



Service Station Association Ltd.

ABN: 44 000 030 688

Suite 402, Level 4  
18-20 Orion Road  
Lane Cove NSW 2066

Tel: (02) 9420 5599  
Fax: (02) 9420 2255  
Email: [email@ssa.org.au](mailto:email@ssa.org.au)  
[www.ssa.org.au](http://www.ssa.org.au)

29<sup>th</sup> October 2009

The Manager  
Transport Fuels Section  
Fuels and Uranium Branch  
Department of Resources, Energy and Tourism  
GPO Box 1564  
CANBERRA ACT 2601

Dear Sir/Madam,

**Statutory review of the *Trade Practices (industry Codes- Oilcode) Regulations 2006***

Thank you for your letter of 31 August 2009 and the invitation to put forward comments on the Oilcode Review recently released by the Minister for Resources and Energy. The SSA, being one of the industry associations frequently referred to in the review, is vitally interested in matters relating to the Oilcode, ranging from its genesis to implementation, operation and review. The SSA regards the Oilcode as an important piece of regulation and takes the view that the Review, coming just 12 months after implementation, was an important opportunity to ensure that proper balance is being maintained in the fuel retailing industry. It is the view of the SSA that this review has not taken up that opportunity. It is the view of the SSA that the Oilcode is a flawed instrument and that the review, in failing to recognise that, is also flawed.

We do not make these statements lightly and the following comments are intended to set out, in an appropriate level of detail, our reasoning behind such a position. Our submission therefore broadly follows the structure of issues set out in the *Executive Summary* and *Summary* of the Review report.

**TERMS OF REFERENCE**

We note the terms of reference as determined by the Minister and again maintain that they are excessively narrow. The SSA has always maintained that the Oilcode instrument is devoid of effectiveness in terms of it achieving a balance between the various parties in the industry, i.e. between buyer and seller and between landlord and tenant. In fact, during the Review consultation process, the SSA put forward robust argument about the Oilcode's deficiencies and put forward suggested remedies. We note, however, that the Minister's

terms of reference did not specifically allow such consideration although we recognise the Review does make passing reference to some of our concerns.

Nevertheless, the SSA remains highly critical of the review on two fronts; firstly that the terms of reference were too narrow and that insufficient credence was given to the well supported arguments we and others put forward.

## **GENERAL FINDINGS**

We take great exception to the opening comment. "The introduction of the Oilcode has been generally well received with a number of submissions expressing support for the regulations."

This comment ignores the background processes that occurred during the development of Oilcode and our submission of bias that we put to the Review. To be specific, the then Minister, Ian MacFarlane MP, at the outset stated that all sides would have to compromise in order to reach a consensus. In reality, what happened was entirely the opposite. The Minister was not prepared to move forward with any draft document that was opposed by the oil companies, the supermarkets and the large non oil company networks. Therefore, the only compromise demanded by the Minister was by the independent operator, the franchisee and the commission agent.

Under these circumstances and with all those organisations mentioned above having achieved all their objectives with Oilcode, it is perfectly obvious that their submissions would be supportive. It is a poor reflection on the Review that it makes such a one-sided statement. The fact that the half of the industry that is forced to receive unfair treatment from oil companies and landlords protested strongly against the effectiveness of Oilcode has been ignored. The fact that their legitimate concerns are glossed over by this report renders it invalid. To contain such a biased opening statement which is totally inconsistent with the view of a significant section of the industry destroys the Review's credibility.

The industry I represent takes great umbrage with this Review and the clear bias contained throughout.

The rest of the section under the heading "*General Findings*" contains nothing but motherhood statements that have no real meaning and is therefore irrelevant.

## **STANDARD CONTRACTURAL TERMS AND CONDITIONS FOR FUEL RESELLING AGREEMENTS**

The Review places great store on the achievements of this part of the Oilcode. It states ... "RET has found that the Oilcode has delivered a minimum set of contractual terms and conditions for both franchisees and commission agency arrangements." However, the Review fails to disclose that the majority of reseller arrangements in place at the time that Oilcode was introduced were captured by the since repealed Sites and Franchise Acts. In other words, all oil company franchisees were covered by legislation already and did not need the Oilcode. In fact, the provisions of the repealed acts were more proscriptive than those contained in Oilcode. As a result, therefore, oil company franchisees are now worse off under Oilcode than they were before.

While the SSA acknowledges that Oilcode captures non oil company reseller agreements that were previously not covered by the since repealed acts, the SSA has always maintained that the number of such agreements were quite small. The key issue is that the standard terms and conditions proscribed in Oilcode are very general and provide little comfort to franchisees and commission agents and do nothing to curtail harsh and unfair behaviour by suppliers. The repealed acts did offer significant comfort and their discontinuation has resulted in a significant change in supplier behaviour to the detriment of those resellers remaining in the industry.

Tenure is a major issue for the SSA and the provisions in Oilcode for tenure are constructed in such a manner that they can be easily circumvented. It is not a surprising fact therefore that there now exists very few reseller agreements in place in the industry that meet Oilcode's qualifications for tenure. All four oil companies have either converted to company operation, commission agency arrangements or separate arrangements in the case of Shell. Only Caltex retains franchisees and they are being progressively converted to commission agency arrangements with the general 30 days tenure provisions of Oilcode. The five year and nine year tenure provisions seen as a show piece of concessions to resellers in Oilcode now apply to very few agreements and they will all eventually disappear altogether.

Yet the Review Summary glosses over this most important issue with a one sentence denial of its importance and the dubious claim that *"..... On the basis that granting tenure without a substantial up front payment could effectively devalue all existing industry resellers and tenured commission agency arrangements..."*. The SSA objects most strongly to this proposition as it is plainly incorrect. We note that the review does not provide any substantiation of this claim because there is none. As in all industries, the value of any business is determined by its ability to deliver profit over a reliable period of time. The repealed Franchise Act covered all arrangements irrespective of the amount of the up front payment. In some cases, the up front fee was zero, but tenure was mandatory. There is no logical argument that can be substantiated for an up front payment threshold and the Review, in siding with one particular section of the industry, is once again displaying extreme bias. All SSA members who enjoyed tenure under the repealed acts were opposed to the threshold exemptions contained in Oilcode. They didn't believe their arrangements would be devalued – sentiments that were conveyed to RET during the review consultation process.

On behalf of its members, the SSA cannot accept these findings.

## **TERMINAL GATE PRICING**

The terminal gate pricing provisions of Oilcode have only achieved a level of transparency of wholesale prices. Operators within the industry have always had a good grasp of prevailing prices and those with the ability to secure product from different sources have benefited from the simple exercise of "shopping around". For those resellers captured by reseller agreements that force them to buy at the suppliers' prices, the TGP provisions mean nothing.

The only value of the TGP provisions of Oilcode is to bring greater transparency to society in general. That in itself is not a bad thing, but it delivers no benefit to operators within the industry.

The failure of the TGP provisions of Oilcode is that they only require the posting of TGP's. They do not require transactions to take place at posted TGP values and very few transactions actually occur at TGP's, a fact acknowledged by the Review. Therefore, the TGP provisions of Oilcode have had no material impact on the relationship between suppliers and resellers and are therefore totally ineffective. To make claims to the contrary is another example of the bias contained in this report

More importantly, the Review has passed up the opportunity to reform the TGP process to make the supply side of the industry more competitive. The ACCC has quite correctly identified the lack of competition at the wholesale level as its major concern following its recent inquiry. As the supply sector of the petrol retail industry and the relationship between supplier and reseller are the focal points of Oilcode, the code should therefore be the main driver of competition and the main vehicle to address the ACCC's concerns. The fact that this review fails to recognise this important role for Oilcode not only fails resellers in the industry, but fails Australian consumers generally.

## **DISPUTE RESOLUTION SCHEMES**

The SSA welcomes the recommendations regarding dispute resolution schemes and notes that they largely follow suggestions contained in our submission and submissions from other reseller representatives. However, the most important aspect of the DRS is that the determinations are non binding. The industry has had DRS's available to it for many years and they have been utilised many times. While many disputes have been resolved, very few have been resolved to the satisfaction of the reseller who's only alternative to an oil company's take it or leave it offer has been to commence legal action. It is widely accepted that the disparity in financial power that exists between suppliers and resellers deters all but the most desperate reseller from seeking justice and fairness through the courts. Some have tried; most have failed at great cost to themselves, even though the DRA has found that the reseller had a legitimate grievance.

To offset such an obvious flaw, the Oilcode must ensure that the DRA's determinations are binding. At the very least, a reseller who commences legal action after an unsuccessful mediation under the DRS of Oilcode must be able to tender the DRA's determination to the court.

The SSA rejects totally the Review's claim that the DRS ... "has achieved a considerable degree of success." We have been involved with two of our members who elevated their grievances to the DRS and neither was satisfied with the outcomes and neither considered that that the redress offered was appropriate to their claims. The forced acceptance of inadequate compensation because the cost of legal remedy is too high cannot be interpreted as successful outcomes. To claim that they are is disingenuous and again displays considerable bias.

Once again, the true nature of these disputes was provided to the RET in great detail during the consultation process, including the unsatisfactory outcomes and yet the Review

report fails to make any reference to the resellers representatives' assertions. Once again, we claim bias in the Review report.

## **COLLECTIVE BARGAINING**

The report correctly reports that no applications have been under these provisions and recommends that further work be carried out between Government and key stakeholders with the aim of identifying and removing barriers. The failure to mount a collective bargaining case has not been without considerable effort on our part to do just that. The difficulties and barriers cannot be overstated and a willingness to address these issues is essential if these provisions are to be of use.

In conclusion, the SSA is extremely disappointed that the RET failed to take the opportunity presented by the Review to restore balance to the petrol retailing industry. The Review mostly dismisses our input and concerns and in many cases chooses to support the suppliers' views. The petrol retailing industry is in a state of crises with an increasing number of private resellers being forced out and more and more of it coming under direct control of the oil companies and the supermarkets. All stakeholders agree that independent, non oil company and non supermarket resellers are essential to retaining competition and yet the Review fails to recognise that Oilcode has important role to play.

The SSA is extremely disappointed that almost all of our recommendations have been rejected. For example we provide an example of a grossly unfair commission agency agreement widely used in the industry, as an example of the need for realistic tenure provision to be adopted. The Review fails to consider such arrangements as undesirable and refers to ...*"A minimum set of standards."* We strongly assert that participants in an industry covered by a mandatory code are entitled to better standards of fairness than that. The Government is abrogating its responsibility to oversee fairness and good faith if it supports such an ineffective position. We believe the minimum we are entitled to is an explanation as to why our concerns and recommendations have been rejected.

There are no barriers preventing the Government from reforming Oilcode and transforming it into a meaningful and effective instrument. This can be done now; it is not necessary to wait another three years. To not act now would only render the RET delinquent in the discharge of its duties.

Notwithstanding our severe criticisms of the Review report, we remain willing, as always, to engage in consultation with the Department on this most important issue.

Yours faithfully,

Ron Bowden  
Chief Executive Officer

