

How to Get out of a Car Contract

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CONSUMER CREDIT LEGAL SERVICE INC.
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on behalf of Consumer Credit Legal Service Inc.

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About Consumer Credit Legal Service Inc.

The Consumer Credit Legal Service is a community legal service specialising in consumer credit issues and litigation. It is funded by Victoria Legal Aid and Consumer & Business Affairs Victoria.

About this manual

This manual refers to the law in Victoria as at 30 April 1997.

This manual is one in a series of 8 “How To...” booklets produced by Consumer Credit Legal Service Inc. to assist consumers and their advisers with various contractual problems.

Each manual deals with problems that are constantly encountered by clients of Consumer Credit Legal Service Inc. and is based on the strategies employed by that staff in solving these problems.

The other manuals in the series, all of which are available direct from Consumer Credit Legal Service Inc. are:-

- How to Get out of a Contract Signed at Home
- How to Make a Consumer Credit Insurance Contract Pay
- How to Win an Electronic Funds Transfer Dispute
- How to Protect your Personal Financial Information
- How to Get out of a Repossession
- How to Get out of a Car Contract
- How to Get out of a Contract of Guarantee
- How to Resolve a Consumer Dispute

The manuals are designed to provide a general guide only and cannot be used as a substitute for sound legal advice in relation to a particular situation. Furthermore, although Consumer Credit Legal Service Inc. believed that at the time of printing all the information contained in the manual is accurate and reliable, no responsibility is accepted for readers who rely on this booklet for legal or financial advice.

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Chapter 1

Introduction

This is the fourth edition of this manual. This edition specifically refers to the *Consumer Credit Code* as well as the *Credit Act 1984* and the *Fair Trading Act 1985* and applications that may now be made under those Acts as well as dealing with contracts in general and the provisions of the *Motor Car Traders Act 1986*.

This manual is designed to be a general guide to legal advisers, financial counsellors and other people who assist consumers when they find they are caught in a contract they do not want. Although designed to be a good general guide the manual cannot cover every situation that may arise, or every provision of the relevant legislation and cannot be used as a substitute for good legal advice.

The information in this manual refers **only** to contracts between consumers and licensed motor car traders, although some of the information may be applicable where the vehicle is purchased privately.

1.1 The need for this manual

Unfortunately, there is a social need for this manual. Transactions between consumers and corporations should ideally involve a bargain where both sides have equal power and are equally informed. Unfortunately, this is unlikely to be the case.

A motor car purchase is one of the most expensive contracts that many consumers will enter into. Nevertheless, the consumer's decision is often based on misrepresentations, over-selling techniques and insufficient information provided by a car salesperson. While the trader is familiar with the contents of the written contract, the consumer is not encouraged to read (and may not understand) the contract. Many consumers are persuaded to purchase a car that on proper reflection they do not want.

The Consumer Credit Legal Service Inc. has a constant stream of consumers in this situation. The manual is based upon the strategies the Consumer Credit Legal Service Inc. has developed to assist these people. Although there is a cooling off period for used car contracts, this manual is just as necessary as it was when first produced.

1.2 Where to start

Begin with obtaining a full and detailed chronological account from the consumer of all actions and discussions leading to the contract, the circumstances in which the contract was signed and all events occurring since the contract was made. This information should include dates, times, places, names, which documents were given to consumer and when, etc. (see instruction

sheets in appendices).

Of course all relevant documents should be obtained from the consumer. If the consumer does not have some or all of the documents then copies must be obtained from the motor car trader and/or credit provider. There are specific sections of the *Credit Act* which will assist in obtaining copies of documents. A draft letter for requesting documents can be found in Appendix B.

Once full information is obtained you will need to know what the consumer wants. Usually consumers want to be released from the contract and to be placed in their previous position. This may not always be the case so full instructions should be obtained. It is also important to get ongoing instructions and authority to act as the matter proceeds.

Once full information has been obtained, refer to the relevant sections of this manual. As a general rule there are two main things to look for in any transaction. These are:

- (i) technical breaches of the requirements of the legislation; and
- (ii) unfair practices - a good starting place is your "gut feeling" about the transaction.

You should then look for the legislation which backs you up.

1.3 Buying a car privately

If the car is purchased privately (not from a trader) some of the "ways out" given in this manual will not apply. It will therefore be important to ascertain whether the seller is a private person or a trader.

If a person buys, sells or exchanges six or more cars (not including buying from and selling to a licensed trader) within a period of 12 months the law states that person is a motor car trader (unless the person can prove that she/he is not). Section 5, Motor Car Traders Act 1986. A person who sells fewer than six, may be a trader, if she/he is in the business of selling cars.

There are heavy penalties if such a person is not licensed.

If the purchaser suspects that a person is a "backyard" (ie unlicensed) trader, it may be worth keeping an eye on the newspaper in case his/her phone number appears regularly in the car advertisement columns.

If this is the case, the purchaser may be able to prove that the seller is an unlicensed trader. As well as making a report to the Motor Car Traders Licensing Authority, the purchaser can use the methods given in this manual. As it is most unlikely that an unlicensed trader would comply with the Act, there may be a number of bases for rescission.

If the seller is definitely a private person, the *Motor Car Traders Act 1986* does not apply. The *Trade Practices Act 1974* and the *Fair Trading Act 1985* will not apply either. Nevertheless, rescission may still be possible based on conditions precedent and the *Goods Act 1958*. The concept of waiver may also apply. See Chapter 4.

1.4 Contracts for new cars

Most of the information in this manual applies to contracts for the purchase of used cars. The reference to *Trade Practices Act, Fair Trading Act, Goods Act, Credit Act Consumer Credit Code* conditions precedent and misrepresentation apply also to new cars.

1.5 Buying a used car on credit from a car dealer

Buying the car

Buying a used car is much the same as buying any other item. Consumers need to consider carefully whether the car meets their needs and is at a price they can afford. However, consumers experience two problems when trying to purchase a used car from a motor car trader:

- a used car yard is often a high pressure selling environment which can result in a consumer failing to make a careful and informed decision when purchasing a car,
- motor cars are complex items and most consumers do not know how to assess the value and quality of a used car.

There are seven rules which will help a consumer to overcome these problems.

- 1 A car salesman is a professional, who makes an income selling cars *at a profit*. It is unrealistic to think that the salesman will do a consumer a favour, and not sell the car at a profit.
- 2 Do not sign *anything* without reading it. Anything you sign is likely to be a legal document placing some obligation on you - usually to buy the car.
- 3 Before looking for a car, decide what type of car you need and your price range - and stick to it.
- 4 On any given day there are more used cars on sale than buyers - so shop around on price. If you are at all unsure about purchasing a car, or even if you are sure, walk away from the car yard for ten minutes to consider the deal.
- 5 Always get the car mechanically tested by someone independent.
- 6 All used cars sold by motor car traders display a form stating the name and address of the

previous owner. Contact that person as to their opinion of the vehicle and why they sold it.

- 7 **Only** if buying privately, check the Vehicle Security Register at Vic Roads to make sure a financier does not have an interest in the car. Where the car is purchased from a licensed motor car trader, the purchaser is guaranteed ownership of the vehicle.

Buying on credit

It is just as important to shop around for the best interest rate when buying on credit as shopping around for the best price for a used car. Again, following a few simple rules can save thousands of dollars.

- **Never** obtain finance or insurance through a car dealer. The dealer usually receives a commission for selling both the finance and the insurance, and so the price of each is invariably higher than obtaining finance or insurance direct from the financier or insurer.
- Shop around for the lowest interest rate. Bank and credit union loans can be 5% or more cheaper than finance company loans sold in car yards.

Chapter 2

Rescinding the Contract

The first objective is to cancel the contract. If your client wishes to cancel the contract there are a number of ways in which this can be done legally. These include:

- (i) where a condition precedent has not been met;
- (ii) where three business days have not expired since the contract has been signed, and the purchaser may have the right to cancel the contract according to Section 43 of the *Motor Car Traders Act* (the cooling off period);
- (iii) where the goods are not fit for the purpose for which they were bought or for which they are commonly used, or are not of merchantable quality;
- (iv) where a trader has misrepresented any major feature of the sale to the consumer and the consumer has relied upon that misrepresentation to enter into the agreement;
- (v) where the trader has breached one of three specific provisions in Section 45 of the *Motor Car Traders Act*.

A legal cancellation of a contract is called "rescission". One of the major purposes of this manual is to explain the legal grounds for cancelling a contract.

You must rescind the contract quickly. Even if you are not relying on the cooling off period (where you must rescind within 3 days), time is important. It was held in one motor car rescission case that where one party to a contract has a right to rescind, that party must do so within a reasonable time.

The rescission must be communicated to the other party. Essentially this amounts to a letter (see Appendices D,E, F). It is also a good idea to send a copy of this letter to the Motor Car Traders Licensing Authority, particularly if there have been breaches of the *Motor Car Traders Act*.

2.1 Retrieving the consumer's deposit

In most circumstances the consumer will have paid a deposit to the trader, either with cash or with a trade-in of a vehicle or a combination of the two. Retrieval of the deposit and/or trade-in is therefore an integral part of getting out of the deal.

If the contract is legally cancelled, both the consumer and the trader must be placed in the same position that they were in before the contract was entered into (except there is a penalty for using the cooling off period - see 3.3). The dealer gets back the car that was sold to the consumer. The consumer gets back the deposit paid together with any trade-in (or, where the trader has already sold the trade-in, the equivalent monetary value of the trade-in). Of course, the car and trade-in

must be substantially in the state they were in when the contract was entered, or one party may be required to pay damages.

2.2 Cancelling the finance contract

The effect of rescission of the sales contract on the finance contract depends on whether the trader arranged the finance (or referred the consumer to a financier), or whether the consumer approached the financier independently.

Where the trader has referred the consumer to the financier (as part of an arrangement between the trader and the financier), or has arranged the finance, the finance contract will be rescinded automatically if the purchase contract is rescinded where:

- if the finance contract was signed by the consumer **before** 1 November 1996 (commencement of the *Consumer Credit Code*) - the cash price of the car is less than \$20,000 (there is no monetary limit if the vehicle is a commercial vehicle or farm machinery), *Credit Act* s.25
- if the finance contract was signed by the consumer **on or after** 1 November 1996 - the vehicle was purchased for personal use (the \$20,000 monetary ceiling does not apply). *Consumer Credit Code* s125.

In addition, Section 43(4) of the Motor Car Traders Act provides (in some circumstances) for discharge of the credit contract where the consumer takes advantage of the cooling off period to terminate the agreement.

If the consumer arranged his/her own finance (and was not referred to the financier by a trader), the trader should return amounts paid to the financier - but the purchaser may need to negotiate with the financier if the amount returned does not exactly cover the net amount due (i.e. does not finalise the contract).

Neither the *Credit Act* nor the *Consumer Credit Code* will apply if the consumer is a corporation.

2.3 Results of failed rescission

If the car contract has not been legally rescinded the consumer may have wrongfully broken the contract. The consumer will then face the risk of being held liable for the monetary loss sustained by the trader as a result of the broken contract. See Chapter 11.

If the trader disputes that the contract has been legally rescinded she/he may also refuse to return the deposit and/or trade-in, and may claim further damages from the consumer.

The consumer can try to force the trader to return the deposit and/or trade-in by making an application to:

1. the Small Claims Tribunal for the return of the deposit and/or trade-in where the value of each does not exceed \$5,000.00;
2. to the Small Claims Tribunal within three months of signing the agreement, for an order of rescission *relying on the* grounds specified in Section 45 of the *Motor Car Traders Act* and a further order for the return of the deposit and/or trade-in, where the cash price of the vehicle does not exceed \$20,000.00;
3. the Credit Tribunal, where there is a contract regulated by the *Credit Act* or *Consumer Credit Code*. See Chapter 12.1 and 12.2.
4. the Magistrates' Court where the monetary value of the deposit and/or trade-in does not exceed \$25,000.00; or
5. the County Court where the monetary value of the deposit and/or trade-in exceeds \$25,000.00.

If the adjudicating body does not agree that the contract has been legally rescinded, the consumer has wrongfully broken the contract. As well as losing any deposit or trade-in, the trader may proceed to take action against the consumer for damages. See Chapter 11.

Depending on the reasons for attempted rescission, the amount that the consumer has already lost, and damages for which she/he may be liable, the consumer may wish to consider the option of taking (or maintaining) possession of the vehicle, and meeting his/her obligations under the contract.

Chapter 3

Cooling Off Period

Section 43 of the *Motor Car Traders Act* allows a purchaser to cancel a contract to purchase a **used** car from a car trader within 3 clear business days after she/he signed the contract, unless:

- the purchaser is a motor car trader or body corporate;
- the purchaser has signed the prescribed form acknowledging that the right to terminate the agreement no longer applies (see Chapter 3.2);
- the car is a commercial vehicle;
- the car was purchased at public auction.

The trader cannot sell any trade-in vehicle within this 3 day period.

3.1 Cancelling within the cooling off period

If the purchaser wishes to cancel, she/he must, within the 3 days, give or serve on the motor car trader (or an agent of the motor car trader) a notice in writing, stating that the purchaser terminates the agreement.

Three clear business days means three whole days, not including the day the contract was signed, and not including weekends or public holidays. For example, if the purchaser signed the contract on Thursday, she/he would have all day Friday, Monday and Tuesday in which to serve notice on the trader.

The written notice must be addressed to the trader at his/her place of business or residence. Post is not recommended due to the limited amount of time. It is recommended that the purchaser either hand the notice to the trader, or an employee at the place of business. It may assist your case if you take along a friend to act as a witness to service. The car must also be returned, even if, the trader refuses to accept it at the same time.

As there is a penalty (see below) involved in cancelling under this section, the purchaser should consider whether any other grounds for rescission exist. If they do, the purchaser should state in the notice of rescission that she/he relies on the cooling offer period *as well* as specifying other grounds. This will show the trader that the purchaser is aware of his/her right to cancel, and negotiation in this situation is likely to lead to cancellation without penalty. If the attempt to cancel on other grounds is unsuccessful, the purchaser can, of course, rely on the cooling off period. See Appendix D, note 6.

3.2 Signing away the cooling off period

The Act allows the purchaser to sign a prescribed form, immediately before accepting delivery, which acknowledges that the right to terminate the agreement no longer applies.

It is unlikely that this form would be valid if it was not signed immediately before accepting delivery. For example, if the purchaser signed the form and the contract at the same time, it is likely that the form would be invalid unless the purchaser drove the car away from the yard.

Accepting delivery does not necessarily involve possession of the goods, and the collection of keys for example, may indicate accepting delivery.

If you believe that the form is invalid, or that the purchaser was tricked or misled into signing the form, the purchaser should consider terminating the agreement within the 3 days, and suing the trader for return of the deposit in a court or tribunal. The court or tribunal will then have to make a decision regarding the validity of form, and whether the purchaser had the right to terminate.

3.3 After you have terminated the contract

After the agreement has been terminated under the cooling off provision -

- The trader must:
 - (i) pay to the purchaser any deposit (or other monies) paid under the agreement, less \$100.00 or 1% of the purchase price under the agreement - whichever is greater (this is the penalty referred to earlier); and
 - (ii) return to the purchaser any used car given as a trade-in.
- If the trader arranged the finance, or referred the purchaser to the financier, the financier must:
 - (i) cancel any finance contract which was entered into for purchase of the car; and
 - (ii) cancel any interest in the motor car which relates to such finance.
- The purchaser must, if she/he has possession of the car, return it to the trader.

If, due to a defect beyond the purchaser's control, the car cannot be driven, the purchaser must permit the trader to collect or arrange for collection of the car. The purchaser will be liable for any damage (other than fair wear and tear) which occurred to the car while it was in his/her possession.

Chapter 4

Condition Precedent

A contract is "subject to a condition precedent" if the trader and consumer agree that the contract does not come into being until a certain event has occurred. Thus, the condition must be fulfilled before any contractual obligation exists or becomes operative.

These conditions may be found written into the contract. The conditions will usually include the words "subject to". However, it is not fatal if the condition is verbal and not written on the actual contract. The argument that the contract is subject to a condition precedent should still be put to the trader. As with all verbal statements which are not reduced to writing on the contract, the problems for the consumer arise only when the trader denies that the verbal comment was made. This leaves the consumer with the difficult task of proving that the verbal statement was made.

4.1 Subject to finance

The most common condition precedent is that the "agreement is subject to and conditional upon the purchaser obtaining finance on or before the delivery date".

If the contract is subject to finance and the consumer cannot get finance the deal is off. The consumer must at least have made an application for finance and been refused. A refusal (preferably in writing) may often be obtained, by the consumer simply being honest with the financier. It is in the financier's interest to be informed of the fact that there is a dispute in progress, and that the consumer wishes to terminate the contract.

If the purchaser has specified "bank finance" or something similar, she/he can't be forced to take the car yard's finance, which is often very expensive.

Both the *Credit Act and Consumer Credit Code* provide that if a purchaser makes it known to the trader that she/he requires credit (and it is not being provided by the trader), and the purchaser takes reasonable steps to obtain the credit but fails, then the purchaser may rescind the contract by notice in writing within a reasonable period. *Credit Act* s.21, *Consumer Credit Code* s.124

The Credit Tribunal or Magistrates' Court may settle disputes about the validity of a rescission and make appropriate orders.

4.2 Subject to mechanical test

A purchaser who signs a contract which is conditional upon a satisfactory mechanical test or test

drive, can choose not to continue with the contract if the test or test drive is unsatisfactory.

The *Motor Car Traders Regulations* 1987 state this right, but extends it so that there can be no argument about what is "satisfactory".

Regulation 25(1) of the *Motor Car Traders Regulations* provides that if a purchaser deposits money or other valuables with a trader for the purpose of a test drive or mechanical test, and subsequently returns the car and does not enter a contract, the trader must return the money and/or valuables immediately on demand.

Regulation 25(2) of the *Motor Car Traders Regulations* provides that if a purchaser enters into a conditional contract to buy a car, then deposits money or valuables prior to a test drive or mechanical test, and subsequently decides not to continue with the contract, the trader must return the money and/or valuables immediately on demand.

Another condition precedent which is often verbal, is that the contract is subject to a parent's or spouse's approval.

When relying on conditions precedent to get out of a used car contract use the standard form letter in Appendix D.

Chapter 5

The Motor Car Traders Act

The *Motor Car Traders Act* 1986 and the *Motor Car Traders Regulations* 1987 provide a number of grounds for rescinding a contract.

There are five grounds for rescission under the Motor Car Traders Act:

1. where the cooling off period applies;
2. where the agreement fails to state the prescribed particulars;
3. where the car is substantially different from the description in the prescribed notice;
4. where a false representation has been made in relation to an odometer reading of the motor car;
5. where delivery of the car is delayed more than 14 days.

5.1 Cooling off period

See Chapter 3.1

5.2 Where the agreement fails to state the prescribed particulars

Section 41 and Regulation 27(1) require that an agreement (contract) for the purchase of a used car must state:

- (a) the name of the employee who negotiated the deal;
- (b) a description of the car;
- (c) if registered, the registration number of the car and serial number on the registration certificate;
- (d) the price and other charges;
- (e) time and manner in which payments are to be made;
- (f) value allowed for trade-in;
- (g) recorded distance travelled by car and whether the trader believes this is true; and
- (h) the licence number of the motor car trader.

The agreement must also contain specified terms and conditions. These are set out in Schedule 3 of the Motor Car Traders Regulations 1986, and are set out in Appendix G. If a standard form contract is used these are likely to be included.

Section 45 of the *Motor Car Traders Act* allows a purchaser to rescind the contract if the trader has not included the prescribed particulars, terms and conditions. The purchaser may apply to the Small Claims Tribunal for an order for rescission, or, if the cash price of the car exceeded \$20,000.00, the Magistrates' Court. The application to the court or tribunal must be made within 3 months of the date the agreement was signed. As long as the purchaser has notified the trader of the non-compliance within the 3 month period, the purchaser has another month in which to make the application.

The Legal Service has, to date, not needed to make an application to the Magistrates' Court for an order for rescission. Usually a rescission by letter and dumping the motor vehicle at the trader's yard has proved adequate.

Any such letter should set out the breaches of the Act by the trader as the trader is usually not aware of the requirements of the law. You may also wish to point out to the trader that by failing to comply with the Act, she/he has committed an offence under the *Motor Car Traders Act*. Because the Act gives the purchaser the right to apply to the Small Claims Tribunal (unless the cash price exceeds \$20,000.00), and because no legal costs are awarded in that tribunal, it may be preferable in some circumstances to apply to the tribunal.

5.3 The prescribed notice

A used car (not a commercial, veteran or vintage car) which is offered for sale by a trader must have attached to it a notice containing certain particulars. These are:

- (a) name and business address of the owner (usually the trader);
- (b) the name of the last person registered as the owner of the car who was not a motor car trader;
- (c) the name and address of the last owner of the car who was not a motor car trader (this name will usually be the same as (b));
- (d) the distance shown on the odometer when the trader acquired the car;
- (e) the cash price of the car (unless offered at auction);
- (f) the year of first registration of the car;
- (g) the model designation (if any);
- (h) the registration number of car;
- (i) engine number/serial number on registration; and
- (j) year of manufacture.

Section 45 allows the purchaser to rescind the contract within three months if the car is substantially different from the car described in the notice. Failure to include details such as the name of the owner or past owner is a contravention of the Act, but may not give the purchaser the right to rescind.

The difficulty here is in obtaining a copy of the notice. While the purchaser may be sure that there was a discrepancy, it is common for the trader to have "lost" this notice. The purchaser may have to consider whether it is worthwhile taking action in a court or tribunal, and obtaining a copy of the notice through the legal process (discovery).

See 5.2 above for information about applying for rescission under Section 45.

5.4 A false representation in relation to odometer reading

Section 45 allows the purchaser to rescind a contract on the basis that a false representation has been made in relation to an odometer reading of the car.

Refer to 5.2 above for information about applying for rescission under Section 45.

5.5 Delivery is delayed

The Act requires that the terms and conditions of an agreement should state that where delivery is delayed more than 14 days after the delivery date stated in the contract, the purchaser may terminate the contract by notifying the seller in writing. This is not the case where the delay has been caused by the purchaser. See Regulation 27(1), Schedule 3.

Chapter 6

Quality

Even though a contract may not say that a trader must guarantee the quality of the car being sold, the law states that guarantees of quality are nevertheless included in the contract. These guarantees are called implied conditions and warranties of quality.

These implied conditions and warranties should not be confused with the statutory warranties required by the *Motor Car Traders Act*. The statutory warranties give the purchaser the right, in certain circumstances, to require the trader to repair the vehicle, but they do not give any right to the purchaser to rescind.

Implied conditions and warranties of quality can be found in the *Goods Act*, *Trade Practices Act* and *Motor Car Traders Act*. Breaches of these conditions and warranties can aid you in any battle with a car trader. In this section, the implied conditions in the *Goods Act* are described as an example of a basis for rescission.

Section 89 of the *Goods Act* implies into a contract a condition that the goods are of merchantable quality. Goods are of merchantable quality if they are fit for the purposes for which they are commonly bought, having regard to the price, etc. Section 90 implies a condition that the goods are reasonably fit for the particular purposes for which the goods are required. The clear intention and effect of these two sections is to require that the goods are of sufficient quality.

There is no exact definition of what is sufficient quality for the purposes of a motor vehicle. However, if you are relying on lack of quality, this can be established by an RACV check or an independent mechanic's check. This should be done as early as possible. The sale of a motor vehicle which is not roadworthy is not lawful, but this will not conclusively establish that the car is of insufficient quality. Nevertheless, it may be used as evidence.

Once a breach of an implied condition is established, the consumer is entitled to rescind the contract. Section 16 of the *Goods Act* provides that a consumer cannot rescind the contract "where the contract is for specific goods the property in which has passed to the buyer". Although property normally passes upon delivery, Section 99(2) provides that the buyer shall not be deemed to have accepted the goods by reason only that she/he has taken delivery or that she/he has retained and used the goods. The buyer has a reasonable period in which to rescind. Mere delivery and use by the consumer of the vehicle does not mean that the consumer cannot rescind the contract, but the consumer should act quickly to discharge or rescind the sale and this should be communicated as quickly as possible to the trader.

Section 101 of the *Goods Act* says that where the buyer discharges a sale of goods by reason of a breach of a condition by the seller the goods must be re-delivered and property must revert in the seller. The seller is liable to the buyer for the money paid and the buyer is liable for any damage caused to the vehicle by wilful or negligent action.

Chapter 7

Misrepresentation

If the trader makes a statement to the consumer about some existing or past fact concerning the car, and the statement both induces the consumer to enter the contract and is untrue, this is called misrepresentation. If a misrepresentation has been made the consumer can rescind the contract within a reasonable time after accepting the goods, or claim damages.

There are many examples of misrepresentation. A common misrepresentation is where a consumer is persuaded to sign an agreement and lodge a deposit on the basis that the contract is not a binding agreement but is only a way of holding the car. Other misrepresentations may relate to the quality of the car, such as this is "an original" or "a single owner car".

7.1 Goods Act

Section 100 of the *Goods Act* says that where there is a misrepresentation, whether or not this misrepresentation was fraudulent, the buyer may rescind the sale by notice given to the seller before or within a reasonable time after the acceptance of the goods. Once again, the acceptance of the goods is not the end of the consumer's right to rescind but speed is of the essence. Section 101 provides that where the buyer discovers the misrepresentation and does not rescind, she/he may be taken to have elected to continue the contract.

Section 102 of the *Goods Act* says that it is irrelevant whether the person who made the representation was an agent or otherwise of the seller - the seller will still be liable for any misrepresentation made.

7.2 Fair Trading Act

The *Fair Trading Act* 1985 (Vic) also prohibits misleading conduct and false representations. The Act applies to the supply or proposed supply of goods or services where documents are signed in Victoria, or if no documents are signed, where the goods or services are delivered or supplied in Victoria. The Act applies to a sale agreement, a credit sale agreement, and a hire purchase agreement. It is doubtful whether it would apply to a loan contract, (but the remedies may be available under the *Credit Act or Consumer Credit Code*).

The goods or services must be of a kind ordinarily acquired for personal domestic or household use or consumption; or may be a commercial road vehicle; or must cost less than \$40,000 and must not be acquired for the purpose of re-supply.

Section 11 of the Act states that a person shall not in trade or commerce engage in conduct that is misleading or deceptive or likely to mislead or deceive. Section 12 of the Act provides that a person shall not in trade or commerce:

- (a) falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have a particular history or use;
- (b) falsely represent that services are of a particular standard quality or grade;
- (c) falsely represent that goods are new;
- (ca) falsely represent that a particular person has agreed to acquire goods or services;
- (d) represent that goods or services have a sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (e) represent that the person has a sponsorship approval or affiliation that the person does not have;
- (f) make a false or misleading representation with respect to the price of goods or services;
- (fa) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;
- (fb) make a false or misleading representation concerning the place or origin of goods;
- (g) make a false or misleading representation concerning the need for any goods or services;
- (h) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy; or
- (i) make a representation that is false, misleading or deceptive in any material particular.

Apart from providing offences and penalties for the contravention of some sections of the Act, there is provision for applications to be made to the County Court for an injunction to stop the conduct that contravenes the Act, and more importantly for the purposes of this manual, allows application to the Magistrates' Court (or County Court where the claim exceeds \$40,000), in relation to the contravention of the Act (s.41). The time limit for an application in relation to most sections is 3 years.

The Court may make the following orders:

- (a) an order declaring the whole or part of the contract void from the start or from a particular date;
- (b) an order varying the contract or arrangement from a particular date;
- (c) an order refusing to enforce any or all of the provisions of the contract;
- (d) an order directing the return of money or property;
- (e) an order for damages;
- (f) an order to repair or supply parts;
- (g) an order to supply specified services; and
- (h) an order in relation to an instrument creating or transferring an interest on land, directing that a further instrument be executed varying or terminating the effect of the first instrument.

There is not a specific right to rescind given in this Act, but it is quite clear that the Court may make orders which give a similar result to the purchaser.

If there has been misleading conduct or false representations made, the breach of the *Fair Trading Act* should be asserted, in addition to breaches of the *Goods Act* which give the basis for

rescission.

The *Fair Trading Act* will apply to most situations arising in Victoria. The *Trade Practices Act* (Commonwealth) has mirror provisions, and applies to corporations. In situations where both Acts may apply it is still okay to use the *Fair Trading Act*.

Chapter 8

Unconscionable Conduct

Section 11A of the *Fair Trading Act* prohibits unconscionable conduct in trade or commerce in connection with the supply or possible supply of goods and services. This particular section is limited to goods and services ordinarily acquired for personal, domestic or household use or consumption. Therefore transactions such as the purchase of a commercial vehicle to be used for business purposes would be outside the operation of this section.

Section 11A states that the Court may look at, but is not limited to looking at:

- (a) the bargaining position of the parties;
- (b) whether the consumer was required to comply with conditions that were not reasonably necessary for the protection of the trader;
- (c) whether the consumer was able to understand the documents;
- (d) whether any undue influence or pressure was exerted; and
- (e) the price and circumstances under which the consumer could have acquired equivalent goods.

The Court may not look at circumstances that were not reasonably foreseeable at the time of the alleged contravention.

The Act does not provide penalties for breach of this section, but an application may be made to the Court pursuant to Section 48. Under this Section a Court can make a broad range of orders, including cancelling the contract. The time limit for an application in relation to Section 11A is two years. The Court may make orders as listed above in the discussion about misleading conduct and misrepresentations.

Chapter 9

Waiver

If one party by his/her conduct:

- (a) leads another to believe that the rights arising under the contract will not be strictly insisted upon;
- (b) intends that the other should act on that belief; and
- (c) the other party does act on the belief;

then the first party will not afterwards be allowed to insist on the strict legal rights under the contract when it would be unfair to do so. This legal concept is called **waiver**.

A waiver of strict rights may lead to a dealer losing its rights to insist that the consumer is bound by the contract.

In a motor car dispute, there are often oral waivers of the original contract. A common waiver is that the customer is allowed to change the car in dispute for another car. Other representations at or soon after the signing of the agreement (such as representations that the contract is not binding or that the customer can get his/her money back if he/she is not satisfied) may constitute a waiver.

In this case, it would be appropriate to argue that the dealer has waived its rights to enforce the agreement and that the agreement is therefore at an end.

There are obviously going to be problems in proving an oral waiver and even if proved, the trader might be able to enforce the contract subject to the waiver made, i.e. it may not have the effect of cancelling the car contract, only amending it.

The Consumer Credit Legal Service Inc. has not litigated this point but the Legal Service does use the concept of waiver in many of its letters of rescission to motor car traders.

Chapter 10

Discharging the Contract

A contract is not made until the purchaser receives notice of the acceptance by the seller of the offer to purchase. Thus, the offer to purchase can be withdrawn at any time before notice is given. This may be particularly useful when the offer is made to a manufacturer who takes some days to accept the offer. Remember to act quickly - you can withdraw the offer by telegram.

Chapter 11

Quantifying Damages to which the Trader is Entitled

If the trader does not give back the deposit money paid by the consumer and the matter finds itself before a court or tribunal, the consumer will be liable for damages if the court or tribunal finds that the consumer did not rescind the contract but wrongfully broke the contract.

This chapter examines the damages that the consumer must bear once the used car has been returned to the trader.

Damages is the money which the trader could have got from the sale but which the trader cannot now recover because the consumer has wrongfully broken the contract. The trader must always attempt to mitigate (minimise) his/her losses. This requires that the trader must use his/her best endeavour to sell the car to another consumer.

However, the consumer is liable to compensate the trader for "loss directly and naturally resulting in the ordinary course of events from the breach" (Section 56(2) Goods Act). The trader must prove this "loss" and he does this by proving the non-recoverable loss of profit which resulted from the fact that the consumer wrongfully broke the contract. *Kargotich v. Mustica (1972-4) W.A.R. 167*.

How is the trader's loss of profit calculated? The following rules can be applied:

- (i) Where the trader has made every attempt to re-sell a car returned to him/her by a buyer, but has not been able to re-sell the car, the consumer will be liable for the full profit mark-up which the trader would receive from the sale.
However, if the consumer believes that the trader has not made a concerted attempt to re-sell the car he/she will not be liable for the full loss of profit. However, the onus of proving that the trader has not minimised his/her loss lies with the consumer.
- (ii) Where the trader has re-sold a car returned to him/her by a buyer, the trader must prove that he/she has suffered an irretrievable loss of profit over and above the re-sale price received by the trader. These damages will be only nominal unless the trader can establish that the supply for the type of car is greater than the demand.

Supply will exceed demand when the trader can get more of a particular type of car than he/she can sell. If supply is greater than demand the trader has lost "a sale". Then the trader must be paid his/her full loss of profit.

If the trader cannot establish that supply exceeded demand, then the trader is entitled only to the difference between the price at which he/she originally sold the vehicle to the consumer and the price at which he/she can re-sell the vehicle (ie. the difference between the contract price and market price). As the measurement of the market will inevitably be the contract price then the damages should be nothing or nominal.

This method of assessment of damages was formulated in *Charter v. Sullivan (1957) 1 All ER*

809 approved in Australia in the judgments of *Kargotich v. Mustica* 1972-4 WAR 167 and *W. & J. Investments Ltd v. Bunting & Anor* (1984) N.S.W. L R 331.

In the initial dealings with the trader, it is important to assert that the consumer will only ever be liable for nominal damages under sub-section 56(2) of the *Goods Act*. This is the estimated loss directly and naturally recovered in the ordinary course of events from the consumers breach of contract.

Chapter 12

Contracts for Used Cars where the Credit Act or Consumer Credit Code Apply

Usually purchasers will enter into a number of contracts. These may include a car sale agreement, a finance contract, a consumer mortgage, insurance contracts and perhaps even a guarantee.

The most common transaction will involve an agreement for sale of the vehicle between the purchaser and the car trader, a separate loan agreement between the purchaser and the financier and a mortgage over the vehicle purchased.

If you are looking at a case where a person has been signed as a co-borrower and only meant to be a guarantor you should look at the manual *How to Get Out of a Co-borrower Contract when it should have been a Guarantee* which deals with this situation.

Both the *Credit Act* and the *Consumer Credit Code* apply to the finance contract, insurance (if taken out at sometime), consumer mortgage and guarantee. The other documents signed at the same time, or as part of the same transaction may also be relevant to the remedies that may be available under the *Credit Act*, or *Consumer Credit Code*.

If the trader arranged the finance or introduced the purchaser to the credit provider then this Chapter may be relevant.

If the purchaser arranged their own finance then these sections will only apply to the transaction/s between the purchaser and financier.

12.1 Does the Credit Act apply?

Most sections of the *Credit Act* apply to regulated contracts. These are contracts where:

- if the contract is a loan - the amount financed is no more than \$20,000 and the annual percentage rate (the interest rate) exceeds 8% (or 14% where the contract was signed by the debtor before 7 December 1993).
- if the contract is a credit sale contract (where the buyer of the vehicle is paying the seller the purchase price by instalments over time) - the cash price of the vehicle is no more than \$20,000 and a charge (e.g. interest) is made for the provision of credit. This will include those cases where no interest has been charged, and the cash price has been inflated due to the vehicle being sold "on terms".

The *Credit Act* does not apply if the consumer (referred to as the debtor) obtaining the finance is a corporation, or where the credit contract was entered into after 7 July 1986 and the purpose of the contract was to provide credit exclusively for a business purpose.

Special rules apply if either, the loan contract is secured by a mortgage over, or the credit sale is for the purchase of, a commercial vehicle or farm machinery. In these cases:

- the monetary ceiling of \$20,000 and the annual percentage rate floor of 8% do not apply.
- the business use exemption referred to above does not apply, unless the commercial vehicle or is purchased by way of a lease or hire purchase.

A large number of consumer transactions are exempt from being regulated contracts under the *Credit Act*, including:

- bank overdrafts and fully drawn advances,
- credit union lending before 1 February 1992 - though some partial exemptions apply to credit union loans after that date.

The linked credit provider provisions of the *Credit Act* apply to a broader range of credit contracts than regulated contracts. In essence these provisions apply where there is a linked credit provider (see 12.3) who is financing a contract for the sale of goods or services where the purchaser is not a corporation, and the sale price is not more than \$20,000.

Again, if the goods purchased are a commercial vehicle the \$20,000 monetary limit does not apply.

The maximum interest rate provisions also apply to a broader range of contracts. These provisions apply to any credit contract where the debtor is not a corporation. (See Chapter 13.1).

12.2 When does the Consumer Credit Code apply?

The Consumer Credit Code applies to any finance contract entered into by a consumer on or after the Code's introduction¹ where:

- the consumer is not a company
- the credit is provided wholly or predominantly for personal, domestic or household purposes
- a charge is made for the credit, eg it's not interest-free
- the credit is provided by someone who is in the business of providing credit, (for example a

¹1st November 1996 in all States and Territories except Tasmania. In Tasmania the Code applies to some credit providers (usually national organisation) from 1 November 1996. However it only applies to all credit providers from 1 March 1997.

bank or finance company) or provides credit incidentally to another business activity (for example, a retailer).

There are a number of exceptions to the Code. The Code does not apply to:

- a credit contract where the period of the contract is limited to 62 days or less
- the provision of credit where there is no agreement or contract to provide credit between the consumer and financier (for example, where a cheque account is overdrawn but there is no agreed overdraft facility)
- a revolving credit contract (such as an overdraft or credit card account) where the only charge that is made for providing credit is an account-keeping or other administrative charge that does not vary according to how much credit is provided
- credit provided by way of a bill of exchange or promissory note
- credit provided by a licensed pawnbroker
- credit provided by an employer (or a subsidiary or related company of that employer) to an employee (or former employee) if -
 - a condition of providing credit is that the consumer is an employee of the employer, or
 - the credit is provided on more favourable terms than provided to the general public.

12.3 Linked credit

The linked credit provisions of the *Credit Act* and the *Consumer Credit Code* are very similar and so can be dealt with together. Both the *Credit Act* and the *Consumer Credit Code* enable a purchaser to obtain damages from a linked credit provider of a supplier (e.g. @ finance company linked to licensed motor car trader) for misrepresentation, breach of contract or failure of consideration if certain circumstances are met.

This means that the purchaser may take action against both the supplier and the credit provider, and may use the liability of the credit provider under this section as a defence to proceedings brought by the credit provider. The provisions provide that the supplier and linked credit provider must be sued jointly or both joined in proceedings unless the supplier is bankrupt, in liquidation, can't be found etc. Where a contract is rescinded and there is a linked credit provider, the loan is also rescinded and any mortgage is discharged to the extent that it relates to that loan. If there is a mortgage over the car then the car must be delivered to the linked credit provider upon rescission.

Both the *Credit Act* (s.5) and the *Consumer Credit Code* (s.117) define a linked credit provider as a credit provider with whom the supplier:

- (a) has a trade or hire agreement;
- (b) by arrangement regularly refers people to obtain credit;
- (c) by arrangement has contracts, loan applicants or offers available to purchasers; or
- (d) by arrangement has loan documents signed at their premises.

But even if a credit provider meets the above conditions the credit provider may not be liable if:

- (a) this particular approach to the credit provider was not induced by the supplier (s.24(2)(a) *Credit Act*, s.119(2)(a) *Consumer Credit Code*);
- (b) in the case of a loan contract the credit provider after due inquiry and before becoming linked, was satisfied that the supplier was of good reputation in respect of his financial standing and ethical standards of trading and since becoming linked and before the contract was entered into he did not have cause to suspect that the purchaser might be entitled to claim damages for breach of contract, misrepresentation or failure of consideration, or might be unable to meet his liabilities as they fell due (s.24(2)(b) *Credit Act*, s.119(2)(b) *Consumer Credit Code*); or
- (c) in the case of a continuing credit contract, before the contract was made the credit provider could not have been expected to suspect having regard to the nature and volume of business carried on by the credit provider, that the debtor might be entitled to claim damages (s.24(2)(c) *Credit Act*, s.119(2)(c) *Consumer Credit Code*).

Disputes arising under the linked credit provisions can be heard by the Magistrates' Court or the Credit Tribunal (s.28 *Credit Act*, s. 128 *Consumer Credit Code*). Application should be made to the Tribunal for a declaration under Section 28 as to the rights and liabilities of the parties under the operation of this section.

Because of the defences listed above it may be difficult to establish that a credit provider is a linked credit provider, though if it is a possibility it should always be asserted.

Chapter 13

Technical Breaches of the Credit Act and Consumer Credit Code to Look Out For

Two categories of errors can, on occasions, be identified with credit contracts which will have a significant effect on whether the credit contract is fully enforceable by the credit provider.

13.1 Excessive interest

A credit contract and any mortgage given to a credit provider in relation to that contract is unenforceable if the annual interest rate exceeds 48% (s. 150A *Credit Act*, s. 39 *Consumer Credit (Victoria) Act*). The *Credit Act* prohibition applies to all credit contracts (including those for amounts greater than \$20,000) provided the debtor is not a corporation. The Code's prohibition is restricted to contracts to which the Code generally applies (see Chapter 12.2). A mortgage securing a credit contract will be void if the interest rate exceeds 30% (s. 150B *Credit Act*, s. 40 *Consumer Credit Code*).The "30% rule" applies to regulated contracts under the *Credit Act* and credit contracts to which the *Consumer Credit Code* applies.

The effect is that the purchaser will get to keep the car and will not have to make payments on the credit contract if the interest rate exceeds 48%. If the interest rate exceeds 30% then any mortgage held over the vehicle or any other property will be void.

13.2 Document errors

Both the *Credit Act* and the *Consumer Credit Code* contain useful civil penalties where the credit provider incorrectly completes the credit contract.

Loan Contracts to be in writing

The *Credit Act* (s.31) and the *Consumer Credit Code* (s.12) require a loan contract or credit sale contract to be in writing, The *Credit Act* also requires the contract to be signed by the debtor (s.31).

Disclosure Requirements.

Both the *Credit Act* and the *Consumer Credit Code* provide that a loan contract and credit sale contract disclose specific information concerning the amount lent and the cost of credit.

The required disclosures for a credit sale contract and loan contract as contained in Section 35 and 36 of the *Credit Act* are listed in Appendices H and I respectively. A breach of any disclosure requirement in Section 35 or Section 36 does not give rise to a right to rescind the contract, but does result in an automatic loss of the credit provider's right to charge interest credit charges on the contract. However this is subject to the credit provider's right to apply to the Credit Tribunal for reinstatement of the interest/credit charges under Section 85 of the *Credit Act*.

The *Consumer Credit Code* has a similar regime. Section 15 of the Code requires a credit provider to disclose information listed in Appendix J in the credit contract. However the penalty regime for a credit provider who breaches the disclosure provisions does not *automatically* result in the credit provider losing the right to credit charges. A civil penalty only applies where a *key* disclosure provision has been breached, and only applies once a Court or Credit Tribunal has first determined that the disclosure provision has been breached. Application for such a determination can be brought by a debtor or guarantor, credit provider or government consumer agency. Key disclosures are those disclosures in italics in Appendix J.

Where the application is brought by the debtor or guarantor the maximum penalty is loss of interest payable under the contract. Where the application is brought by a credit provider or government consumer agency then the maximum penalty is a civil fine which is not payable to the debtor but to a government consumer education fund.

Chapter 14

Unjust Contracts

Both the *Credit Act* and the *Consumer Credit Code* allow the Credit Tribunal to re-open unjust credit contracts.

14.1 Credit Act

Section 146 of the *Credit Act* enables the Credit Tribunal to re-open a transaction giving rise to a contract or mortgage if the contract or mortgage is unjust.

Section 145 of the *Credit Act* states that a contract or mortgage is unjust if -

- (a) it is unconscionable, harsh or oppressive; or
- (b) the annual percentage rate is excessive, having regard to the risk, value of any security, the amount of the consideration, the time for repayment, the amount financed and any other relevant circumstances.

Section 147 sets out the matters to be considered by the tribunal.

These include -

- (a) whether there was any material inequality in the bargaining powers of the parties;
- (b) whether the provisions of the contract or mortgage were the subject of negotiation;
- (c) whether the debtor could have altered or rejected any of the provisions of the contract or mortgage;
- (d) whether any of the provisions are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of a party;
- (e) whether the debtor or his/her representative was reasonably able to protect the debtor's interests because of age or physical or mental capacity;
- (f) the form or intelligibility of the language in which the contract is prepared;
- (g) whether and when independent legal or other expert advice was obtained;
- (h) whether undue influence, unfair pressure or unfair tactics were used by, or on behalf of, or apparently on behalf of, or with the knowledge of the credit provider;
- (i) the conduct of the parties in relation to similar contracts to which any of them have been a party;
- (j) the commercial or other setting, purpose or effect of the contract.

The courts have taken a restrictive approach to interpreting the Credit Tribunal's power to re-open a transaction giving rise to a credit contract or mortgage. The transaction may only be re-opened where either:

- the terms or substance of the *credit contract* are unjust or
- the process leading to the consumer entering into the *credit contract* was unjust.

The rationale behind this approach is that Part 9 of the *Credit Act* only allows the transaction

to be re-opened where the credit contract is unjust. and for this to occur the credit provider must have acted in some way so that its “conscience” is affected.

The previous approach taken by the Credit Tribunal was to consider whether the overall *transaction* that *gave rise* to the credit contract was unjust. Therefore, where the principal unfairness in a transaction concerning the purchase of a motor vehicle on finance related to a misrepresentation about the motor vehicle by the dealer, the Tribunal would have contemplated reopening this transaction and possibly setting aside both the car sale contract and the resulting credit contract. This approach can no longer be taken.

More recent cases, such as *Custom Credit Corporation -v- Lynch* (1993) ASC 56-201 have further limited the application of the reopening provisions of the Credit Act where the credit contract is signed by a consumer in a retail outlet such as a car yard. In Lynch's case the consumer purchased a caravan from a caravan dealer. It was alleged that the dealer had made a number of false misrepresentations concerning both the caravan and the credit contract. On the basis of these misrepresentations the Credit Tribunal reopened the transaction and set aside the credit contract. On appeal, the Supreme Court of Victoria decided the Credit Tribunal had acted incorrectly. It held that a misrepresentation by the dealer, even in relation to the credit contract, did not allow the credit contract to be reopened unless evidence could be given that the dealer was acting as an agent of the credit provider. If this could not be shown then the conscience of the lender was not affected and the credit contract could not be reopened as unjust.

Some credit providers rely on the decision in Lynch’s case as support for the proposition that a credit provider is never responsible for the acts of a dealer. This is incorrect, a credit provider is responsible for the acts of a dealer who is acting as *agent* for the credit provider.

Often a motor car trader will be an agent of the credit provider, however, proving this can be difficult. Agency can only arise if the financier and the trader agree to an agency arrangement, or where the financiers conduct is such that the trader appears to be an agent of the financier.

14.2 Consumer Credit Code

The position under the *Consumer Credit Code* is very similar to that under the *Credit Act*. The Code only allows a transaction to be reopened if the credit contract is unjust. However, two important differences apply.

First, the definition of "unjust" in the Code is not restricted to a contract *that* is "unconscionable, harsh or oppressive". The Code defines unjust as *including*, but not restricted to, a contract that is unconscionable, harsh or oppressive.

This is a broader concept. Under the *Credit Act* a contract is only able to be unjust if the conscience of the lender is affected. This means the credit provider must have acted improperly. This is not the case under the Code. The contract may be unjust even if the *credit*

provider has not acted unjustly itself.

Second, section 118 of the *Code* provides that where there is a *tied* loan contract or tied continuing credit contract in relation to a sale contract, any misrepresentation or statement by the dealer, or any person acting on behalf of the dealer, about the credit contract will be taken to be a misrepresentation or statement made by the credit provider. No evidence of agency is required, and so the problems associated with Lynch's case and proving agency are avoided.

A tied loan contract or tied continuing credit contract occurs where the credit provider is a linked credit provider of the dealer, and, in the case of a tied loan contract, either knows or should have known that the consumer is entering into the loan in order to pay for the goods or services supplied by the dealer.

Chapter 15

Hire Purchase

The effect of the *Credit Act* 1984 and *Consumer Credit Code* is that hire purchase is now an infrequent form of finance in relation to the purchase of motor vehicles for private use. Under the *Consumer Credit Code* a hire purchase agreement in relation to a vehicle used for private purposes will virtually always be deemed to be a credit contract and so regulated by the Code.

However, hire purchases still remains common in relation to vehicle financing for business purposes. The *Hire Purchase Act* 1959 can be of great assistance in relation to a dispute relating to a car in the same way that the *Credit Act* and *Consumer Credit Code* can assist.

15.1 Disclosure requirements

Section 3 of the *Hire Purchase Act* provides that a hire purchase agreement shall be in writing and signed by each party to the hire purchase agreement. The hire purchase agreement must also contain the disclosures required in section 3(2) of the Act and these disclosures are:

- the cash price of the goods subject to the hire purchase agreement;
- the amount of any deposit or trade in;
- the amount representing the difference between the cash price and the amount of any deposit or trade in;
- the amount of any third party insurance relating to the agreement;
- any amount payable for maintenance of the goods;
- any amount payable to cover the expenses of delivering the goods to the hirer;
- any amount of vehicle registration fees;
- any amount of stamp duty in relation to the agreement;
- the total of the above amounts representing the total amount payable under the agreement;
- a description of the goods sufficient to identify them;
- the repayment details;
- the amount of any terms charges.

The terms charges under the hire purchase agreement are essentially the amount of interest charged, and is the amount in excess of the amounts payable in relation to the cash price of the goods plus the other amounts stated above. These disclosures must be set out in a tabular form and failure to provide these required disclosures results in the financier not being able to recover terms charges on the agreement. Civil penalty breaches are surprisingly common, and unlike the situation in relation to the *Credit Act* and *Consumer Credit Code* there is no legislative capacity under the *Hire Purchase Act* for the financier to seek reinstatement of terms charges lost due to a documentary error.

A number of common errors on hire purchase documentation continue to occur. As stated, the hire purchase agreement must correctly state the cash price of the goods subject to the hire purchase agreement and the amount of any trade in provided by way of deposit. It is common practice for car dealers to “jack up” the price of the trade in vehicle and the cash price of the

goods in order to make it appear that the consumer's deposit represents a higher proportion of "equity" in the overall deal than is otherwise the case. For example, consumer A may wish to purchase a \$10,000 vehicle and has a trade in vehicle at \$1,000. From a financier's perspective this is a risky deal as the amount being required to be lent is 90% of the cash price of the vehicle. However, if the trader were to jack up the prices so that the trade in was now valued at \$3,000 and the vehicle to be purchased was now valued at \$12,000, then the amount required to be financed now represents only 75% of the "cash price of the goods". Of course, in such a situation both the cash price of the goods and the trade in vehicle have been incorrectly stated, giving rise to the civil penalty of loss terms charges.

Another common error made by dealers when documenting hire purchase agreements is that where the trade in vehicles value is less than the amount owed on that vehicle to a financier, then the additional amount required to pay out the financier on that vehicle is added to the hire purchase agreement. Therefore if the trade in vehicle was valued at \$5,000 and it was subject to a finance agreement which had a pay out figure of \$5,500, then \$500 would be added to the hire purchase agreement. The courts have held that such an arrangement is not permissible under the *Hire Purchase Act* as it is not lawfully possible to effectively hire money, as represented by the amount required to pay out the financier and so the agreement is incorrectly documented, and terms charges are lost.

Finally, it is common for dealers to fail to separately specify fees and charges as required by the *Hire Purchase Act*. Often dealers simply include these charges as part of the cash price and again this will give rise to a loss of terms charges.

15.2 Re-opening of hire purchase agreements

Section 24 of the *Hire Purchase Act* allows a hirer to seek to re-open a hire purchase agreement where that agreement is harsh and unconscionable or is otherwise such that a court of equity would give relief. Essentially, this provision is similar to the re-opening provisions contained in the *Credit Act* but two important limitations should be noted.

First, proceedings to re-open a hire purchase agreement can only be brought:

- in a case where the financier has taken possession of the goods subject to the hire purchase agreement - within four months of the financier serving on the hirer a fourth schedule notice under the Act (which is given to a hirer following repossession),
- in any other case - within four months of the hire purchase agreement ending.

Second, an application under Section 24 of the *Hire Purchase Act* must be made to a Magistrates Court, and so the Credit Tribunal cannot be used. The disadvantage to the consumer is twofold. The consumer is liable for costs of they lose, and the Magistrates are usually unaware of consumer issues relating to credit.

APPENDIX A
INSTRUCTION SHEET

Purchaser:.....

Trader:.....

Any other party:.....

Name of traders representative and any other people present:

.....

Place:.....

(initial approach made at appropriate trade premises? If not, date, and time taken to negotiate deal - refer to manual on Door-to-Door Sales).

Purchase price:.....

Amount allowed for trade-in:.....

Description of transaction:.....

.....

(What doesn't seem fair about the transaction (gut feeling)?)

Within cooling off period? (see 3.1).....

Condition precedent eg. subject to finance, subject to mechanics report, etc? (see 4).....

Compliance with Motor Car Traders Act (see 5)

- (a) agreement fails to state prescribed particulars (see 5.2);
- (b) car substantially different to description in prescribed notice (see 5.3);
- (c) false representation in relation to odometer reading (see 5.4);
- (d) delayed delivery (see 5.5).

Car of merchantable quality (Goods Act) (see 6).....

Misrepresentation? (see 7).....

Unconscionable conduct? (see 8).....

Waiver? (see 9).....

APPENDIX A

INSTRUCTION SHEET - WHERE CREDIT ACT OR CONSUMER CREDIT CODE APPLIES

Does the Credit Act or Consumer Credit Code apply? See 12.1 & 12.2

Purchaser:.....

Co-borrower:.....

Guarantor:.....

Mortgagor:.....

Trader:.....

Financier:.....

Insurer:.....

Any other party:.....

Names of car trader's representative, financiers representative and any other people present:.....

.....

Place:.....

(Initial approach made at appropriate trade premises, if not see manual on Door-to-Door Sales.

Date/time and time taken to negotiate deal:.....

.....

Do linked credit provisions apply? (see 12.3).....

Description of transaction:.....

What doesn't seem fair about the transaction?.....

.....

Within cooling off period? (See 3.1).....

Condition precedent eg. subject to finance subject to mechanics test? (see 4).....

.....
Compliance with Motor Car Traders Act:

- (a) agreement fails to state prescribed particulars (see 5.2)
- (b) car substantially different to description in prescribed notice (see 5.3)
- (c) false representation in relation to odometer reading (see 5.4)
- (d) delayed delivery (see 5.5)

Car of merchantable quality (Goods Act) (see 6).....

Misrepresentation? (see 7 and 14).....

Unconscionable conduct? (see 8 and 14).....

Waiver? (see 9).....

ABOUT THE CONTRACT (see 13 and 14)

Purchase price:.....

Deposit:.....

Amount financed:.....

Amount requested (if different):.....

Amount allowed for trade-in:.....

Any discrepancies (eg. amount allowed for trade-in or deposit misstated, etc).....

Disbursements correct? (eg. stamp duty).....

Interest rate:

- (a) was it discussed?.....
- (b) does it differ from rate discussed?.....
- (c) is it above 48% (breach s.150A Credit Act, s.39 Consumer Credit (Vic) Act);.....
- (d) is it above 30% and secured by mortgage (breach s.150B CA, s.40 CC(V)A);
.....
- (e) is it correctly stated (can be checked by Consumer Advocacy and Financial Counsellors Association of Victoria)?.....

Number of payments:.....

Was it discussed?.....

Amount of each payment:.....

Was it discussed?.....

Insurance: N.B. amount for each insurance must be listed separately

Mortgaged property insurance? (possible breach of s.36):

.....

Life insurance:.....

Unemployment insurance:.....

Sickness, injury, disability or death insurance:.....

.....

Other insurance:.....

Was the insurance requested by purchaser?.....

Was he/she compelled to take it?.....

Was there a choice of insurer?.....

Names of insurers?.....

Whether commission charge payable and to whom:.....

Any refinancing?.....

Details of previous contracts:.....

Mortgage taken:.....

Land:.....

Vehicle:.....

Other:.....

Who does mortgage property belong to?.....

Guarantee?.....

By whom?.....

Relationship to purchaser:.....

When given:.....

What documents given and when?.....

For what amount?.....

See Sections 136 to 144 Credit Act, and sections 50 to 57 Consumer Credit Code.

N.B. Guarantor may need separate representation as guarantor's interest may conflict with those of purchaser.

Misrepresentation?.....

Unconscionable conduct?.....

Undue influence?.....

Unfair pressure?.....

Unfair tactics?.....

Purchaser's description of events:.....

APPENDIX B

LETTER REQUESTING DOCUMENTS - CREDIT ACT

Date

Greedy Finance Company
62 Interest Street
PROFIT VALLEY 1234

Dear Sir/Madam,

JOSEPHINE CUSTOMER - CONTRACT NO. 67891234

Could you please provide the following information in relation to the above contract:

1. Statement pursuant to Section 45 of the Credit Act 1984.
2. Copies of all contracts including insurance contracts, guarantees and mortgages pursuant to Section 46 of the Credit Act 1984.
3. Statement of the net balance due with details of calculations pursuant to Section 104 of the Credit Act 1984.

I await your response within 14 days of today's date.

Yours faithfully,

JOSEPHINE CUSTOMER

(B) LETTER REQUESTING DOCUMENTS - CONSUMER CREDIT CODE

Date

Greedy Finance Company
62 Interest Street
PROFIT VALLEY 1234

Dear Sir/Madam,

JOSEPHINE CUSTOMER - CONTRACT NO. 67891234

Could you please provide the following information in relation to the above contract:

1. Complete statement of account pursuant to Section 34 of the Consumer Credit Code.
2. Copies of all contracts including insurance contracts, guarantees mortgages and any notices under the Consumer Credit Code as required by Section 163 of the Consumer Credit Code.
3. Statement of the pay out figure of the credit contract with details of its calculation pursuant to Section 76 of the Consumer Credit Code.

I await your response within 30 days of today's date.

Yours faithfully,

I, JOSEPHINE CUSTOMER

APPENDIX C

LETTER CANCELLING CAR CONTRACT WITHIN COOLING OFF PERIOD

Date

Name and address of Motor Car Trader

Dear Sir/Madam,

MOTOR VEHICLE REGISTRATION NO. XYZ 124

I hereby terminate any agreement for sale of the above used motor car pursuant to Section 43 of the Motor Car Traders Act 1986.

I require you to immediately repay any monies and/or trade-in due to me on termination of this agreement.

Yours faithfully,

Signed

CC: Finance Company
Office of Fair Trading

Notes:

1. As you only have three days in which to terminate, this letter must be delivered to the trader within this period - preferably by hand.
2. It is suggested that a copy of the letter be retained. If hand delivered it is also suggested that a friend be taken to act as a witness to the service of the letter.
3. If you have the car, it must be returned to the trader, preferably at the same time as you deliver the letter.

APPENDIX D

Date

Name and address of Motor Car Trader

Dear Sir/Madam,

MOTOR VEHICLE REGISTRATION NO. XYZ 123

I hereby rescind any agreement for sale of a motor car made in respect of the abovementioned vehicle on the basis of a non-fulfilment of a condition precedent as to finance (or whatever the condition precedent is you are relying upon).

I require you to immediately repay the full amount of any deposit held by you in default of which legal proceedings will be issued in the Small Claims Tribunal. Your cheque should be made payable to the writer and sent to (insert your address).

Yours faithfully,

SIGNED

CC Finance Company
Office of Fair Trading

Notes

1. This letter can be used where the car is purchased from a private person, but the reference to Small Claims Tribunal should be excluded, and no copy should be sent to the Office of Fair Trading.
2. Note that this letter can also be used where the motor vehicle is new.
3. Ring up the owner or the trader and read the letter out.
4. Don't forget to return the motor vehicle to the trader.
5. If the trader proves cantankerous add this to the letter:
"In the unlikely event that you are correct in asserting that the purported contract was wrongfully repudiated, then you are only entitled to nominal damages under sub-section 56(2) of the Goods Act. In view of the above, it would be in the mutual interest of all if

the contract is cancelled".

6. If you are able to rely on the cooling off period as a "fall back" position, you may wish to add "Alternatively, I rely on Section 43 of the Motor Car Traders Act 1986, and terminate the agreement pursuant to that section".

A.

APPENDIX E

LETTER

Date

Name and address of Motor Car Trader

Dear Sir/Madam,

MOTOR VEHICLE REGISTRATION NO. XYZ 123

I hereby severally rescind any agreement for sale of a used motor car made in respect of the abovementioned vehicle on the following grounds:

1. The vehicle is not of merchantable quality and there has been a breach of the condition implied pursuant to Section 89 of the Goods Act 1958.
2. The statutory right conferred by Section 45 of the Motor Car Trader Act 1986.
3. (Any other grounds for rescission).
4. Breach of Fair Trading Act or other legislation.

I hereby require you to immediately repay the full amount of any deposit held by you in default of which legal proceedings will be issued in the Small Claims Tribunal. Your cheque should be made payable to the writer and sent to (insert your address).

Yours faithfully,

SIGNED

CC. Finance Company
Office of Fair Trading

Notes

1. Options 2 and 4 are only available where the car is purchased from a licensed motor car trader.

2. Ring up the owner or trader and read the letter out.
3. Don't forget to return the motor vehicle to the trader.
4. If the trader proves cantankerous add this to the letter:

"In the unlikely event that you are correct in asserting that the purported contract was wrongfully repudiated, then you are only entitled to nominal damages under Sub-section 56(23) of the Goods Act. In view of the above, it would be in the mutual interest of all if the contract is cancelled".

APPENDIX F

LETTER TO CREDIT PROVIDER

Date

Name and address of credit provider

Dear Sir/Madam,

BORROWER: _____ CONTRACT NO. _____

I enclose a copy of my letter to (motor car trader's name) rescinding my agreement to purchase vehicle registration number

1. Pursuant to Section 23 of the Credit Act 1984/ Section 125 Consumer Credit Code I require you to discharge my loan contract, mortgage, and the guarantee signed by (delete items not applicable).
2. As you are a linked credit provider as defined by Section 24 of the Credit Act 1984/ Section 119 Consumer Credit Code, I advise that legal proceedings will be issued against you jointly with (name of motor car trader) if this matter is not resolved to my satisfaction.

Yours faithfully,

SIGNED

CC. Motor car trader

Note

1. Option 2 is only available where the credit provider is a linked credit provider (see 12.3).
2. The car trader should also be sent a copy of this letter.
3. This letter should also allege any breaches of the Credit Act 1984/ Consumer Credit code

and/or grounds for re-opening the credit contract if applicable.

A APPENDIX G

SCHEDULE 3 MOTOR CAR TRADERS REGULATIONS PRESCRIBED TERMS AND CONDITIONS

Subject to finance

1. (1) Where this contract is subject to the purchaser obtaining finance, the contract is conditional upon the purchaser obtaining finance approval:
 - (a) within the time stated in this contract;
 - (b) of the amount stated in this contract;
 - (c) from the credit provider named in this contract (or from a similar type of credit provider);
 - (d) for the type of finance stated in this contract; and
 - (e) upon reasonable terms and conditions in the circumstances

Transfer to the credit provider

2. Where requested by the purchaser the seller shall transfer title to the purchaser vehicle to the purchaser's credit provider upon payment of the total purchase price to the seller.

Delays in delivery

3. (1) The seller shall make every reasonable effort to make the purchaser vehicle available for delivery on or before the delivery date stated in this contract. Where delivery is delayed more than 14 days the purchaser may terminate this contract by notifying the seller in writing, unless the delay is caused by the purchaser.
 - (2) The purchaser shall take delivery of the purchase vehicle within 7 days of being notified by the seller that the vehicle is ready for delivery. If the purchaser fails to take delivery within this time the seller may terminate the contract by notice in writing.

Trade-in conditions

4. (1) Where the purchase involves a trade-in vehicle then the amount for the trade-in (net trade-in allowance) shall be deducted from the total purchase price. The net trade-in allowance will be the amount allowed on the trade-in vehicle less any amount to be paid by the seller to discharge the interest of any other person in the vehicle.
 - (2) The trade-in vehicle must be delivered to the seller no later than the date of delivery of the purchase vehicle. If the trade-in vehicle is delivered after this date or is not in substantially the same condition as at the date of this contract then

the net trade-in allowance may be adjusted by an amount equal to the change in the fair market value of the trade-in vehicle between the date of this contract and the date of delivery to the seller.

- (3) The purchaser's interest in the trade-in vehicle shall be pass to the seller:
 - (a) when the purchaser accepts delivery of the purchase vehicle; or
 - (b) when the purchaser has delivered the trade-in vehicle to the seller and the seller has paid the net trade-in allowance to the purchaser or acknowledged in writing that this amount has been credited towards total purchase price, whichever first occurs.
- (4) The seller shall not, without the prior written consent of the purchaser, sell or agree to sell the trade-in vehicle before delivery of the purchase vehicle to the purchaser.

Termination

5. (1) Where the contract is lawfully terminated by the seller due to a breach of this contract by the purchaser then:
 - (a) the purchaser shall forfeit the amount stated in this contract to the seller provided that the amount does not exceed 5 per cent of the total purchase price;
 - (b) where the amount (if any) has been paid towards the purchase price and that amount exceeds the forfeitable amount then the seller shall:
 - (A) refund to the purchaser so much of the amount paid that exceeds the forfeitable amount; and
 - (B) return any trade-in vehicle to the purchaser; and
 - (c) where an amount (if any) has been paid towards the purchase price and that amount does not provide the seller with the forfeitable amount and the trade-in vehicle has been delivered to the seller then the trade-in vehicle may be forfeited to the seller and the purchaser credited with the net trade-in allowance. If this amount and any other amount paid by the purchaser exceeds the forfeitable amount then the excess shall be refunded to the purchaser.
- (2) Where this contract is lawfully terminated by the purchaser due to a breach of this contract by the seller then the seller shall:
 - (a) refund the purchaser all money paid by or on behalf of the purchaser; and
 - (b) return any trade-in vehicle to the purchaser.
- (3) Where this contract is lawfully terminated by either the purchaser or the seller due to clause 1 or for any reason other than a breach of this contract then the seller shall:
 - (a) refund to the purchaser all money paid by or on behalf of the purchaser;

and

(b) return any trade-in vehicle to the purchaser.

- (4) Where this contract provides for the seller to return any trade-in vehicle to the purchaser but the seller has, with the prior written consent of the purchaser, sold or agreed to sell the trade-in vehicle then this contract will be complied with if the seller pays to the purchaser:
- (a) an amount equal to the net trade-in allowance; or
 - (b) where the purchaser or seller have agreed on a value as the fair market value of the trade-in vehicle-that agreed value less any trade-in payout made or to be made by the seller.
- (5) Where the seller returns any trade-in vehicle to the purchaser and the seller has carried out repairs on the vehicle with the consent of the purchaser then the seller shall be entitled to an amount equal to the reasonable cost of those repairs.
- (6) Where either the purchaser or the seller wishes to terminate this contract in accordance with this clause he must give written notice to the other party of the decision to terminate.
- (7) Nothing in this clause affects the rights and duties conferred by section 43 of the **Motor Car Traders Act 1986** or Regulation 11 of the Motor Car Traders Regulations 1987.

Non exclusion of statutory warranties and other rights

6. The benefits conferred by this contract and by the seller's warranty, if any, are in addition to all other rights and remedies in respect of the purchaser vehicle which the purchaser has under the **Trade Practices Act 1974** and any other Commonwealth, State or Territory laws.

Note: The parties to this contract may include other conditions if those conditions do not reduce the rights given to either party by or under the **Motor Car Traders Act 1986**.

A APPENDIX H

CREDIT ACT - DISCLOSURES FOR CREDIT SALE CONTRACTS.

Credit sale contracts must include:

- (a) the date on which the offer or contract was signed by the purchaser;
 - (b) a description of the goods or services;
 - (c) the amount financed - must be shown separately;
 - (i) deposit or trade-in allowance;
 - (ii) the cash price of the goods or services;
 - (iii) balance after deposit or trade in deducted;
 - (iv) installation charges;
 - (v) delivery charges;
 - (vi) maintenance charges;
 - (vii) registration fees and compulsory insurance;
 - (viii) amounts payable under contracts of insurance and rate of the insurance shown separately in respect of each contract for -
 - 1. mortgaged property insurance
 - 2. mortgaged property insurance re loss of security
 - 3. sickness, injury, disability or death insurance life insurance
 - 4. unemployment insurance
 - 5. loss of profit insurance
 - 6. other proscribed risks - not included
 - 7. extended warranty insurance
 - (ix) contract stamp duty;
 - (x) mortgage stamp duty;
 - (xi) legal fees;
 - (xii) fees for registration or discharge of a mortgage, title searching and security registration;
 - (xiii) amounts to be paid out under prior contracts;
 - (d) (i) a statement of the credit charges (schedule 3) expressed as an amount of money, or where that is not possible a statement of the method by which the credit charge is to be calculated;
 - (ii) a statement that no part of the credit charge (other than the minimum credit charge, if any), becomes due and payable unless it is an accrued credit charge;
- (e) a statement of the total of the credit charge and the amount financed (where it is possible to express the whole credit charge as an amount of money);
 - (f) a statement of the annual percentage rate in accordance with Section 38;
 - (g) a statement of the person to whom, and the place at which, payments are to be made;
 - (h) a statement of whether payments are to be made by instalments, and where they are known and can be calculated, the amount of each instalment, number of instalments and times and intervals for payment;
 - (i) whether commission charges are payable and to whom;
 - (j) a statement of whether any mortgage is to be made or has been entered into.

A APPENDIX I

CREDIT ACT - DISCLOSURES FOR LOAN CONTRACTS

Loan contracts must include:

- (a) the date on which the offer or contract was signed by the debtor; and
- (b) the amount financed (schedule 4) which must show separately;
 - (i) amount agreed to be lent;
 - (ii) amounts payable under contracts of insurance and the name of the insurer shown separately in respect of each contract for;
 - 1. mortgaged property insurance
 - 2. mortgaged property insurance re loss of security
 - 3. sickness, injury, disability or death insurance life insurance
 - 4. unemployment insurance
 - 5. loss of profits insurance
 - 6. her prescribed risks - now includes extended warranty insurance
 - (iii) contract stamp duty;
 - (iv) mortgage stamp duty;
 - (v) legal fees;
 - (vi) fees for registration of a discharge of mortgage, title searching and security registration;
 - (vii) amount paid out under prior contracts;
- (c)
 - (i) a statement of the credit charges (schedule 5) expressed as an amount of money, or where that is not possible a statement of the method by which the credit charge is to be calculated.
 - (ii) a statement that no part of the credit charge (other than the minimum credit charge, if any) becomes due and payable unless it is an accrued credit charge
- (d) a statement of the total of the credit charge and the amount financed (where it is possible to express the whole credit charge as an amount of money);
- (e) a statement of the annual percentage rate in accordance with Section 38;
- (f) a statement of the person to whom and the place at which payments are to be made;
- (g) a statement of whether payments are to be made by instalments, and where they are known and can be calculated, the amount of each instalment, number of instalments and times and intervals for payment;
- (h) whether commission charges are payable and to whom;
- (i) a statement of whether any mortgage is to be or has been entered into.

APPENDIX J

CONSUMER CREDIT CODE - DISCLOSURES

Matters that must be in contract document

The contract must contain the following matters:

- (A) **Credit provider's name**
The credit provider's name
- (B) **Amount of credit.**
- (a) If the amount of the credit to be provided is ascertainable, that amount and the persons, bodies or agents (including the credit provider) to whom the amount is to be paid and the amounts payable to them, to the extent that they are ascertainable.
 - (b) If the amount of the credit to be provided is not ascertainable, the maximum amount of credit agreed to be provided, or the credit limit under the contract, if any.
 - (c) Of the credit is provided by the supplier for a sale of land and its price or of the goods and their cash price.
- (C) **Annual percentage rate or rates.**
- (a) The annual percentage rate or rates under the contract.
 - (b) If there is more than one rate, how each rate applies
 - (c) If an annual percentage rate under the contract is determined by referring to a reference rate:
 - (i) the name of the rate or a description of it; and
 - (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates; and
 - (iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
 - (iv) the current annual percentage rates or rates.
- (D) **Calculation of interest charges.**
The method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.
- (E) **Total amount of interest charges payable.**
The total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions in sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract).
- (F) **Repayments.**
- (a) If more than one repayment is to be made:
 - (i) the amount of the repayments or the method of calculating the amount; and
 - (ii) if ascertainable when the contract is made-the number of the repayments, the period over which they are to be paid and the total amount of the repayments; and

(iii) when the first repayment is to be paid, if ascertainable, and the frequency of payment of repayments.

(b) If the contract provides for a minimum repayment, the amount of that repayment, if ascertainable, but, if not, the method of calculation of the minimum repayment.

(G) Credit fees and charges.

(a) A statement of the credit fees and charges that are, or may become payable under the contract, and when each such fee or charge is payable, if ascertainable.

(c) The amount of any such fee or charge if ascertainable, but, if not, the method of calculation of the fee or charge, if ascertainable.

(d) The total amount of credit fees and charges payable under the contract to the extent that it is ascertainable.

(H) Changes affecting interest and credit fees and charges.

If the annual percentage rate or rates or the amount or frequency payment of a credit fee or charge or instalment payable under the contract may be changed, or a new credit fee or charge may be imposed a statement or statements to that effect and of the means by which the debtor will be informed of the change or the new fee or charge.

(I) Statements of account.

The frequency with which statements of account are to be provided to the debtor (except in the case of a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate).

(J) Default rate.

(a) If the contract is a contract under which default rate of interest may be charged when payments are in default – a statement that effect and the default rate and how it is to be applied.

(b) If the default rate under the contract is determined by referring to a reference rate:

(i) the name of the rate or a description of it; and

(ii) the margin or margins (if any) above or below the reference rate to be applied to determine the default rate; and

(iii) when and where the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and

(iv) the current default rate.

(K) Enforcement expenses.

A statement that enforcement expenses may become payable under the credit contract or mortgage (if any) in the event of a breach.

(L) Mortgage or guarantee.

(a) If any mortgage or guarantee is to be or has been taken by the credit provider, a statement to that effect.

(c) In the case of a mortgage, a description of the property subject to, or

proposed to be subject to, the mortgage, to the extent to which it is ascertainable.

(M) Commission

If a commission is to be paid by or to the credit provider for the introduction of credit business or business financed by the contract:

- (a) a statement of that fact; and
- (b) the person by whom the commission is payable; and
- (c) the person to whom the commission is payable; and
- (d) the amount if ascertainable.

Commission does not include fees payable by a supplier under a merchant service agreement with a credit provider, and amount payable in connection with a credit-related insurance contract or commission paid to employees of the credit provider.

(N) Insurance financed by the contract.

If the credit provider knows that the debtor is to enter into a credit-related insurance contract and that the insurance is to be financed under the credit contract:

- (a) the name of the insurer; and
- (b) the amount payable to the insurer or, if it is not ascertainable, how it is calculated; and
- (c) the kind of insurance and any particulars that may be prescribed by the regulations; and
- (d) if the credit provider knows of any commission to be paid by the insurer for the introduction of the insurance business – a statement that is to be paid and, if ascertainable, the amount of the commission expressed either as a monetary amount or as a proportion of the premium.

(O) Other information.

Any information or warning required by the regulations.

Note: Sections 158 to 160 set out the tolerances and assumptions applicable to matters required to be disclosed.

APPENDIX K
WITHDRAWAL

Name and address of
Motor Car Trader and
Finance Company (if applicable)

Dear Sir/Madam,

RE: Motor Vehicle Registration Number ABC-123

Pursuant to s.88B of the Motor Car Traders Act 1986 (Vic) (“the Act”), I hereby withdraw from any agreement for the sale of a motor car made in respect of the above mentioned vehicle on the ground that the agreement for sale does not contain the prescribed particulars terms and conditions in accordance with section (*insert s.41 or 42 as appropriate*) of the Act.

You are required to immediately repay the full amount of the deposit held by you and return the trade-in vehicle in accordance with s.88(4) & (5) of the Act in default of which I will make a claim to the Motor Car Traders Guarantee Fund for compensation for loss pursuant to s.76 of the Act. Your cheque should be made payable to the writer and sent to (*insert you address*).

I also hereby terminate my credit contract in accordance with Section 19 of the Consumer Credit Code (*if applicable*).

Signed:.....

Notes:

- (1) In the first paragraph, refer to s.41 if the vehicle is a used car. Refer to s.42 if the vehicle is a new car.
- (2) There are two other grounds for withdrawal under s.88B, namely, the failure to comply with ss.37 or 38. The last three lines of paragraph one of the letter will need to be amended to suit the ground relied upon.
- (3) The third paragraph may not be applicable “if any credit has been obtained or has been attempted to be obtained” within the meaning of s.19 of the Consumer Credit Code.
- (4) You should ring up the owner or trader and read the letter out as well as posting it by registered post and keeping the receipt, delivering it personally, or faxing it to the trader.
- (5) Return the vehicle to the trader immediately.