



## Motor Trades Association of Australia

Mr Peter Hallahan  
Committee Secretary  
Senate Economics Legislation Committee  
Suite SG.64  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

Thank you for the opportunity to make a submission to the Senate Economics Legislation Committee Inquiry into the provisions of the *Petroleum Retail Legislation Repeal Bill 2006*.

The Motor Trades Association of Australia (MTAA) is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association is the largest 'stand-alone' small business association in Australia, representing over 115,000 businesses in a sector which turns over more than \$120 billion each year and employs over 316,000 people. As part of its representative role, MTAA represents the interests of service station operators throughout Australia, including single site franchisees, multi-site franchisees, commission agents, branded independents and unbranded independents. The Association therefore has a strong interest in the *Petroleum Retail Legislation Repeal Bill 2006*.

As you will be aware, that Bill is proposed to be part of a wider package of 'reform' measures for the retail petroleum market. The Bill will repeal the two retail petroleum sector-specific Acts, the *Petroleum Retail Marketing Sites Act 1980* (Cth) ('the Sites Act') and the *Petroleum Retail Marketing Franchise Act 1980* (Cth) ('the Franchise Act'). The Sites Act limits the number of sites that a company may directly operate; while the Franchise Act provides tenure and other rights to petrol franchisees. It is the existence of the Sites Act which underpins the benefits provided by the Franchise Act. It should be noted however that the Government recently amended the Sites Act regulations which, for the moment at least, effectively make the Sites Act inoperative. It is disappointing that that has been done at a time when the Parliament and indeed this Committee is debating the future of the Sites Act itself. It is proposed that the two retail petroleum sector-specific Acts be replaced by a mandated oil industry code of conduct under the *Trade Practices Act 1974* (Cth).

MTAA has, for a considerable period time, been involved in discussions, regarding the reform of the retail petroleum market, with the Minister for Industry, Tourism and Resources, the Hon Ian Macfarlane MP, officials from the Department of Industry, Tourism and Resources and other interested stakeholders. The Association has willingly participated in those discussions as it accepts that there is a need to update the regulation governing the sector in response to the significant structural changes that have occurred in the sector in the recent past.

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MTAA is therefore not opposed per se to reform of the retail petroleum sector. That said however, the Association is unable to support the Australian Government's Downstream Petroleum Reform Package and its proposed repeal of both the Sites Act and the Franchise Act, as we believe that the proposed reforms will result ultimately in an erosion of the rights of our service station operator members and will not deliver a more competitive, transparent and efficient retail petroleum sector. Our reasons for holding those views are discussed in detail in the attached correspondence and in the attached MTAA publication, *The Australian Oil Industry*. I would like however to take this opportunity to outline the major concerns that our members have in relation to the Government's proposals.

One of the major concerns that MTAA and the service station operators it represents have in relation to the reforms and the repeal of the retail petroleum sector-specific Acts relates to tenure. As you may be aware, service station operators who hold a Franchise Act franchise are currently entitled to a minimum statutory tenure of three plus three plus three years. Under the proposed Oilcode, the period of minimum tenure will be five years (plus a further four years if the service station operator is operating a site owned by its supplier), but the coverage of the minimum tenure provisions is proposed to be extended to commission agents. While MTAA welcomes that expansion of coverage, the Association is deeply concerned that the Oilcode, as currently drafted, does not sufficiently secure those minimum tenure rights and that service station operators may therefore be being asked to trade certain minimum tenure rights under the Franchise Act for uncertain and potentially non-existent minimum tenure rights under the proposed Oilcode.

MTAA's concerns in this regard arise as a result of Regulation 32(11)(c) of the draft *Trade Practices (Industry Codes – the Oilcode) Regulations 2005*. Under that regulation, a supplier may offer a retailer a fuel re-selling agreement with a duration of less than five years if:

*'...the total initial non-refundable amount that any prospective retailer must pay, or agree to pay, to the supplier and any associates of the supplier, before commencing operations under a new or renewed fuel re-selling agreement, would be less than \$20,000, excluding any of the following amounts:*

- (i) payment for motor fuel at or below the usual wholesale price;*
- (ii) payment of the usual wholesale price of motor fuel taken on consignment;*
- (iii) payment at market value for the purchase or lease of real property, fixtures, equipment, services or supplies that are needed to operate under the fuel re-selling agreement;*
- (iv) security deposits for fuel stocks, real property, fixtures, equipment, services or supplies provided by the supplier.'*

In MTAA's view, most fuel re-selling agreements could easily be structured to take advantage of the above exception and those agreements would therefore not be subject to the minimum tenure provisions of the Oilcode. Such an outcome would significantly reduce the effectiveness of, or nullify, the minimum tenure provisions of the Oilcode and have a considerable detrimental impact on service station operators. In light of the fact that the right to minimum tenure is one of the most important issues for service station operator members of the MTAA federation, MTAA cannot support a change package which expects service station operators to forgo the statutory tenure rights that they are currently afforded under the Franchise Act in return for minimum tenure rights under the Oilcode which can be easily circumvented by suppliers.

MTAA and the service station operators it represents are also particularly concerned about the impact that the repeal of the Acts may have on the tenure of some agreements which are currently on-foot, as some current franchise agreements contain a clause which allows the agreement to be ended in the event of a 'mandatory law change' (for example, the repeal of the Franchise Act). While MTAA acknowledges that the Minister has proposed amendments to the draft Oilcode in response to those concerns, the Association is concerned that those amendments may not sufficiently address the Association's concerns in this regard.

MTAA is also unable to support the Government's proposed reforms and therefore the repeal of the Sites and Franchise Acts due to the failure, in MTAA's view, of those reforms to adequately address a number of key issues, including the transparency of terminal gate pricing arrangements, access to supply and protections against misuse of market power. Each of these factors has, in MTAA's view, a significant impact upon either the level of transparency in the sector or the ability of individual businesses within the sector to compete effectively and therefore impacts upon the level of competition and pricing transparency in the market as a whole. MTAA therefore considers that it is imperative that these issues are addressed fully and adequately in any reform package for the retail petroleum sector.

In particular, MTAA considers that nationally consistent and transparent terminal gate pricing arrangements are an essential component of a competitive retail petroleum sector as they improve pricing transparency in the sector and thereby reduce the ability of market participants to engage in anti-competitive behaviour. While the Government's proposed reforms purport to introduce transparent terminal gate pricing arrangements, the Association notes that the proposed arrangements still allow suppliers to discount the wholesale price at the terminal gate. In MTAA's view, any arrangement which allows for discounts at the terminal gate is hardly transparent, is little different from the opaque wholesale pricing arrangements which are currently in place in the sector, and is therefore unlikely to improve the level of transparency or competition in the sector. MTAA therefore considers that the introduction of the terminal gate pricing provisions of the Oilcode are unlikely to increase the transparency of wholesale pricing in the retail petroleum sector.

Access to supply of petroleum products is a fundamental issue for all independent service station operators because without access to supply, those operators will not be able to continue in their businesses. The ability of those market participants to secure a supply of petroleum products will therefore have a significant impact on the number of competitors in the market. MTAA also notes that a greater number and diversity of competitors is more likely to encourage competition in the sector than a small number of large competitors. This is particularly so when one considers that independent retailers are usually the driving force behind price competition in the sector. As Dr Thomas Parry noted in the Report on the Inquiry into Fuel Prices in the Northern Territory, '*[e]xperience in Australia and overseas suggests that the key to increased price competition in the petroleum market is not government regulation or subsidies but the spread of effective independent operators.*'<sup>1</sup> MTAA considers that it is important that any reform package for the industry addresses the issue of actual access to supply.

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<sup>1</sup> Parry, T (2004) Inquiry into Fuel Prices in the Northern Territory, p.29.

While the Association acknowledges that the terminal gate pricing arrangements proposed as part of the draft Oilcode will apparently “allow access for all customers, including small businesses, to petroleum products at a published terminal gate price”<sup>2</sup>, the Association considers that those arrangements do not provide any customer with the right to actually access supply. MTAA also notes that access to supply may give certain market participants a substantial degree of market power and that the potential exists for some of those participants to misuse that power.

MTAA therefore believes that it is important that there is an effective regulatory framework in place to deal with issues relating to the misuse of market power. In that regard, MTAA is concerned that despite the issue being mentioned as an element of the reform process in the 2002 Downstream Petroleum Industry Framework, the proposed reforms do not adequately address the concerns that service station operators have in relation to anti-competitive behaviour in the retail petroleum sector; in particular, predatory pricing, the misuse of financial power and the misuse of market power in one market to gain substantial power and reduce competition in another market. MTAA strongly believes that the *Trade Practices Act 1974* needs to be strengthened to address those concerns.

In that regard, the Association is aware that the Australian Government has foreshadowed amendments to section 46 of the *Trade Practices Act* which it proposes will address the issue of predatory pricing. MTAA notes however that at the briefing on section 46 organised by the Department of Industry, Tourism and Resources for Oilcode stakeholders and held on 27 April 2005, the Department’s own legal adviser confirmed MTAA’s view that the *Trade Practices Act* does not adequately address predatory pricing and that the Government’s proposed amendments will not resolve that issue. In MTAA’s view, the significant structural changes which have occurred in the retail petroleum sector over the last decade, including the growing market power of Coles and Woolworths and the trend toward vertical integration, mean that it is imperative that any reform package for the sector includes appropriate amendments to Part IV of the *Trade Practices Act* which will ensure that the Act deals effectively with all types of anti-competitive behaviour, including predatory pricing. The Government’s petroleum sector reforms as currently proposed do not include such amendments and as a result the Association cannot support the repeal of the two petroleum sector-specific Acts.

MTAA also has concerns about the independent downstream petroleum dispute resolution scheme that is to be introduced as part of the Oilcode. The Association notes that the matters which can be mediated under the Oilcode’s dispute resolution process are limited to those matters which are set out in the Oilcode; and that those matters are significantly narrower than the matters which form part of the business relationship between the parties to a fuel re-selling agreement. MTAA is therefore concerned that the dispute resolution process may therefore prove to be an ineffective alternative to legal action because it is possible that, in many circumstances, the matters under dispute may be broader than those matters covered under the Oilcode. The Association also notes that a mediator appointed under the Oilcode’s dispute resolution process may also only make a non-binding determination about the dispute and such a determination is likely to be of little value in a commercial environment.

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<sup>2</sup> Quoted from the Second Reading Speech on the *Petroleum Retail Legislation Repeal Bill 2006*, which was given by the Member for Groom, Mr Ian Macfarlane MP, in the House of Representatives on 30 March 2006.

While MTAA acknowledges that service station operators will still have a prima facie recourse to legal remedies, the Association considers that the pursuit of those remedies is unlikely to be a viable proposition for many service station operators as the costs associated with doing so would simply be prohibitive. This is one of the reasons why MTAA sought to have the dispute resolution process available under the Oilcode extended to all matters which form part of the business relationship between the parties (this would be consistent with the approach taken in the Franchising Code of Conduct) and it is also the reason why the Association has actively sought to ensure that the Oilcode does not diminish the existing rights of service station operators. It is also why MTAA has sought the strengthening of the *Trade Practices Act* to ensure that it proscribes certain types of unacceptable commercial conduct.

I would also like to again take this opportunity to reiterate that MTAA and its members do support reform of the retail petroleum sector. We do however presently oppose the repeal of the two petroleum sector-specific Acts when it is proposed that they be replaced with a regulatory framework which fails to protect the existing rights of the service station operators that we represent and which also fails to address the key threats to vigorous and effective competition in the sector.

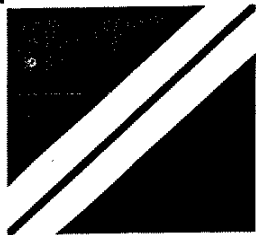
I trust that these comments are of assistance in your consideration of this matter.

Yours sincerely

A handwritten signature in black ink that reads "Michael Delaney". The signature is written in a cursive, slightly slanted style.

**MICHAEL DELANEY**  
**Executive Director**

13 April 2006



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## **Motor Trades Association of Australia**

Stephen Payne  
General Manager  
Minerals and Fuels Branch  
Department of Industry, Tourism and Resources  
GPO Box 9839  
CANBERRA CITY ACT 2601

Dear Mr Payne

I am writing to you on two matters relating to the draft OilCode. The first is to formally express my concern about the level of MTAA Federation representation at the OilCode round-table on 17 March and the second, to provide as we agreed we would some preliminary comments on the draft OilCode.

With regard to the first matter, when I spoke to you in early February about the new date of the OilCode round table, you provided a clear indication to me that all Executive Directors of MTAA Member bodies and their relevant Officeholder would be invited to participate in the round-table. However, I have had confirmed to me at a telephone conference of ASSCSA Members on Monday 21 February that no such invitations have been received. As this is an important matter for all service stations, and a matter of contention over an extended period of time, I believe that it is only appropriate that all stakeholders are invited to participate at the round table. I would appreciate it if invitations to the round-table could be extended to all Executive Directors and their relevant Officeholder.

On the second matter, I am aware that you have spoken to Sue Scanlan about the matters raised in our correspondence with the Department on 13 June 2003. The Department's response to the matters raised in that letter and the draft code, in general, were considered by the Association during its telephone conference earlier this week and I have been requested to write to you about the following matters:

**1. Coverage**

It is MTAA's view that all suppliers, including second tier marketers, should be covered under the OilCode. All resellers with more than a supply agreement must be covered by the general provisions of the Code and all resellers should be covered by the TGP provisions. As the Code is currently drafted MTAA does not believe that has been secured.

Additionally, LPG is not covered by the Code nor is the PULP proprietary products. That is a matter that needs to be rectified. The Department's comment about the position of LPG being reviewed after 12 months is noted, but it remains MTAA's view that LPG should be covered by the Code at its commencement. I would also note that with changes in fuel standards (and the phase out of lead replacement petrol) more higher octane fuel will be sold to motorists and thus it is our view that it would now be appropriate to include within the scope of the Code, the PULP proprietary fuels.

**2. Tenure**

There must be a minimum tenure of five years for those covered by the Code (that is, all franchisees and commission agents). MTAA remains concerned that the provisions of the code as currently drafted do not adequately ensure that commission agency agreements are covered by the code. Equally MTAA remains concerned about the application of clause 32(2)(c) of the Code and the potential that exists for the general tenure arrangement of a minimum of five years to be eroded by that provision; particularly when this clause is read in conjunction with clause 37 relating to the termination of such agreements.

**3. Contracts 'on-foot'**

All contracts 'on-foot', should remain undisturbed in relation to their tenure arrangements. Any prospect of contract 'on-foot' being voided by a repeal of the two petroleum acts must be avoided.

**4. Terminal gate pricing**

As drafted the Code allows for discounts at the terminal gate. I must advise you that MTAA remains unanimously opposed to allowing discounts before the terminal gate. MTAA is also of the view that all resellers should be provided the opportunity to purchase their fuel at a terminal gate price. It seems however that access to the TGP arrangements is limited (by clause 6.1) to those who have a 'fuel reselling agreement' (which is specifically defined and is broadly speaking a 'franchise agreement'). All other resellers are thus not to have any benefit that might arise from a TGP.

Fundamental to the introduction of a terminal gate price is that all wholesale buyers purchase at a true wholesale price and thus encourage competition at the wholesale level of the market.

**5. The Code does not address the issue of 'below cost selling'**

I am also requested to advise you that MTAA's view is that in the absence of any other legislative framework to address concerns about pricing behaviour there needs to be a provision in the OilCode which deals with the issue of retailing below cost.

**6. Full documentation to provided at the point and time of fuel delivery**

Currently the Code proposes that detailed documentation has to only be provided to the retailer up to 30 days after delivery. This is totally unacceptable, particularly as the suppliers demand and take via direct debit 'cash on delivery'. Full documentation must be provided on delivery. Service

station operators advise that they require such documentation for GST purposes.

7. **There should be no 'termination at will' provision in the Code**  
Currently the Code proposes (at clause 33(2)(d)) that a supplier be allowed to terminate an agreement on 30 days notice, without giving reasons and without the retailer having breached the agreement. The inclusion of that clause in the Code is entirely unacceptable to MTAA. There is provision in the Code for all parties to agree to an early surrender of an agreement and on that basis we see no reason for the Government to introduce a clause which allows suppliers to terminate agreements at will and without just cause. The Association cannot support the codification of 'termination at will'.

8. **Dispute resolution procedures**  
MTAA is of the view that dispute resolution procedures should apply to all disputes relating to the agreement between the supplier and the reseller. In the view of the National Secretariat, clause 40 of the draft Code currently limits dispute resolution to matters addressed in the Code (which is narrower than all disputes related to an agreement).

A second issue in relation to dispute resolution procedures is there has in the past been discussions about the inclusion of a provision which allows for a 'class action'-type resolution of disputes. As the code is currently drafted it is not clear that the code provides, in circumstances where there are similar issues in dispute, that the matters do not need to go individually to the dispute resolution adviser. It is our view that where there are similar issues in dispute there are two options for the resolution of the issues. One would be that one retailer takes the dispute through to the dispute resolution process set out in the code and the outcome applies to all the similar disputes; the other that the disputes are dealt with by the dispute resolution process as a 'group'.

In addition, MTAA believes that there should be a role in dispute resolution for dealer councils and trade associations; that is a formal stage in the dispute resolution process (as well as a role for association or dealer council representatives acting as advisors in a mediation situation; if that is the wish of the retailer concerned).

9. **Notice period for non renewal**  
The issue of the period of notice to be given by suppliers in the event that an agreement is not going to be renewed is not sufficiently addressed in the Code. The National Secretariat has previously proposed that one years' notice of non-renewal of an agreement should be included in the Code.
10. **Code amendment process**  
While noting your comments of last week in response to my letter of 13 June 2003, MTAA is firmly of the view that there should be a requirement in the Code for the Government to consult with all parties before making changes to the Code.



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**11. Payment Arrangements**

One of the matters that has and continues to be of concern to service station operators is inequitable arrangements between them and their suppliers about payment arrangements between the parties. Service station operators are usually required to pay cash on delivery for fuel yet price support, fuel card reimbursements and the like are not made on the same terms. In general terms the Association would not like to see any further differential arise in relation to these payment arrangements.

If you would like to discuss these preliminary views please do not hesitate to contact Sue Scanlan.

Yours sincerely



**Michael Delaney**  
Executive Director

24 February 2005



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The Hon Ian Macfarlane MP  
Minister for Industry, Tourism and Resources

PARLIAMENT HOUSE  
CANBERRA ACT 2600

14 MAR 2005

Mr Michael Delaney  
Executive Director  
Motor Trades Association of Australia  
PO Box 6273  
KINGSTON ACT 2604

Dear Mr Delaney *Michael*

Thank you for your letter of 24 February to Mr Stephen Payne of my Department concerning the MTAA's comments on Oilcode.

I appreciated the opportunity to discuss the Oilcode and the Downstream Petroleum Reform Package at our meeting in Brisbane last month. I note that some of the issues raised in your letter were discussed at that meeting and may be raised again at the industry roundtable on 17 March 2005.

My response to each of the matters you raise in the letter is as follows:

**1. Coverage**

Section 6 of Oilcode will be amended to clarify the coverage of Parts 2 and 3 of the code. LPG will not be included under the TGP arrangements in this version of the Oilcode, but will be considered during the 12 month review. I would prefer to see a TGP for LPG developed by industry prior to enshrining it in regulation. In this context, I note that LPG is not covered in either the Victorian or West Australia TGP legislation. PULP proprietary fuels, which are only sold to affiliated retailers, are not suitable for inclusion under the Oilcode TGP arrangements, which are designed to cover sales to the industry generally, including a requirement to supply fuel to non-affiliated customers.

**2. Tenure**

The Oilcode provides five year tenure for all franchisees and commission agents except those risking only a very small amount of their capital. Oilcode is designed to encourage as broad a range of business models as possible and a traditional franchise or high-end commission agency may not suit all industry participants. Independents currently using short term or no minimum duration commission agency agreements could become less competitive if forced to adopt less flexible 5 year agreements. Also, new entrants to the industry, with limited access to capital, may be excluded by the size of the guarantees required for five year agreements. Oilcode

provides a significant improvement in benefits for these types of agreement, which currently have no coverage at all. Even without 5 years tenure, Oilcode still offers increased disclosure, improved termination arrangements and dispute resolution services.

### **3. Contracts "on-foot"**

Section 6 of Oilcode provides that existing agreements with 5 years or more minimum duration will have their tenure undisturbed. The timing of the repeal of the Franchise Act and the introduction of Oilcode will be co-ordinated to ensure a seamless transition.

### **4. Terminal gate pricing**

Oilcode will not ban discounting off the terminal gate price. Such a ban would seriously restrict the competitiveness of larger retailers, which rely on economies of scale, both in purchasing and selling, to deliver cheap petrol. A ban on discounts would inevitably raise wholesale and retail petrol prices. As noted under "Coverage", Section 6 of Oilcode will be re-worded to ensure that all resellers have access to fuel based on a terminal gate price.

### **5. The Code does not address the issue of "below cost selling"**

As previously discussed, Oilcode is not an appropriate instrument to address below cost selling. The Government has already announced in June 2004 changes to the Trade Practices Act 1974 in response to the recommendations of the Senate report into 'The effectiveness of the Trade Practices Act 1974 in protecting small business' (Senate report). The Government has agreed that section 46 of the Trade Practices Act should be amended to ensure that courts may consider below cost pricing when determining whether a corporation has misused its market power. The Government also considers that section 46 should be amended so that a court may consider whether a corporation has a reasonable prospect or expectation of recoupment as a relevant factor in assessing whether a corporation has misused its market power. As you would be aware, amendments to the Trade Practices Act to implement the recommendations of the 2003 'Review of the competition provisions of the Trade Practices Act' (the Dawson Review) are currently being considered by Parliament. I understand that a Bill to implement the Government's response to the Senate report will be introduced to Parliament in mid 2005.

### **6. Full documentation to be provided at the point and time of fuel delivery**

Oilcode provides for key documentation to be provided at delivery with further documentation within 30 days. The key documentation will enable the customer to identify the applicable terminal gate price and the price actually paid for each purchase, meaning the customer will have enough information to determine at the time of delivery whether the pricing for that purchase is correct. In relation to your claim that suppliers are not supplying documentation required for GST purposes, your members should take this matter up with the Australian Taxation Office.

### **7. There should be no "termination at will" provision in the Code.**

Section 37 of Oilcode allows for termination on 30 days notice of agreements covered by Section 32(2)(c) (agreements involving an outlay of less than \$20,000 upfront) and which have no specified minimum duration. This section will apply to a restricted number of agreements which are normally signed on the basis that either party can terminate at will. Such agreements are currently terminated on 7 days or, in some cases, 24 hours notice. Oilcode will provide a 30 day notice period and a requirement that the supplier offer to buy merchandise purchased by the

retailer under the supplier's operational specifications. This is a significant improvement on the current situation for such agreements.

#### **8. Dispute resolution procedures**

Oilcode sets out minimum standards and requirements for fuel re-selling agreements. If the parties to an agreement include terms and conditions additional to the matters set out in Oilcode, that is a matter for the parties and disputes about those terms and conditions are also a matter for the parties and not for the Oilcode dispute resolution scheme.

In relation to "class action"-type disputes, there is a provision for this type of action under Section 44(7)(b). Details of this procedure will be set out in guidelines to be produced by the Dispute Resolution Adviser. Similarly dealer councils can be included in the procedure under 44(7)(a). Again, details will be included in the dispute resolution adviser's guidelines.

#### **9. Notice period for non renewal**

Oilcode includes a provision for 30 days minimum notice of non renewal. I note that neither the Franchise Act (in the case of agreements that have passed the minimum 9 years duration) nor the Franchising Code specify a minimum period for notification of non renewal, so Oilcode represents a significant improvement on the current situation.

#### **10. Code amendment process**

It is standard procedure that the Government consult with all parties before making changes to regulation of this type. I can assure you that all parties will be consulted prior to changes in the Oilcode, but it is not appropriate to have such procedural matters specified in the regulation.

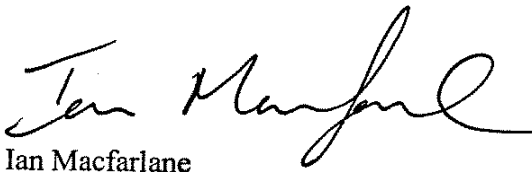
#### **11. Payment arrangements**

Section 31 of Oilcode specifies maximum periods for suppliers to reimburse retailers for supplier's proprietary fuel card payments. This represents an improvement on the current situation, where no such requirement exists. The maximum periods represent an acceptable compromise on this matter between the demands of your members and those of the suppliers.

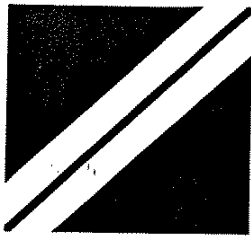
If you have any queries about the above responses, please contact Martin Squire, Manager, Petroleum Refining and Retail, on (02) 6213 7847 or email [martin.squire@industry.gov.au](mailto:martin.squire@industry.gov.au).

Thank you for bringing your members' concerns to my attention. I look forward to meeting you again at the industry roundtable.

Yours sincerely

  
Ian Macfarlane

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No. of Pages: 8

To: <i>Ian Macfarlane</i>	From: <i>M Bolaney</i>
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## Motor Trades Association of Australia

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The Hon Ian Macfarlane MP  
Minister for Industry, Tourism and Resources  
Parliament House  
CANBERRA ACT 2600

Dear Minister

Thank you for your letter of 11 March 2005 in response to mine of 24 February 2005 to Mr Stephen Payne of your Department.

As you, the Government, we and the other oil industry participants are well aware there has been a long, and often divisive, debate over this issue of oil industry reform over many years. It is abundantly clear to all of us that the structure of the petroleum industry, particularly at the retail level, has changed markedly during that time. It is also true that the two petroleum Acts, the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act) remain on the statute books albeit that MTAA acknowledges that they are 'locked up in time', that the oil majors have essentially circumvented the Sites Act in the last decade, that it has been the Government's stated intention that they be repealed and that repeal of the Acts has been supported by the oil majors.

It is however equally clear to service station operators that those Acts, operating together, locked up in time though they be, provide them with certain rights. Absent those rights, those small business service station operators would have no tenure such as all other small businesses have through retail tenancy Acts in almost every jurisdiction; would have difficulty securing access to finance from financial institutions; would have difficulty securing a return on their investment and more generally in commercial terms operating a service station would be a more risky business and the operator much more exposed to the whims of larger corporations.

For the record, those rights as MTAA and its service station operator members see them are as follows:

- a minimum of three plus three plus three tenure for Franchise Act franchisees. This essentially equates to a minimum of nine years tenure as there are limited circumstances in which an agreement cannot be renewed at the end of each tenure period;
- pre-contractual disclosure for Franchise Act franchisees;
- very limited circumstances under which a Franchise Act agreement can be terminated;
- protection against unreasonable behaviour by a franchisor – such as an unreasonable increase in payments by a franchisee, the imposition of

- unreasonable or impossible obligations by a franchisor, and price discrimination between franchisees;
- rights about renewal, non-renewal and assignment;
- obligations on the franchisor in disposing of its interest in a franchise; and
- controls on vertical integration in the industry.

In addition, of course, oil industry franchisees (as distinct from just Franchise Act franchisees) are covered by the provisions of the mandatory Franchising Code of Conduct (FCC) which provides for more extensive pre-contractual disclosure (than the Franchise Act), a cooling-off period and an alternative dispute resolution process among other rights. That Code though does not include any provisions relating to statutory tenure. It can however apply to oil industry commission agents who operate shops and other service station site activity under a franchise agreement as defined in the FCC.

The biggest challenge, for service station operators, in the last 18 months has of course been the entry of Coles Myer, through its alliance with Shell, into the retail sector and the expansion of the Woolworths retail network through its alliance/joint venture with Caltex. The exclusive nature of the discount voucher arrangements, particularly the Woolworths Caltex vouchers, has caused an enormous shift in motorists buying patterns and at the same time reduced supplies of wholesale fuel for independents and 'spot' buyers from the two largest refiner/marketers. Access to fuel has thus become a problem.

In addition service station operators are concerned about the fact that they are unable to buy fuel at wholesale for the same price as the 'supermarkets' are retailing their fuel. This is an unsustainable situation for many service station operators and irrespective of views about not wishing to impede on a retailer's rights to discount product, no retailer 'loss leads' or discounts its major item in the same manner that the supermarkets 'discount' fuel over long periods. Thus you will understand why my members are concerned about 'selling below cost', 'predatory pricing', 'misuse of market power' and other such matters. I might add here that at the time of writing no amendments (relating to the Dawson Review of, or the Senate Economics Committee inquiry into, the Trade Practices Act) have been passed by the Parliament. Indeed no proposed amendments on misuse of market power or unconscionable conduct, let alone predatory pricing, have been released by the Government.

To return, however, to the long debated matter of reform of the petroleum industry. MTAA has in the past been unable to support the various 'reform' packages put forward because it believed that at the end of the process service station operators then current rights were to be eroded and the oil majors stood to gain control over the retail sector of the petroleum industry. We remain of that view in relation to the current reform discussions; only we would add that the supermarkets and their refiner/marketers partners will be the biggest winners.

Our reasons for holding, firmly, those views are as stated above and further set out below.

Service station operators are particularly concerned about the impact of the proposed reform arrangements (that is the repeal of the two petroleum Acts and the introduction of a mandatory Code) on 'contracts on-foot'. I note that your letter of 11 March proposes that 'existing agreements with five years or more minimum duration will have their tenure undisturbed'. That may well be the Government's intent but we are concerned that the Code

will not provide for that. MTAA is aware that in the current Caltex agreements (which I understand have five plus five tenure and which are covered by the Franchise Act) there is a clause which provides that in the event of a 'Mandatory Law Change' (such as say the repeal of the Franchise Act) Caltex has the right to alter the agreement (say to change the tenure arrangements or the nature of the agreement). In light of that MTAA does not believe that the draft Code sufficiently secures the present property rights of those service station operators who have contracts on-foot. We see that as being unacceptable.

The draft OilCode definition of a franchise agreement is in construct very similar to the definition of a franchise agreement under the FCC. One of the issues with that definition in the FCC has been that it is possible to avoid the Code by constructing an agreement which does not meet all of the four necessary parts of the definition; one of which relates to the payment of a fee (such as a royalty or franchise fee). One of the concerns that MTAA has had in the past in relation to coverage in the draft OilCode is that it would have been quite possible to construct a commission agency agreement under which there was no on-going payment or fee and thus the agreement would fall outside the OilCode. I note that the most recent draft of the Code (received on Monday, 14 April) has been amended to recognise that and to make it clear that commission agency agreements are covered by the Code. We thus believe that if statutory tenure of a minimum of nine years is to be 'traded' for a broader coverage with a minimum of five years then we must at least get the coverage matter correct. However, we remain concerned that as the Code is currently drafted most agreements could, after the introduction of the code, be structured so that they fall within the category where no minimum tenure applies. Again this issue must be addressed as we see the current proposal as being unacceptable.

MTAA also notes that the 'improved' pre-contractual disclosure requirements contained in Part 3, Subdivision 1, do not entitle franchised independents and Franchise Act franchisees to a necessarily higher level of disclosure than that which they are currently entitled to under the Franchising Code of Conduct; albeit that the proposed regime will be more petrol specific.

As I advised in my letter of 24 February the introduction in a statutory instrument of a provision allowing for termination 'at will' is something which the Association will not support. It is not sufficient for the Government to say that what is being proposed in the draft OilCode is better than what is happening now in the market in relation to some commission agency arrangements. As you constantly point out those arrangements are not currently covered by the two petroleum Acts. Termination at will is not permitted under the Franchise Act and we cannot support the right to engage in that behaviour being codified by regulation; irrespective of how much or how little the commission agent or other retailer may have invested in their business. Given such a clause I doubt that any financial institutions would provide capital or overdraft facilities to those operators. For MTAA this is also unacceptable.

MTAA's views on the proposed, so-called, terminal gate pricing arrangements are well known to you and I will not repeat them at length here; suffice to say I do not understand how an arrangement that allows for discounts at the gate can introduce transparency and wholesale competition - which have always been what we have contended is required for a true terminal gate pricing regime. I would add also that the introduction of a so-called terminal gate pricing arrangement does not automatically result in buyers being granted access to terminals or indeed them being supplied with fuel.

I note your comments in your letter about the alternative dispute resolution procedure in the draft Code. I and my members fail to understand why the application of the alternative dispute resolution process has to be limited to matters contained in the Code. Again if this reform process is to provide some benefits to my members then surely the dispute resolution process should relate to all matters covered by the commercial agreement between the two parties. The Franchising Code of Conduct dispute resolution process applies to '*a dispute arising under a franchise agreement or this code*'. I do not understand why the narrower view is to apply in respect of the OilCode when oil industry franchisees covered by the FCC already enjoy a wider right.

MTAA has also analysed the commentary prepared by officials from the Department of Industry, Tourism and Resources and provided to MTAA following our discussions in Brisbane. MTAA does not support many of the statements in that paper. I have therefore responded, in the terms set out below, to each of the matters raised in that paper. Before doing so I must say that many of the propositions it contains are 'straw men' and that it misrepresents what service station operators say or seek in these matters.

### **OilCode - Benefits**

#### General

*The current regulatory regime is discriminatory, (in the sense it offers some operators rights under the Sites and Franchise Act and other [sic] none at all), ineffective and covers only a minor number of participants i.e. franchisees and company operated sites. The proposed OilCode would apply to all industry participants including commission agents and independents.*

The current regulatory regime is only discriminatory due to the manner in which it has been applied by the Australian Government. The fact that the current legislation has not been applied to all relevant market participants by either amending the Acts and/or designating particular companies as "prescribed corporations" for the purposes of the Acts has given rise to the current situation in which some market participants are covered by the Acts but others are not. The Government's failure to revise the current regulatory regime to address structural changes in the market has also given rise to the 'ineffectiveness' of which your Department speaks.

The Association believes that the Government could address the issues raised in this point by simply ensuring that the Acts applied consistently to all relevant market participants.

*As regulations, the OilCode is easier to amend than legislation in response to changing market needs and conditions.*

The Association notes that legislative instruments such as regulations must be drafted in the same careful manner as legislation. Legislative instruments must also be tabled in both Houses of the Australian Parliament and that the vast majority of those instruments can be disallowed by either House of Parliament within fifteen sittings days of that tabling. Therefore the proposition that it will be easier to amend the OilCode because it is a legislative instrument rather than legislation may not hold. The Association also notes that the Government, although it has the power to do so, has not enacted regulations to specify that Coles and Woolworths are 'prescribed corporations' for the purposes of the Sites Act.

Additionally, the draft OilCode does not currently specify the process by which it is to be amended and it is therefore possible that future governments might be able to amend or even revoke the OilCode with little or no consultation with industry stakeholders.



*The OilCode will be reviewed after it has been in operation for twelve months.*  
Noted and accepted.

Terminal Gate Pricing

*Terminal Gate Pricing (TGP) will ensure all customers have the option to buy petroleum products at a TGP based price. Access to supply at TGP can not [sic] be denied providing customers meet occupational health and safety standards at wholesale facilities and can pay for product.*

MTAA disagrees with this statement. Under section 11 of the draft OilCode, a wholesale supplier can decline to supply a declared petroleum product to a customer if the wholesale supplier 'does not have sufficient supplies of the declared petroleum product that it can reasonably provide to meet the customer's requirements'. Therefore, while customers may have a right of "access to supply", they do not have any right to "actual supply" if the wholesale supplier merely determines that it does not have sufficient supplies of the declared petroleum product in question. Considering that wholesale suppliers are currently operating at full or near to full capacity in order to meet current market demand and that the demands on local producers are likely to increase with the introduction of tighter fuel standards in the near future, there is the very real possibility that some market participants may not be able to secure supply of some declared petroleum products. The Association would therefore reiterate that access does not equate with supply.

*Requires suppliers to post a TGP for temperature corrected petroleum products and increase [sic] transparency by ensuring that TGP pricing information is publicly displayed.*

The proposed TGP pricing arrangements will still allow for discounting at the terminal gate. The Association believes that, in the interests of a competitive and transparent wholesale market, the TGP should be a true reflection of the wholesale price and therefore suppliers should not be permitted to distort or falsify the TGP price through hidden discounts at the terminal gate.

The suggestion that the proposed TGP arrangements will 'increase transparency' is false as the posted TGP price will not necessarily be the wholesale price at which the wholesale transaction is made. This is because wholesale suppliers will be able to offer discounts at the terminal gate. The public display of such an 'opaque' TGP will therefore do nothing to improve the transparency of pricing in the wholesale market.

*The TGP arrangements do not prevent discounting or below cost selling.*  
Noted.

*Improved delivery and invoice documentation which identifies costs of fuel, volume and other services such as credit or delivery.*

The draft OilCode provides that invoice documentation must be provided within 30 days. MTAA considers that such a requirement is unacceptable in light of the fact that service station proprietors are required to pay for the goods on delivery. MTAA believes that wholesale suppliers in the retail petroleum industry should be required to meet the standards applying to wholesale suppliers in all other industries and provide invoice documentation at the time of supply.

#### Fuel Reselling Agreements

*Provides five year tenure for all parties to fuel re-selling agreements, not just franchisees (who have nine years tenure under existing legislation), provided that there is investment of over \$20,000.*

The Association notes that not all franchisees have tenure under existing legislation; only PRMF Act franchisees are entitled to tenure under existing legislation. MTAA also notes that the OilCode will effectively discriminate between retailers whose initial investment is less than \$20,000 and those whose initial investment is over \$20,000. This, in our view, is likely to encourage some wholesale suppliers to restructure their agreement so that the 'upfront' investment is less than \$20,000.

*Improved disclosure arrangements imposed on the oil majors in the creation, transfer or termination of agreements.*

The Association notes that the proposed disclosure arrangements are comparable to the disclosure requirements imposed on oil companies by the PRMF Act in relation to Franchise Act franchisees and on them and other oil industry franchisees under the *Franchising Code of Conduct*. In any event, the Association believes that the disclosure of an absence of rights is of very little value to fuel resellers.

#### Dispute Resolution Service

*The OilCode's proposed Dispute Resolution Scheme will provide a low cost and rapid means of addressing disputes as an alternative to legal action. The Office of the Dispute Resolution Advisor through their[sic] facilitation and technical skills will be able to assist the parties to explore the issues in depth and reach the best possible joint decisions that the circumstances allow. Unlike many mediation schemes, the Dispute Resolution Advisor can make nonbinding recommendations.*

The matters which can be mediated under the OilCode's dispute resolution process are limited to those which are set out in the Code and those matters are significantly narrower than the matters which form part of the business relationship between the parties. The dispute resolution process may therefore prove to be an ineffective alternative to legal action. The limitation of matters which may be mediated under the OilCode's dispute resolution process may also compromise the rights that franchisees currently have under the *Franchising Code of Conduct*. The Association also considers that non-binding recommendations are of little value in a commercial environment.

*The recourse to legal action remains available.*

The Association acknowledges that service station proprietors will, prima facie, still have recourse to legal remedies. For many service station proprietors however legal action is simply not a viable option due to the prohibitive costs associated with pursuing such a course of action. MTAA believes that the likelihood of a small service station operator commencing legal action against a major oil company for breach of contract is very remote as the costs of doing so would simply be prohibitive. This is one of the reasons why the Association has pursued the strengthening of the Trade Practices Act to proscribe certain unacceptable behaviour and has been actively seeking to ensure that any OilCode does not diminish existing rights for service station operators.

## **OilCode – Key Issues**

### *Why doesn't the Government prevent below cost selling?*

MTAA has never asked for a prohibition on below cost selling, although the Association acknowledges that some of its Member bodies have previously requested such a prohibition. The Association does however believe that the misuse of market power provisions in the Trade Practices Act need to be strengthened. It is however incorrect to assert that below cost selling will typically only occur at the bottom of the discount cycle. Large retailers could sustain below cost selling for a long period of time if they are using profits from one sections of their business, for example grocery retailing, to cross-subsidise their petrol operations.

### *Why doesn't the Government prevent supermarkets from below cost selling?*

MTAA does not believe however that supermarkets should be able to use their power in one market to reduce competition in another (for example, the retail petroleum market). In particular, supermarkets should not be able to use other sectors of their business to cross-subsidise their petrol operations in order to reduce competition.

### *Why doesn't the Government introduce a pristine Terminal Gate Price?*

As discussed above, MTAA believes that, in the interests of a competitive and transparent market, the Government should introduce a true wholesale TGP. In relation to discounts and economies of scale it should be noted that the most fuel any one service station can purchase at one point in time is a tanker load. That is true for a Coles site, an independent site or a franchised site. Equally each gantry can only service one fuel tanker at a time.

### *The OilCode doesn't offer small operators any protection. Wouldn't independents be better off under the Sites Act?*

As discussed above, MTAA considers that many of the supposed benefits of the draft OilCode are illusory. The OilCode does not offer any guarantee of supply. It also does not follow that independents have no protection whatsoever as branded independents are likely to be covered currently by the *Franchising Code of Conduct*. The Association also notes that the Sites Act does not apply to franchisees – it applies only to the prescribed corporations and to the sites that they directly operate and in most circumstances to their commission agency sites. MTAA would also reiterate that the only reason that the Sites Act has not kept pace with developments in the industry is because Governments have failed to update the Act in response to those developments.

### *What role will independents or small operators have in the future?*

It cannot be presumed that the larger retailers are more efficient than smaller operators. The use of market power in one market to force competitors out of another market does not make for a more efficient competitor. The initial setup and infrastructure costs associated with service stations are significantly higher than in some other retail sectors. Furthermore, other retail sectors frequently have a range of wholesale suppliers to choose from, but in the retail petroleum sector that choice is limited because if an operator cannot secure supply of petrol then it will not be able to operate a service station. MTAA believes that a diversity of operation and ownership in the retail sector will provide for a strong competitive market. The issue is that the Association does not believe that the current 'reform' proposals provide the framework for continued diversity of ownership and operation that the market needs to sustain a long-term competitive environment.

*What will happen if the OilCode is not introduced?*

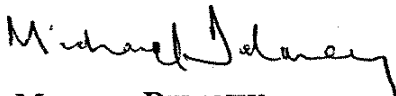
The Association wonders whether any economic analysis has been commissioned on the impact of the introduction of the OilCode and the repeal of the petroleum Acts on the current structure of the market. MTAA also notes that the Government could, if it wished, designate Coles and Woolworths as "prescribed corporations" for the purposes of the Act.

*Why doesn't the Government use the Trade Practices Act to guarantee a place in the market for existing independents and owner dealers?*

MTAA has never sought to secure a place in any market for its small business members who are not efficient or competitive operators. What the Association has long sought is to address the current (and growing) imbalance of market power in our economy as between big and small businesses. Small businesses are not necessarily uncompetitive or inefficient operators. Many in fact are particularly efficient and compete vigorously in the market. However, many small operators are hampered in their ability to compete by the unfair market actions of some of their competitors and suppliers. The environment that MTAA seeks to secure for its members is one in which there is an opportunity for small and large businesses alike to compete fairly on the basis of their products and services. MTAA is not convinced that the so-called, 'reform' package proposed will assist in securing that environment.

I look forward to discussing these matters with you at the Forum on Thursday.

Yours sincerely



**MICHAEL DELANEY**  
Executive Director

**COPY**

16 March 2005



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The Hon Ian Macfarlane MP  
Minister for Industry, Tourism and Resources

PARLIAMENT HOUSE  
CANBERRA ACT 2600

Mr Michael Delaney  
Executive Director  
Motor Trades Association of Australia  
PO Box 6273  
KINGSTON ACT 2604

19 APR 2005

Dear Mr Delaney *Michael*

Thank you for the Motor Trades Association of Australia's (MTAA) involvement in the Downstream Petroleum Reform Package (Oilcode) Industry Roundtable held on 17 March 2005 and for your letters of 16 and 18 March detailing the MTAA's position on the Oilcode. The Government appreciates the MTAA's involvement in the Oilcode discussions and notes the position of your members as outlined both in your correspondence and at the Roundtable.

I understand that tenure arrangements under the Oilcode have been a key concern for your members. In this regard I am pleased to advise you that the Australian Institute of Petroleum (AIP) has acceded to my request that tenure for franchisee arrangements under the Oilcode be extended to 9 years (with commission agent arrangements remaining at 5 years).

In the same letter, the AIP also stated that its member companies consider that repeal of the *Petroleum Retail Marketing Franchise Act 1980* (Franchise Act) and the *Petroleum Retail Marketing Sites Act 1980* (Sites Act) would not result in the termination of any franchise agreement and that no contracts have conditions that would void the contract if the Sites and Franchise Acts are repealed.

In addition, I have received advice from the Australian Government Solicitor (AGS) on the issue of preserving the duration of contracts 'on-foot' at the time the reform package takes effect. The AGS have advised that, despite any clauses in current franchise agreements that may allow for variation of the terms of those agreements in the event of a law change, the addition of a sub-clause into Section 32 of the Oilcode, as detailed in the Attachment to this letter, will ensure that action by a franchisor to shorten the duration of an existing franchise fuel re-selling agreement because of the introduction of the Oilcode or the repeal of the Sites Act or the Franchise Act would be inconsistent with the Oilcode and would therefore expose the franchisor to a range of penalties and remedies. My Department will soon be sending all stakeholders a final draft of the Oilcode for their consideration, which will include amendments to account for these changes.

I consider these outcomes on the tenure and duration of agreements should provide your members with greater certainty with regards to their property rights under the Oilcode regime. From discussions at the Roundtable it is apparent that many in the industry continue to hold concerns regarding below cost selling and the role of the *Trade Practices Act 1974* (TPA).

Therefore I have asked my Department to work with the Department of Treasury and the Australian Competition and Consumer Commission (ACCC) to organise an industry information session. The focus of this session will be to clarify issues surrounding Section 46 of the TPA (misuse of market power) and to discuss the objectives of current Government reforms in this area.

As you know, Section 46 has been the subject of a number of Government reviews, most recently, *The Review of the Competition Provisions of the Trade Practices Act 1974* (the Dawson Report) and the Senate Economics Reference Committee (SERC) inquiry on *The Effectiveness of the Trade Practices Act in Protecting Small Business*.

Although the Dawson Report concluded that Section 46 adequately prohibited misuse of market power, several important TPA cases were concluded after the Dawson Report delivered its findings. Thus the Government's response to the subsequent SERC inquiry concluded that Section 46 should be amended so that courts may consider below-cost pricing and recoupment for consideration of misuse of market power. The Bill to implement the Government's response to the SERC report will be introduced to Parliament in mid 2005.

I also note that in 2004 the ACCC conducted an inquiry into the pricing behaviour of supermarkets in the retail petroleum industry. This report concluded that there were significant benefits to consumers from shopper docket discount offers, including lower petrol prices for consumers and increased non-price competition. Indeed, the ACCC 2003-04 Annual Report indicated that petrol prices have declined relative to benchmark indicators and I note that many petrol retailers, including independents, are now offering shopper docket discounts as a competitive response.

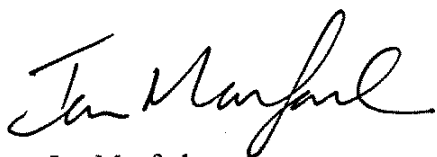
Against this background it would not be appropriate for the Oilcode to include any actions that would inhibit competitive pricing of fuel products. Indeed such a move would be inconsistent with the findings of the Dawson Report, which concluded that the competition provisions of the TPA are designed to protect competitive process rather than specific market structures or individual competitors and as such should be distinguished from industry policy and industry specific measures. Accordingly, the Government is not willing to make any changes in the Oilcode that are aimed at restricting shopper docket schemes or at preventing below cost selling.

The Roundtable also discussed the powers of the Dispute Resolution Adviser (DRA) under the Oilcode regime, in particular the ability of the DRA to refer pricing concerns to the ACCC. I have asked my Department to work with the ACCC to consider the implications of more explicitly stating the powers of the DRA to refer matters to the ACCC in the Oilcode.

As I noted at the Roundtable, the Oilcode has been developed over a number of years and has required compromises from all industry participants. The current document will provide a more equitable regulatory regime that will allow the retail petroleum industry to respond and adapt to changing market conditions without distorting or reducing levels of competition.

I believe that it is now time to move forward with implementation and, taking account of the issues outlined above, I seek your advice on the MTAA's final position on the Oilcode before I commence the steps to introduce the reforms into Parliament. I would appreciate your response within a fortnight of receipt of the final draft of the Oilcode and in any case by 13 May 2005.

Yours sincerely



Ian Macfarlane

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## ATTACHMENT

**Maintenance of existing tenure arrangements under the Oilcode regime**

Following receipt of legal advice, a subclause has been added to Section 32 of the Oilcode to provide for the policy intent of maintaining tenure (term, duration) under all franchise fuel re-selling agreements entered into before the date of commencement of the Oilcode to be maintained under the Oilcode regime.

The new subsection provides –

- (x) The duration of a fuel re-selling agreement entered into before the date of commencement of this code must not be altered for a reason that is, in substance, related to:
  - (a) the commencement of this code: or
  - (b) the repeal of the *Petroleum Retail Marketing Franchise Act 1980* or the *Petroleum Retail Marketing Sites Act 1980*.

*Note:* Where a fuel re-selling agreement entered into before the commencement of Oilcode contains a provision allowing the supplier to vary the duration of the agreement (for example subsequent to a change in any law), the duration of that agreement is not to be altered due to the commencement of Oilcode or the repeal of the specified Acts.



## Motor Trades Association of Australia

COPY

The Hon Ian Macfarlane MP  
Minister for Industry, Tourism and Resources  
Parliament House  
CANBERRA ACT 2600

Dear Minister

Thank you for your letter of 19 April 2005 outlining the latest proposals in relation to the draft OilCode. MTAA remains willing to negotiate with you and the other stakeholders on proposals for reform of the petroleum industry. There is an opportunity to achieve an acceptable balance on reform of the petroleum industry which could be satisfactory to all parties. In MTAA's view this includes that small businesses have a role in the retail petroleum sector.

We acknowledge that you have proposed some changes in relation to tenure and on-foot contracts. However, the Association's legal advice expressly indicates that the proposed amendment still does not make legally binding the prohibition on oil companies terminating franchise agreements as a result of the repeal of the Sites and Franchise Acts. Our advice also is that any undertakings given by the Australian Institute of Petroleum do not constitute any guarantee for our members as far as tenure is concerned.

The current package is not as broad-ranging as the 2002 Downstream Petroleum Industry Framework which addressed not only the introduction of a Code, but legislative reform of the *Trade Practices Act* and refinery restructuring as well. It may be possible to secure service station operators support for the repeal of the Acts if satisfactory measures of that kind, providing for a fair and equitable market enabling small business to compete in the sector were to be introduced. That would require something other than the current reform model; more specifically, one that combines the introduction of an OilCode with appropriate amendments to the *Trade Practices Act* and consideration of the future structure of the petroleum industry.

As your package of measures is currently drafted, the Association continues to have concerns about its application. In our view, with the repeal of the Sites Act and the introduction of the Code as currently drafted, it will not apply to anyone, as the oil companies move their operations outside of the OilCode structure. We are aware that oil companies are already in the process of further vertically integrating their operations and moving away from franchising; evidence of this has been demonstrated by BP's public comments in *The Australian Financial Review* (20 April 2005) and Mobil is moving its operations under the Quix banner, which we understand to be operated by Strasburger Enterprises.



We also do not believe that the proposed legislative changes to the *Trade Practices Act* will adequately address the imbalance of power in the market. Assurances have been provided to MTAA that the Government's proposed amendments to Section 46 of the *Trade Practices Act* will address predatory pricing behaviour. However, the recent Section 46 briefing arranged by your Department confirmed our understanding that the *Trade Practices Act* does not address or proscribe predatory pricing and there is nothing in the Government's proposed amendments that will preclude or address it into the future; as confirmed by your Department's independent legal adviser. The Association accepts that the petroleum industry has changed over the last decade, in particular with the entry of the two major grocers, in recent times, into the petrol market. To secure a fair and equitable market, we look to Section 46 of the *Trade Practices Act* to ensure predatory behaviour is able to be addressed by the Act.

MTAA would like to continue to discuss all of these matters with you. In particular, the Association believes that two of the issues you considered to be 'off the table' on 17 March 2005 need to be discussed further by the Government and industry stakeholders, namely the issues of:

- (i) how service station operators concerns about below cost selling might be addressed; and
- (ii) a tie between OilCode and *Trade Practices Act*.

Precluding discussion on those two matters significantly reduces the chance of a successful outcome, for all parties, from the reform process.

Successful and enduring reform requires a 'win-win' outcome. With all the changes in the retail petroleum market in recent years, and recent anecdotal and media reports about the plans of the oil majors, post-repeal, the current package of measures will not result in a 'win-win' outcome.

Rapid market change is continuing, driving the need for all parties, including the Government, to consider what the future structure of the industry might be.

I would welcome the opportunity to discuss that with you. MTAA has previously put forward compromise proposals, on behalf of its Members, for market reform and we would welcome an invitation to do so again.

Yours sincerely

  
MICHAEL DELANEY  
Executive Director

**COPY**

13 May 2005