Alternatively, in accordance with best practice regulation principles, if the Oilcode is no longer required because it is deemed ineffective or irrelevant to current industry operations by the review, it could be actively repealed rather than allowing it to sunset. The Oilcode could be repealed as a legislative instrument through the automatic and bulk repeal provisions of Part 5A of the LIA on another date prior to 1 April 2017.

Stakeholder views

None of the submissions received in response to the Oilcode Review Options Paper supported repeal of the Oilcode. Submissions received presented a range of justifications for retaining the regulations and protections offered by the Oilcode including:

- The Oilcode provides effective regulation of the industry;
- The Oilcode has ensured continued rigorous competition between competitors; and
- The high level of risk associated with repealing the Oilcode, including the lack of legislative protection for key groups such as commission agents.

Costs and benefits

The costs associated with implementing the Oilcode have already been incurred by fuel suppliers and retailers and the ongoing costs are minimal. Repeal of the Oilcode may see some fuel re-selling agreements become

regulated by the Franchising Code of Conduct. The Franchising Code regulates the conduct of parties to a franchise agreement where no other mandatory code, such as the Oilcode, applies. However, unlike the Oilcode, the Franchising Code does not cover the operation of commission agent agreements between fuel suppliers and retailers. A higher percentage of fuel retail sites are covered by commission agent agreements rather than franchisee agreements due to this being a lower cost method of entering the retail fuel sector (see Figure 2).

Contractual Agreements

Given the similarities between the codes in areas such as disclosure requirements and dispute resolution, fuel franchising parties will be broadly subject to similar regulation as currently under the Oilcode – with the addition of recent reforms to the Franchising Code such as good faith and pecuniary penalty provisions. However, some protections offered by the Oilcode including the guarantee of tenure under s32 (5) is not provided in the Franchising Code of Conduct.

Furthermore, petroleum retailers believe that, if a decision is made to repeal the Oilcode, the Government would need to explore alternative mechanisms for the accommodation of commission agent agreements, as they cannot be readily accommodated under the national franchise legislation.

Terminal Gate Pricing

Repeal of the Oilcode would also remove the requirement for Terminal Gate Pricing (TGP), reducing price transparency in the wholesale fuel market. Petroleum retailers believe that TGP provides a useful reference price for both market participants including for use in agreements and the community at large and should continue. The ACCC also uses TGP as a benchmark for wholesale prices when monitoring fuel prices to ensure compliance with the CCA and identify anti-competitive behaviour.

Dispute Resolution Services

It may appear that repealing the Oilcode could align with the Government's regulatory reform agenda, reducing the regulatory burden for businesses through removing associated regulatory business costs for both retailers and suppliers. However, repeal of the Oilcode would have little impact on the cost

of dispute resolution for franchisees as the dispute resolution services for the Oilcode and the Franchising Code are provided by the same organisation.

Dispute resolution services are offered under a number of codes of conduct across industries nationwide. The 2015 Competition Policy Review indicated that such codes of conduct are a valuable addition to the CCA, as they provide a flexible regulatory framework and set norms of behaviour.

However, fuel retailers not covered by the Franchising Code (e.g. commission agents) could be faced with higher costs to resolve disputes through the courts or other legal channels. Furthermore, during such legal proceedings, commission agents could be at a disadvantage in disputes with fuel suppliers as there would be no code which provides for minimum terms and conditions in supply contracts.

4.2 Retain the Oilcode (remake with minor amendments)

To keep the Oilcode in its current form without major amendment, it is a requirement that the legislative instrument be remade prior to the scheduled sunset date. This is the same process as the options outlined in part 4.3 – to remake the Oilcode with significant amendments.

Stakeholder views

Retaining the Oilcode is supported by both fuel suppliers and fuel retailers. As noted in Section 4.1, stakeholders consider that the Oilcode has provided for effective regulation, rigorous competition and legislative protection for key groups. Another benefit of this option is that the existing arrangements and regulatory compliance costs are unchanged. Fuel suppliers note that the Oilcode provides a consistent regulatory framework for industry that is administered at minimal cost to industry and government.

Against the backdrop of the Government's regulatory reform agenda, fuel suppliers note that the Oilcode was the outcome of a previous market reform package that saw the repeal of the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act). These two Acts were found to be outdated and ineffective and their repeal removed barriers to greater competition in the fuel market.

Retaining the Oilcode is consistent with the Competition Policy Review's Final Report, which supports industry codes under the CCA. It also indicated that industry codes play an important role by providing a flexible regulatory framework to set norms of behaviour.

Costs and benefits

As noted in Section 4.1, the costs associated with implementing the Oilcode have already been incurred by fuel suppliers and retailers and the ongoing costs are minimal.

The benefit of retaining the Oilcode in its current form is that it continues to meet the requirements of the fuel retailing market. While fuel retailing has continued to evolve, the changes that have occurred since 2006 are not as far reaching as those that occurred prior to the establishment of the Oilcode. For example, since 2006, the number of retail sites has remained relatively stable, ranging from 6000 to 6500 sites. Between 1980 and 2006, the number of retail sites declined from around 13,000 to around 6300.

Another reason for retaining the current arrangements of the Oilcode is that small business has already benefitted from amendments made following the 2008 Oilcode Review. The percentage of retail sites operated by either commission agents or franchisees increased from 18.4 per cent in 2009 to 26.3 per cent in 2014.

Due to this increase in the portion of the market controlled by small business, the need for the protections offered by the Oilcode has assumed greater importance over time. Furthermore, as noted in Section 4.1, the Oilcode – unlike the Franchising Code - covers the operation of commission agent agreements between fuel suppliers and retailers. A higher percentage of fuel retail sites are covered by commission agent agreements than franchisee agreements (see Figure 2).

In examining the costs to industry of complying with the Oilcode, it is valuable to consider the costs of the various components.

Contractual Agreements

In relation to the minimum standards for contracts, there should be negligible on-going cost for existing fuel suppliers which have already ensured that their contracts are consistent with minimum standards. For new retailers entering the fuel market, the benefits of minimum standards should far outweigh the

costs, as these new entrants should be able to make more fully informed decisions.

These minimum contractual conditions require the disclosure to potential retailers of the contact details of past and current resellers with which the supplier has an agreement. This information allows resellers to conduct referee checks on potential suppliers and make an informed decision before entering into any arrangements. Furthermore, fuel retailers are given a period of fourteen days to undertake the due diligence measures.

Terminal Gate Pricing Arrangements

The requirement for fuel suppliers to issue terminal gate prices imposes only modest costs on fuel wholesalers. The industry is constantly reviewing wholesale prices to reflect changes in global oil prices and movements in the US\$/AU\$ exchange rate. The cost of implementing TGP is also minimised by posting prices on the Internet. In addition the TGP provides a low cost mechanism for contracts to reflect the constantly changing wholesale prices.

In the event that the Oilcode was repealed, the industry is likely to be faced with some other form of wholesale price disclosure. The ACCC uses TGP as a benchmark for wholesale prices when monitoring fuel prices to ensure compliance with the CCA.

Dispute Resolution Services

The dispute resolution scheme provides only benefits for the fuel industry, as it provides an avenue for resolving dispute at an earlier stage, and at lower cost, than pursuing the matter through litigation. The framework provides support to all parties and its availability reduces costs for those who require such services.

Another important aspect of the Oilcode is that its existence has potentially lessened the need for parties to access the dispute resolution service. Since 2007-08, the dispute resolution service has averaged 13 enquiries and 1.5 mediations per year. Although less than one per cent of participants covered by the Oilcode access the service annually, fuel retailers have noted that the existence of this service is an incentive for parties to resolve issues without the need for recourse to these procedures.

4.3 Remake the Oilcode (remake with major amendments)

If the Oilcode is retained and significantly amended, the Minister could seek to have it remade. A remade instrument is a 'new' instrument, which may include desirable or important policy changes to the existing instrument.

The remade instrument will have a new ten year sunset period and must:

- have a new title
- repeal and replace the existing Oilcode, and
- be made and registered before the sunset date of the current Oilcode.

Stakeholder views

Although fuel retailers and a major independent petroleum company¹³ are supportive of some changes to the contractual terms and conditions in the Oilcode, their positions differ on matters of detail and would take the Oilcode in different directions. While the independent fuel supplier advocates a streamlining of conditions in accordance with the Government's regulatory reform agenda, fuel retailers support a strengthening of the conditions to align with recent changes to the Franchising Code.

The risks associated with remaking the Oilcode were emphasised by fuel suppliers, who noted that the market reform package that led to the establishment of the Oilcode arose from several phases of consultation and negotiation with interested parties, over an extended period of time. Over that period, many compromises were made in order to find a workable solution for all parties. Given the past experience, both fuel suppliers and retailers were comfortable with maintaining the Oilcode in its current form, rather than making changes to the code which were potentially costly and time-consuming to resolve.

Importantly, this approach would ensure that commission agents retain cover under the mandatory industry codes and TGPs remain as a benchmark for prices. This approach would also enable experience to be gained from

¹³ The company made a confidential submission to the Oilcode Review consultation process

administering new provisions in the Franchising Code before considering their inclusion in the Oilcode.

Costs and Benefits

The costs and benefits of remaking each component of the Oilcode are examined in the following sections.

Contractual Agreements

As noted above, a potential benefit from remaking the Oilcode is to strengthen the conditions to align with recent changes to the CCA. The CCA was recently amended to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes. The first code to incorporate the new civil penalties is the new Franchising Code of Conduct, which took effect from 1 January 2015.

However, the Competition Review Panel considered that experience with administering these new provisions in the Franchising Code is needed before determining whether they should be applied more broadly. Furthermore, applying these new provisions to the Oilcode would not only have implications for franchisees but also commission agents, which comprise a larger percentage of retail sites covered by this industry code.

Extending protections provided to franchisees to commission agents without increasing the associated costs for commission agents could have unintended consequences for the fuel retail market. For example, such an arrangement could devalue the benefits of existing franchising agreements when compared to commission agent agreements. Such an approach was rejected by the 2008 review of the Oilcode.

Amendments to the Oilcode, following the 2008 Oilcode Review, have enhanced the disclosure to potential retailers of the contact details of past and current resellers with which the supplier has an agreement. This information allows resellers to conduct referee checks on potential suppliers and make an informed decision before entering into any arrangements. Furthermore franchisees are given a period of fourteen days to undertake the due diligence measures so as to allow them to make informed choices before entering into contracts.

In relation to the costs, past experience would suggest that remaking the Oilcode with significant amendments could be a time-consuming exercise in

negotiation between the interested parties. Having negotiated these changes, fuel suppliers and retailers would then be faced with the cost of drawing up new contracts to reflect the changes to the Oilcode.

5 Conclusion

The Review finds that the benefits of this industry code outweigh any associated costs. Notwithstanding on-going changes in the retail fuel market, the Oilcode continues to be fit for purpose, by facilitating an equitable market environment for petroleum wholesalers and retailers and improving the operating environment for small businesses, which is consistent with the findings of the 2008 Oilcode Review.

The Review considers that the Oilcode strikes an appropriate balance between competition and regulation reform. The Oilcode was the outcome of a previous market reform package in 2006 which imposed minimal costs on fuel market participants and removed barriers to greater competition in the market.

Repealing the Oilcode would deliver minimal cost savings for fuel market participants and would expose commission agents - the largest category of small businesses in the market - to uncertainty about terms and conditions and potentially higher costs associated with resolving disputes through the courts or other legal channels.

Remaking the Oilcode with significant amendments would impose additional costs on market participants without evidence of commensurate benefits. The Oilcode has already benefitted from improvements which were implemented following the 2008 Oilcode Review. In the intervening period the percentage of small businesses in the retail fuel market has increased from 18 per cent to 26 per cent.

6 Recommendations

It is recommended that the Government pursue retain Oilcode. This would be consistent with the findings of the Competition Policy Review's Final Report, the Government's regulatory reform agenda and it has the broad support of fuel suppliers and retailers. In terms of the specific issues addressed by the Review, it is recommended that:

1. Terminal gate pricing arrangements be retained in their current form;
2. The code be retained so as to offer continued contractual protection to all parties; and
3. The dispute resolution scheme be continued to offer services to industry participants under the Oilcode.

In retaining the Oilcode, it is recommended that there be minor amendments to:

1. correct outdated references to Departments, Ministerial and other position titles and legislation; and
2. provide for a mid-term review of the Oilcode.