

A report on the Motor Car Traders Act consultations



**Prepared by Noel Pullen MP with the
assistance of Consumer Affairs Victoria**

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DEPARTMENT
OF JUSTICE



“ *Foreword – John Lenders MP, Minister for Consumer Affairs* ”



In March 2004, I asked Mr Noel Pullen, Member for Higinbotham, to undertake a series of consultations on the operation of the *Motor Car Traders Act 1986*. Since then, Mr Pullen has met with a large number of stakeholders including industry and consumer representatives and

individual traders and consumers. Mr Pullen has now completed his consultations and has reported to me on the issues raised by participants.

It has been some time since the Act was last reviewed and Mr Pullen's consultations have provided a very useful insight into the issues facing the industry and how the Act is currently operating. The motor vehicle retail industry touches a large number of consumers, involves a high level of expenditure and makes a significant contribution to Victoria's economy. Therefore, it is important to ensure the regulatory framework is effective and efficient and meets the needs of industry and consumers.

As a follow up to Mr Pullen's consultations, I will be preparing a government response to the report and the recommendations contained therein. In preparing this response, I will be consulting with other government agencies that have not yet been consulted on the issues raised, including VicRoads, Victoria Police and the State Revenue Office.

In order to ensure that the government response and any ensuing legislative change reflects the best regulatory framework, I am now releasing Mr Pullen's report for public comment.

If you would like to comment on any of Mr Pullen's recommendations or any of the issues raised in the report, please address your feedback to the details below. The closing date for receipt of feedback is 28 February 2005.

Motor Car Traders Act consultations
Consumer Affairs Victoria
GPO Box 123A
Melbourne Vic 3001

or

by email to mcta.consultations@justice.vic.gov.au

A handwritten signature in black ink that reads "John Lenders". The signature is written in a cursive style with a horizontal line underneath the name.

JOHN LENDERS MP
Minister for Consumer Affairs
December 2004

“ *Foreword – Noel Pullen MP* ”



In March 2004, the Minister for Consumer Affairs, John Lenders asked me to conduct a series of consultations on the motor car trading industry on his behalf with particular emphasis on the *Motor Car Traders Act 1986* and the *Motor Car Traders Regulations 1998*.

The Bracks Government is committed to seeing Victoria's vehicle industry develop and thrive while protecting the rights of consumers.

The consultation process commenced following a Motor Car Trader forum held in March 2004 that was jointly sponsored by Consumer Affairs Victoria (CAV) and the Victorian Automobile Chamber of Commerce (VACC). The forum was known as "Driving a better industry".

Representatives at the Forum included the VACC, Australian Automobile Dealers Association, Motor Car Traders Guarantee Fund Claims Committee (MCTGFCC), RACV, VicRoads, Victoria Police and other interested parties.

As part of my consultation across Victoria, focus group meetings were held in Preston, Frankston, Ringwood, Geelong, Bendigo, Wodonga, Traralgon, and Warrnambool. I also met with a range of stakeholders on an individual basis, including the VACC, Business Licensing Authority, MCTGFCC, RACV, Consumer Law Centre, and a number of individual consumers and traders. Written submissions were also received.

To give participants the opportunity to freely air their views no formal terms of reference for the consultations were devised or required. The intention of the consultations was to examine the existing legislation and identify any gaps. This Report represents the views of participants in the consultations and many of the issues addressed in were raised at each of the focus group meetings.

The recommendations contained in the report concern proposals for both administrative and legislative change. Owing to the complex nature of the industry and the delicate balance between over regulation and adequate consumer protection, I felt it was premature to make a final determination on some of the issues raised without further research and consultation.

I would like to single out the issue of 'lemon laws', which was raised by a number of consumers, the RACV and the Consumer Law Centre. I consider this worthy of further consideration not only for motor vehicles but also possibly for other products.

I would like to thank the Minister for the opportunity accorded to me and all the participants from across Victoria who presented their many and various views about the legislation and administration of the licensing scheme. Their input has been considerable and valuable. This Report reflects the views of those participants and I recommend that it be publicly released for comment.

A handwritten signature in black ink, appearing to read "Noel Pullen".

NOEL PULLEN MP
Member for Higinbotham
December 2004

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“ *Executive Summary* ”

The primary pieces of legislation governing the motor car trading industry are the *Motor Car Traders Act 1986* and the *Motor Car Traders Regulations 1998*.

The purpose of the regulation governing motor car traders is to establish an efficient and equitable licensing scheme in order to protect the rights of consumers. The legislation is designed to address an ‘information asymmetry’ or an imbalance of information between traders and consumers, which is inherent in motor car trading transactions.

To address this asymmetry and achieve its aim of protecting consumers, the Act establishes a licensing scheme for motor car traders; imposes restrictions on traders’ conduct; and establishes a fund to provide compensation for consumers who suffer loss as a result of a motor car traders’ conduct.

As a result of industry concerns in relation to the operation of the Act and Regulations, and in recognition of changes that have occurred in the marketplace since the legislation was last reviewed, the Minister for Consumer Affairs initiated consultations aimed at assessing the effectiveness of the existing regime. The consultations involved peak industry bodies, consumers and consumer representatives, and individual traders. The consultations were led by Mr Noel Pullen, MP and this report outlines his findings.

Outline of the Report

The purposes of the consultation, the consultation process and overview of the industry are outlined in section 1 of the report. The current regulatory framework is described in section 2.

In establishing the licensing scheme, the Act has the anti-competitive effect of restricting participation in the industry to those who have obtained a licence. However, a National Competition Policy review of the Act, which was completed in 1998, found that the legislation was not overly restrictive and the benefits outweighed the costs. In fact, many traders who participated in the consultations said licences were too easy to obtain. They said the Business Licensing Authority, which administers the licensing scheme, did not apply the refusal criteria specified in the Act strictly enough. In particular, traders said there should be more stringent checking of financials and knowledge of the Act. Many participants also said there should be greater restrictions on employees in the industry, with some even proposing the introduction of a licensing scheme. The licensing scheme and its administration are discussed in section 3.

The Act and Regulations contain a number of requirements affecting business conduct and contractual relations between sellers (mainly licensees) and buyers of motor vehicles. These provisions include restrictions on advertising, record keeping and contractual obligations such as cooling off periods and statutory warranties. These conduct requirements are the subject of section 4.

Some of the restrictions attracted a lot of debate at the consultations, particularly the Form 7, which requires traders to display notices on used vehicles offered for sale (including previous owners details), and the dealings book, in which traders are required to keep a record of all transactions. Consumer representatives also commented on how these conduct requirements imposed on traders could be better communicated to consumers so they understood the protections afforded them by the Act.

Not all of the conduct requirements apply to all licensees with an auction endorsement or a wholesale condition, and they generally do not apply to private sales. Many participants expressed concern that most consumers no longer benefited from the protections under the Act due to the sharp increase in private sales¹ and growth in auctions and brokers where consumers may not have the same protection as if they trade with an LMCT.

Auctions, wholesalers and brokers were a major topic of discussion in each of the focus group meetings and one-on-one meetings with industry participants and representatives and the exemptions applying to these areas of the trade were heavily criticised. These issues are outlined in section 5.

There was a strong suggestion coming out of the consultations that the increase in auction sales and brokers was due to a deliberate attempt by traders to circumvent consumer rights and reduce compliance costs.

Of course, it is also possible that traders' criticism of the exemptions applying to wholesalers and auctions merely reflects traders' dislike of the competition that these areas of the trade represent. Rather than a deliberate attempt to reduce consumer protection, it is possible that the increase in brokers and auctions is in response to a changing marketplace and an increase in demand for these types of sales. For example, consumers may purchase at auction rather than through a dealer if they wished to buy an ex-government fleet vehicle. Similarly, consumers may use the services of a broker due to the convenience and the greater choice of vehicles available, or because they are time and knowledge poor.

If consumers understand the protections that do or do not apply in relation to these transactions compared with protections afforded by dealers, then an increase in these areas of the trade may not be of concern. However, if, as traders allege, these areas of the trade have emerged in order to circumvent the Act, and consumers do not understand their different rights, then the legislation may no longer be achieving its aims.

Most traders argued that the growth of brokers was particularly worrying as the rights of consumers when dealing with brokers was often unclear. Many participants suggested that the law, and the existing licence framework, should be updated to encompass these new practices, remove the current loopholes and ensure consumer protection.

In addition to criticism that auctions and brokers were circumventing the law, traders also expressed concern with the current level of unlicensed trading, or 'backyarding' as it is commonly referred to. Apart from an across the board criticism that Consumer Affairs Victoria was not doing enough there were also more specific issues raised relating to Consumer Affairs Victoria's enforcement strategy. Among these was a perception that Consumer Affairs Victoria's enforcement activity was unfairly biased towards them rather than unlicensed activity because they were 'easy targets'. Traders also suggested a number of ways in which they thought enforcement of the Act could be improved. Enforcement of the legislation is discussed in section 6.

A major theme of the consultations was traders' interaction with government agencies, including the Business Licensing Authority, Consumer Affairs Victoria and VicRoads. Participants commented that they did not fully understand the areas of responsibility of these agencies and were unsure who to contact regarding specific enquiries. A common remark was that the Business Licensing Authority and Consumer Affairs Victoria were not accessible to traders, who thought they should be available to provide advice on the licensing scheme and compliance with the Act. Generally, traders said that Consumer Affairs Victoria did not communicate with traders enough and often said they wanted 'more for their money'. Many said what little contact there was, was usually in the negative context of compliance and enforcement.

1 The growth in private sales (including unlicensed trading) was said to be a result of the introduction of the GST, which increased dealer prices and made them less competitive with the private market.

Issues raised during the consultations

Although not directly related to the Act or its implementation, participants also raised issues relating to VicRoads and stamp duty, which is the purview of the State Revenue Office. These issues and concerns are noted in the report and it is recommended they be passed on to the relevant Ministers for consideration.

The final two sections of the report (sections 8 & 9) cover the avenues available to consumers who are involved in disputes with motor car traders. Section 8 looks at the Motor Car Traders' Guarantee Fund, which is established under the Act and provides compensation to persons who suffer loss by reason of the actions of motor car traders. The primary concerns of traders in relation to the Fund were the ability of non-consumers (particularly VicRoads) to claim on the Fund and the perceived lack of accountability of the Fund. To address this lack of accountability, traders suggested increased information including revenue and expenditure figures and details of claims admitted.

Apart from making a claim against the Fund, there are other options available to consumers to assist them resolve disputes with traders. These include Consumer Affairs Victoria's enquiries line and conciliation advice and services offered by community legal centres and financial counsellors. Not all disputes arise from situations under which a claim can be made against the Fund and these other avenues of resolving problems are quite important. It was argued during the course of the consultations that the existing dispute resolution mechanisms available to consumers were inadequate, and that improvements could be made.

A wide range of issues were raised during the consultations. The report endeavours to document all the views expressed and attempts to highlight the issues that were of most concern to participants. It was never intended that this report would provide a full analysis of the issues raised, nor was there time to do this. That said, a number of key themes were evident throughout the consultations. Some limited analysis is provided in the body of the report in order to prioritise these issues and to develop recommendations about the future actions that might be taken to address them. These issues can be summarised as:

- restriction of competition
- clarification of existing legislation
- communication and information provision
- enforcement of the legislation
- difficulties in the practical implementation of the legislation
- improvements to consumer protection.

These issues are summarised below and this summary is followed by a list of recommended actions that may be taken to address them.

Restriction of competition

Many suggestions put forward during the consultations would have the effect of restricting competition in the industry if they were implemented. Competition is generally seen as beneficial for consumers as it increases choice and competitive pressure helps prevent artificial inflation of prices. Under the National Competition Policy principles, any regulation that has an anti-competitive effect must be justified by showing that the benefits outweigh the costs and that there are no alternative and less restrictive ways of achieving the same objective.

The suggestions for regulatory change put forward by participants could have an anti-competitive effect in a number of ways:

- By directly preventing new entrants to the industry – examples include calls for a closed licensing scheme.
- By indirectly restricting entry into the industry – such as by requiring applicants to provide a large sum of money as a bond or initial application fee, thereby limiting those able to enter the industry.
- By imposing burdensome costs on parts of the industry, or reducing compliance costs in other areas – such as differentiating licence fees.
- By imposing restrictions on the way current industry participants (licensees) conduct business – for example by restricting auctions to only selling to licensees.

In evaluating any of these potential changes, it is necessary to consider the Act's primary objective of consumer protection and to determine what public benefit would arise from their implementation. In some of the examples put forward, such as the closed licensing scheme, it is difficult to tell what public benefit would arise. However, other suggestions, such as the requirement for applicants to provide a bond, were couched in terms of consumer protection objectives. Participants often said that undercapitalisation at the time of obtaining a licence led to many claims against the Fund and that a bond would reduce these claims. However, data provided by the Motor Car Traders Guarantee Fund on claims admitted did not support these suggestions.

The suggestions that involved the imposition of restrictions on existing licensees were generally aimed at removing current exemptions from conduct requirements for certain areas of the trade. In particular, participants called for a 'level playing field' for auctions, brokers and retail traders, where all are subject to the same obligations.

Clarification of existing legislation

Many participants criticised the Act as having gaps in consumer protection, which had led to the growth of certain areas of the industry in order to capitalise on these gaps. The growth areas that were said to be outside the operation of the Act, or circumvented some of the consumer protection provisions, included auto recyclers, car removalists, brokers, internet trading and auctions selling off the floor. However, it is not clear whether the Act does in fact cover these areas and traders only perceived there to be inadequacies.

If these gaps are merely perceptions and the Act does apply to these areas of the trade, it may indicate that there is a lack of enforcement of the Act in relation to these areas.

An example of the confusion regarding the application of the Act was in relation to the calls for a level playing field discussed above. Participants said that where auctions sold off the floor, they should be subject to the same requirements as retail traders. There were differing views among participants as to whether auctions were already subject to the same requirements as retail traders.

In this, and many other areas, clarification of the operation of the existing Act would most likely demonstrate that the Act does apply to these areas of the industry. Further, it would ease the concerns of retail traders that the Act was unfairly biased against them.

Communication and information provision

Apart from uncertainty regarding the operation of the Act, many of the concerns of participants have arisen from misinformation, or a lack of information, regarding the activities of the Business Licensing Authority, Consumer Affairs Victoria and Motor Car Traders Guarantee Fund Claims Committee.

Quite a number of suggestions were made based on perceptions rather than facts. For example, suggestions for changing the application process often arose from perceptions of the types of traders who made claims against the fund (those with less experience or due to under-capitalisation). However, information provided by the Motor Car Traders Guarantee Fund Claims Committee did not support these perceptions. Similarly, without information on enforcement activity, traders could believe they were unfairly targeted and that unlicensed traders were not prosecuted.

Provision of the following types of information (on a regular basis) would help to remove misperceptions and traders' dissatisfaction with the accountability of government agencies:

- information aimed at training licensees and improving their knowledge and understanding of the various pieces of legislation, together with advice on good customer service and business practice
- information on compliance and enforcement activities
- details of disciplinary action taken
- details of claims against the fund, including amounts claimed and the types of traders these claims are paid out against
- information on licence applications.

In addition to the provision of the above information to traders, the establishment and promotion of a contact point within government to assist traders, to provide advice and to hear concerns would improve traders' relationship with the government regulators.

Enforcement of legislation

Throughout the consultations, there was significant criticism of Consumer Affairs Victoria's enforcement of the Act. This criticism was exacerbated by traders' lack of information regarding enforcement activity and uncertainty regarding how the Act currently applies in a number of areas.

Not only did traders suggest there was not enough enforcement activity, they expressed a belief that current enforcement activity was biased against licensees and that unlicensed activity was largely ignored. Traders felt targeted by investigators, who they believed they were just revenue raising. Provision of information on enforcement activity would help alleviate these concerns.

There were a large number of suggestions for catching (or reducing the number of) unlicensed traders and improving enforcement. The most common suggestion being greater collaboration between Consumer Affairs Victoria, the Business Licensing Authority, VicRoads and the Police.

Traders' calls for greater prosecution of unlicensed traders were most likely because they dislike the competition presented by such traders, rather than concerns for consumers dealing with unlicensed traders. Few participants acknowledged that breaches of the Act by licensees may be a greater concern to consumers than unlicensed traders due to consumers' different expectations of the protections afforded them. When dealing with an unlicensed trader, consumers will generally believe they are purchasing the vehicle privately, in which case they will not have the benefit of protections such as the statutory warranty or cooling-off period. However, when purchasing from a licensed trader, consumers expect them to comply with the requirements of the Act.

Difficulties in the practical implementation of the legislation

The conduct requirements imposed under the Act can be onerous and impose significant costs on traders, such as the requirement to provide statutory warranties and roadworthy certificates. Despite these costs, traders were largely happy with these requirements. Most concerns regarding conduct requirements related to traders' alleged inability to comply, or difficulty in complying, with some of these requirements.

Examples of difficulties in compliance included problems in obtaining previous owner details to include in the Form 7 and difficulties of motorcycle traders verifying clear title of unregistered motorcycles.

The concerns of traders in these areas were an important part of the consultation process. It is only through discussion with those applying the law on a daily basis that practical difficulties in its implementation can be identified and understood. By addressing these issues, and considering alternatives, regulators can signal to industry participants that it is willing to work together to develop a regulatory framework that meets the needs of both industry and consumers.

Improvements to consumer protection

One of the main objectives of the consultations was to assess the effectiveness of the legislation in meeting the needs of consumers and to identify areas where improvements could be made. Although the majority of participants in the consultation process were traders or industry representatives, the Act's objective of protecting consumers was still considered. In particular, consumer representative groups such as the RACV and the Consumer Law Centre commented on the regulatory framework from a consumer perspective.

In general, participants indicated that the protections afforded under the Act provided an appropriate level of consumer protection. However, consumers' awareness of these protections and their ability to enforce their rights was questioned.

“ Recommendations ”

These recommendations are a combination of proposals for legislative and administrative change. These include proposed changes to both the Act and Regulations and changes to the way the legislation is administered and enforced by the Business Licensing Authority and Consumer Affairs Victoria. In addition, several recommendations relate to the activities of other areas of government outside the consumer affairs portfolio.

Recommendation 1 – page 8

Since it is not clear from the consultations what the benefits of a closed scheme would be to the public as a whole, an ‘open’ licensing scheme should be maintained.

Recommendation 2 – page 13

That the Act be extended to allow the Authority to consider associates who:

- have had a claim admitted against them (or a company or partnership in which they were involved)
- the Authority is satisfied are not fit and proper persons to hold a licence, if they were to apply for one.

Recommendation 3 – page 13

The impact on directors of companies against which a claim has been admitted on the Fund should be clarified in the legislation.

Recommendation 4 – page 16

That the Business Licensing Authority, in collaboration with Consumer Affairs Victoria, VicRoads, the VACC and possibly the Office of Small Business, develop an information package for new licensees containing information on the application of the law and general information on how to conduct a motor car trading business.

Recommendation 5 – page 16

That information on relevant legislation and other areas of interest be provided to licensees on a regular basis through a newsletter (or other suitable format).

Recommendation 6 – page 17

That consideration be given to introducing different fees for different areas of the industry, having regard to the effects on the industry and the purposes of licence fees.

Recommendation 7 – page 18

That consideration be given to introducing additional fees for extra/additional premises held by a licensee, fees for permission applications and the exemption of partners from licence fees or the application process following dissolution of a partnership.

Recommendation 8 – page 19

The application of the above provision to brokers should be clarified, and if necessary to uphold the objectives of the Act, should be reconsidered.

Recommendation 9 – page 19

The definition of ‘customer service capacity’ should be extended to include aftermarket service and finance, unless evidence can be provided as to why they should not be added.

Recommendation 10 – page 21

Given that the introduction of some kind of licensing scheme or regulation of sales staff was raised at each of the focus groups, it is an area that requires further investigation. The benefits and costs of the different types of regulation should be further explored.

Recommendation 11 – page 24

That replacing the requirement of stipulating in red font whether there is statutory warranty, with a requirement to stipulate this in bold font, be given further consideration.

Recommendation 12 – page 26

The inability of wholesalers and finance companies to provide previous owners' details for inclusion in the Form 7 due to restrictions under the Commonwealth Privacy Act should be further investigated.

Recommendation 13 – page 27

The benefits and costs of requiring the disclosure of previous owners' details in the Form 7 should be explored in further detail. In particular, options allowing previous owners to 'opt out' or to minimise the disclosure of personal information should be explored.

Recommendation 14 – page 28

Clarification of the application of this provision to traders advertising on the Internet is required. Also, an examination of whether internet advertisements by non-traders are captured by regulation 22(4) – that is, the restrictions on newspaper and magazine advertising – is required. If necessary, the Act and Regulations should be amended to ensure traders are required to include their LMCT number in all advertisements, regardless of whether the advertisements are published on the Internet.

Recommendation 15 – page 30

Most of the concerns regarding dealer charges could be alleviated by improved enforcement of the current Regulation and perhaps by extending this Regulation to require dealer charges to be disclosed in a minimum of 10 point font.

Recommendation 16 – page 31

The inability of traders to keep only an electronic version was often raised as a concern throughout the consultations. Given the prevalence of these concerns, the dealings book requirements should be revisited, both in terms of their rationale and whether the paperwork requirements can be improved. For example, a workshop involving traders, regulators and software companies could be organised.

There is no clear indication of the benefit of requiring a physical signature in the dealings book. Unless strong reasons can be provided as to why it should be maintained, this requirement should be removed.

Recommendation 17 – page 32

Traders should be required to provide a statutory warranty for commercial vehicles that are less than 10 years old and have travelled less than 160 000km, where such vehicles are purchased by private individuals.

Recommendation 18 – page 33

That options be examined regarding ways to improve consumers' awareness of the existence or otherwise of a statutory warranty and their rights and obligations in relation to such warranties. At a minimum, traders should be required to provide consumers with a statement of their rights and obligations under a warranty, where such warranty applies (similar to the standard form supplied by the VACC).

Recommendation 19 – page 35

That options be examined regarding ways to improve consumers' awareness of the existence or otherwise of a right to a cooling-off period and how to exercise such a right. In particular, a consumer's right (or otherwise) to a cooling-off period should be made a required particular in contracts for sale.

Also, the extension of the cooling-off period to new and commercial vehicles should be considered with regard to the objectives of the provision.

Recommendation 20 – page 38

The Chattel Securities Act should be amended to require financiers to cancel a security interest within 7 days of the financier having knowledge of the cancellation of the interest by the trader.

Should this recommendation not be adopted, consideration should be given to amending the Chattel Securities Act as proposed by the Australian Finance Conference.

Recommendation 21 – page 41

That section 37 be amended to reflect the repeal of section 8 of the Road Safety Act and to clarify the application of this provision.

Recommendation 22 – page 44

The Business Licensing Authority and Consumer Affairs Victoria should give consideration to use of the Authority's condition making power and possible enforcement activity under the Fair Trading Act to prevent use of the terms 'auction' and 'wholesale' where these would be misleading to consumers. If these options do not adequately address the concerns raised, consideration should then be given to legislative change.

Recommendation 23 – page 46

Consumer Affairs Victoria should examine the effects of introducing such requirements, with consideration given to the objectives, and associated costs and benefits.

In particular, the removal of the exemption from providing a roadworthy certificate where a registered vehicle is sold at public auction should be given serious consideration. However, regard must be had to the likely resulting effects on the auction system and the objectives designed to be achieved by the legislation.

Recommendation 24 – page 46

There should be clarification of the existing provisions in relation to auctions and an examination of whether these are achieving the objectives of the legislation.

At a minimum, the legislation should require Form 7's on cars for sale at public auctions to include a price range, in the same way that real estate advertised for sale at auction indicates an anticipated price range. Also, if the vehicle fails to sell at auction, the passed in value should be displayed on the Form 7.

Recommendation 25 – page 47

Further consideration should be given to requiring auctions to record details of vendors and purchasers of vehicles sold through their auction business where this information would assist enforcement activity.

Recommendation 26 – page 47

Restricting the sale of written-off vehicles to trade-only auctions should be given further consideration, subject to a deeper analysis of who presently purchases these vehicles, what the risks are to consumers and what the impact would be on private purchasers.

Recommendation 27 – page 48

An investigation should be conducted into the benefits to be obtained from the introduction of dummy bidding restrictions at motor vehicle auctions, having regard to the differences between the motor vehicle and real estate industries.

Recommendation 28 – page 51

Given that so many participants raised the issue of brokers, and that this area of the industry appears to have emerged only recently, it is recommended that further work be carried out on the issue, including the following:

- a clarification of how the existing provisions apply to the various practices of brokers, and
- once the application of the existing provisions is clarified, the adequacy of the provisions in protecting consumers who deal with brokers should be assessed, and
- if found to be inadequate, options for legislative change should be identified and examined, including the possibility of restricting brokers to operating only as introduction agents.

Recommendation 29 – page 53

The inclusion of publishing an advertisement by electronic means should be clarified as constituting an offer to sell a motor car for the purposes of section 7A.

Recommendation 30 – page 54

That it be made clear that auto-recyclers and car removalists who purchase vehicles from the public are required to hold a licence.

Recommendation 31 – page 55

Penalties for unlicensed trading should be increased.

Recommendation 32 – page 60

A central contact point for all matters relating to the regulatory scheme, including licensing, compliance and enforcement, should be established and promoted. This contact point could be within the Business Licensing Authority or within Consumer Affairs Victoria.

Recommendation 33 – page 61

That CAV examine its communications strategy with traders and identify ways in which communication might be improved.

Recommendation 34 – page 62

That the points raised in relation to VicRoads be forwarded to the Minister for Transport for his consideration.

Recommendation 35 – page 64

That the points raised in relation to stamp duty be forwarded to the Treasurer and Minister for Finance for consideration as appropriate. In particular, it is thought that the idea of establishing an assessment centre has some merit.

Recommendation 36 – page 68

That the purpose of the Fund be reviewed. If the intended purpose is only to compensate consumers, consideration should be given to the above amendments suggested by the Committee. However, if the intended purpose is to compensate all persons who suffer loss, then no legislative amendment is necessary but consideration will need to be given to increasing the amount in the Fund.

Recommendation 37 – page 74

The ways in which consumer and trader disputes are currently resolved should be examined to determine their effectiveness and adequacy, and options for improvement should be considered, including the establishment of an industry-specific dispute resolution scheme.

Recommendation 38 – page 75

Consumer protection in relation to new car warranties and 'lemons' is an area that requires further investigation, particularly given the large amounts of money involved and the unequal positions of consumers and vehicle manufacturers. Such an investigation could occur in the context of a broader examination of 'lemon laws' and their possible application to other types of products as well as cars.

“ Section 1 Introduction ”

1.1 Background to the Consultations

At the Motor Industry Forum on 03 March 2004, the Minister for Consumer Affairs, John Lenders MP, announced that Mr Noel Pullen, member for Higinbotham, would be consulting with stakeholders on the operation of the *Motor Car Traders Act 1986*.

The consultation process was initiated in response to calls from the industry and a recognition that the industry and marketplace has changed since the last major review of the Act in 1996, including the growth of the Internet and online vehicle sales.

There were no formal terms of reference for the consultations. However, the consultations had the following broad aims:

- to gain a better understanding of the issues in relation to the Act and how the Act is currently operating
- to assess how effective the Act has been in meeting the needs of consumers and traders
- to determine if there are improvements that could be made to the regulatory framework, and
- to work through some of the issues raised at the Motor Industry Forum held in March 2004, which was jointly organised by Consumer Affairs Victoria and the Victorian Automobile Chamber of Commerce.

1.2 The consultation process

One on one meetings were held with a variety of stakeholders including industry and consumer representatives, a small group of individual traders representing a cross-section of the industry and consumers. In addition, focus group meetings were held (primarily with traders) throughout regional and metropolitan Victoria, including Preston, Frankston, Geelong, Bendigo, Ringwood, Wodonga, Traralgon and Warrnambool, in order to provide an opportunity for as many traders as possible to have a say in the future of their industry.

Throughout the consultations, a number of written submissions from interested stakeholders were also received.

The consultations, in particular the focus groups, were informal and no official transcripts were taken. This was in order to encourage participation and open discussion. During the consultations, various allegations were made, including allegations of infringements. As such allegations were beyond the scope of the consultations, no details were sought, but participants were provided with appropriate contact details in Consumer Affairs Victoria in order to follow-up in relation to specific concerns.

Some participants also proposed solutions to specific issues raised by them and others throughout the consultations. Every effort has been made regard to these proposals that it was pleasing to see so many participants in the forums and other meetings so actively contributing to the discussions.

1.3 Overview of the industry

The motor car trading industry is an important part of Victoria's economy. The industry covers a range of retail operations including the trade of new and used cars, and the sale of related goods and services, such as repairs and fuel.

The motor vehicle retail industry also has a significant impact on other areas of the motor vehicle industry, such as vehicle manufacturing, financiers and insurers. Trading in new and used vehicles can involve a complicated set of transactions between the manufacturer and the consumer. For example, a vehicle may be purchased from the manufacturer by a wholesaler, before being sold to a trader who then sells to a consumer. In addition, the purchase of a vehicle involves several government transactions including stamp duty, GST, and vehicle registration and often involves a finance arrangement.

There are many ways in which a consumer can purchase a car. For example, they may purchase privately, at auction, or from a licensed motor car trader. In addition, there are several different stages of a vehicle's life-cycle at which consumers can make a purchase. For example, a consumer may purchase a new car, a demonstration vehicle, an ex-rental, or a used car, and at the end of the vehicle's life, they may sell it to an auto-recycler.

As at 30 June 2004, there were approximately 2200 licensed motor car traders in Victoria. Although there were 162 new licences issued in 2003-04, the total number of licences has not changed significantly over the past 5 years. Victorian licensed motor car traders (LMCTs) are predominantly located in the metropolitan area, in particular in Ringwood, Preston, Cheltenham and Dandenong. However, there are also a large number of LMCTs in regional areas, in particular in Ballarat, Bendigo and Geelong.

There are a number of different ways in which LMCTs can conduct business. For example, they might sell to the public or operate only in the wholesale sector (purchasing and selling within the trade). In addition, they may conduct sales by auction. They might trade in a range of vehicle types, including new or used cars, and may specialise in particular areas, such as prestige cars, motor cycles or buses.

Licences may also be obtained by businesses whose primary activity is not trading in motor vehicles. For example, they may operate a business in another area of the industry, such as motor vehicle repairs, or they may operate an unrelated business, such as a hospital or council.

These consultations emerged following concerns from the industry that the Act was not keeping up to date with changes occurring in the industry. Among the many changes cited include the development of the Internet and Internet sales, the growth of private sales and the emergence of brokers in the industry. Another relatively recent development is the introduction, or planned introduction, of so called 'park and sell' venues in Victoria.

“ Section 2 Current regulatory framework ”

The primary pieces of legislation governing the motor car trading industry is the *Motor Car Traders Act 1986* and the *Motor Car Traders Regulations 1998*. In addition to this industry-specific legislation, a number of other Acts are also relevant to the industry. These include the:

- *Fair Trading Act 1999*
- *Business Licensing Authority Act 1998*
- *Road Safety Act 1986*
- *Chattel Securities Act 1987*
- *Duties Act 2000*

2.1 Objectives of the legislation

The stated purpose of the *Motor Car Traders Act 1986* (the Act) is:

...to provide for the regulation of motor car traders and to ensure that licensing is carried out efficiently and equitably and that the rights of those who purchase motor cars are adequately protected.

Regulation of motor car trading is designed to address what is known as an ‘information asymmetry’ that is inherent in motor car trading transactions. An information asymmetry refers to a situation in which not all parties to the transaction have the same level of information, or the necessary information in order to make an optimal decision.

In the case of motor car transactions, an information asymmetry exists because buyers generally do not have sufficient information regarding the quality, safety or reliability of the motor vehicle to make an informed decision or negotiate an appropriate price.

Sellers who possess this information may not have an incentive to reveal it to buyers. This information asymmetry is compounded by the cost and complexity of the product and, in general, a lack of expertise on the part of buyers. Also, in many cases, the quality, reliability and safety of a car only becomes apparent after the car has been purchased and driven for a period of time.

Information asymmetry problems also provide an opportunity for fraudulent and deceptive conduct, because buyers are susceptible to being misled by sellers. The potential for fraud and deception may encourage unethical operators to enter the industry, particularly in an industry like motor car trading, where it is relatively easy for an operator to enter the market.

The legislation aims to deal with the problems associated with information asymmetry by including measures broadly intended to:

- improve buyers’ bargaining position by both correcting and compensating for information asymmetry
- provide efficient disciplining of dishonest trades, and
- allow losses due to dishonest trader conduct to be recovered.

2.2 Achieving these objectives – the regulatory framework

The regulatory framework comprises three main elements:

1. The control of motor vehicle traders through a licensing system.

- The Act regulates entry into the industry through the licensing scheme and makes it an offence to carry on the business of trading in motor cars without holding a motor car trader's licence.
- Individuals, partnerships and bodies corporate may apply for a motor car trader's licence, provided they meet certain specified criteria. These criteria and the application process are discussed in further detail in section 3.
- The Act also provides for a system of disciplinary action for motor car traders, including fines and licence cancellation or suspension. Disciplinary action is discussed further in section 6.

2. The establishment of positive protections for members of the community on the buying, selling and exchange of motor vehicles.

- The Act contains a number of requirements affecting business conduct and contractual relations between sellers and buyers of motor vehicles. These provisions apply mainly to the sale of used vehicles between traders and consumers. However, some provisions also apply to new vehicle sales and private sales.
- These conduct provisions include requirements relating to odometer readings, roadworthy certificates, consignment selling, advertising, cooling-off periods and statutory warranties. These provisions will be discussed further in section 4.

3. The establishment of a fund to provide for compensation for persons who suffer loss by reason of the actions of motor car traders.

- The Fund is used to meet the costs of administering the regulatory scheme and to pay claims to consumers for certain losses incurred as a result of motor car traders' actions.
- The Fund primarily receives revenue from licence fees as well as fines imposed under the Act and any interest earned through investment of monies held by the Fund.

This regulatory framework addresses the objectives by:

- ensuring that information held by sellers, which is relevant to a purchasing decision is disclosed to buyers
- providing an assurance to buyers that the vehicle being purchased meets legal requirements for registration and has clear title
- preventing misrepresentation by sellers regarding quality of the vehicle by providing some assurance of reliability at the time of sale
- deterring unfair and unconscionable conduct by traders in negotiating contracts
- providing efficient disciplining of dishonest traders, and
- providing for the recovery of losses due to dishonest trader conduct to be resolved.

2.2.1 Who does the Act apply to?

The Act defines a motor car trader as any person who carries on the business of trading in motor cars, except those doing so in the capacity of employee or those involved in a number of transactions which are excluded from the definition.

The following transactions are excluded from the definition of 'trading in motor cars', and therefore the people involved are exempt from the requirement to hold a motor car traders licence:

- Any person buying from, selling to, or exchanging motor cars with a licensed motor car trader, financier or manufacturer (such as wholesalers who buy only from, and sell only to, LMCTs).
- Any person selling, buying, or exchanging with their employee or with an employee of a related company.
- Financiers selling, by public auction or tender, cars that have been repossessed or surrendered (by persons who are not motor car traders).
- Private sale by financiers of repossessed cars to buyers introduced by persons from whom the cars were repossessed.
- Any person selling cars to a person who has hired or leased the car for a continuous period of at least 3 months immediately prior to sale.
- Buying or selling at public auction ex-government cars or cars owned by a company (not a licensed motor car trader) in liquidation.

Private sellers of used cars are exempt from the Acts' requirement to be licensed or to meet conduct requirements contained in the legislation other than those prohibiting odometer tampering and requiring used vehicles to be sold with a current roadworthy certificate.²

The Australian Finance Conference, which is a national association of finance institutions, supported the retention of the exemption relating to financiers selling repossessed cars. The Conference noted that this exemption acknowledged the difference between financiers and motor car traders, and the already high level of regulation of the finance industry.

2.3 The regulatory framework and competition policy

In 1995, the Australian state and territory governments, together with the Federal Government agreed on a framework to promote enhanced competition in Australia. The Competition Principles Agreement, one of three inter-governmental agreements reached, provides that legislation should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition (that is, whether there are alternative ways of achieving the objectives that are less anti-competitive).

There are anti-competitive effects inherent in all licensing schemes. By restricting participation in the industry to those who have obtained a licence, the licensing requirements restrict competition in the industry.

Restrictions on licensees can impose substantial costs to consumers (purchasers of motor vehicles) through higher prices and reduced choice. Under the existing regulation, the costs of entering the industry are relatively low. Provided that applicants meet certain minimum standards under the Act, all that is required to become a licensed motor car trader is payment of a \$778 application fee and an annual licence fee of \$973.

In a review of the Act that was completed in 1998 which applied the national competition principles, the view was taken that the licensing scheme imposed relatively few costs in terms of entry to the industry.

² It should be noted that the Act contains a deeming provision, whereby a private seller is deemed to be trading in motor cars if they buy, sell or exchange four (4) motor cars within a 12 month period.

“ *Section 3 Participation in the industry* ”

Under the Act, it is an offence to carry on the business of trading in motor cars without holding a motor car trader's licence.

The licensing scheme is administered by the Business Licensing Authority. In 2003-04, the Authority received 181 licence applications, issued 162 new licences and processed 2074 notifications, annual statements and licence renewals. As at 30 June 2004, there were 2205 licensed motor car traders in Victoria.

The licensing scheme allows for more effective monitoring of industry participants. Through the imposition of penalties, suspension of the right to trade, or in cases of more serious misconduct, loss of the right to trade, the licensing scheme provides a credible deterrent to dishonest conduct.

3.1 An 'open' licensing scheme

The licensing system is an 'open' one in the sense that there is no cap on the total number of licences that may be granted. Provided that applicants meet the licensing criteria set out in the Act, the Authority must grant a licence.

This open licensing system is in contrast to some licensing schemes that operate in other industries, such as taxi drivers and abalone divers, where there is a ceiling on the total number of licences that can be issued.

One of the benefits of an open licensing scheme compared to a 'closed' scheme, is that it significantly reduces the licensing requirement's anti-competitive effect caused by the raising of entry barriers to the industry.

During the consultations, a number of traders suggested that a closed scheme should be adopted in relation to motor car traders and a cap on the number of licences issued should be applied. This was an issue that was first raised at the Motor Industry Forum, and seemed to arise from a general, and widespread, concern that motor car traders licences were 'not worth anything'.

At present, traders can sell their business and business name, but used-car traders in particular, argued they cannot obtain a premium for the goodwill of the business. For those with new car dealerships, the position is slightly different, as they are able to sell what is effectively a franchise. With a fixed number of licences, traders would be able to on-sell their licences to someone approved by the Authority, which would allow a value to be placed on their licence.

Traders suggesting a cap on licences said that if they had an asset they could sell, they would work harder and have more incentive to comply with the Act, because the possibility of losing their licence through non-compliance with the Act would have significant financial consequences.

The idea of a closed licensing scheme received mixed reaction from stakeholders throughout the consultations. There was some acknowledgment that such a scheme would create significant barriers to those wishing to enter the industry, as they would have to pay a lot more for their licence. Further, some traders said the system would be hard to work and, in the absence of improvement in the current enforcement system, would just lead more people to trade without a licence.

Traders calling for a cap on licence numbers may not be aware that the total number of licences in operation at any one time has remained fairly constant over the last 20 years, with around 2000 to 2200 licensees. Although around 200 new licences are granted each year, the equivalent number generally lapse or are suspended, cancelled or revoked. This indicates that market forces act to create a natural limit to the number of licensees in the industry.

If a closed scheme were to be introduced, it would need to be clear what it was trying to achieve, and whether there were alternative ways of achieving the same objective. This is because it would significantly increase the anti-competitive effect of the legislation and, in accordance with national competition policy, could only be justified where the benefits exceeded the costs.

Recommendation 1

Since it is not clear from the consultations what the benefits of a closed scheme would be to the public as a whole, an 'open' licensing scheme should be maintained.

3.2 Licence categories

There is only one category of licence issued by the Authority. However, the imposition of a 'wholesale only' condition on a licence, effectively creates another type of licence – a wholesale licence. Under the Act, licensees with a wholesale condition can only sell to other licensed motor car traders (although they can purchase from other licensees or the public)³.

A further distinction made among licensees relates to auctions. Although not a separate licence, a licensee may apply to the Authority for an endorsement on their licence to conduct public auctions. This effectively creates a distinction between those who are able to conduct auctions and those who are not.

Although not distinguished administratively, wholesale traders and those with auction endorsements are exempt from some of the conduct requirements that must be observed by traders who do not have a wholesale condition or auction endorsement. Wholesale traders and auctions are discussed further under separate headings below.

During the consultations, it was suggested that, because of these exemptions and the resulting reduction in compliance costs, the auction and wholesale areas of the industry had grown. Traders said that the lines between retail, wholesale, and auctions were blurring, particularly where brokers were also operating in the industry.

³ During the consultations there were allegations that wholesale licensees did sell directly to consumers. If this did occur, the licensee would be in breach of their licence condition.

Participants said one example of this blurring was between an auction and a retail licensee. An auction endorsement does not mean the licensee can only trade by auction, just that they can trade by public auction if they wish. This means that licensees with an auction endorsement are able to 'sell off the floor' prior to auction as well as at auction. Some participants expressed concern that consumers are confused when auctions also sell retail as to whether the protections in the Act apply.

Some traders also suggested that because of their auction endorsement and the corresponding exemptions from certain requirements in the Act, licensees with an auction endorsement used this endorsement to avoid complying with these requirements, even when selling 'off the floor'. A number of traders said that to avoid such circumvention of the Act, trading by auction should not be an endorsement to a licence, but a condition of a licence. If made a condition of a licence, traders could apply to have an 'auction only' condition imposed on their licence in the same way that traders can apply for a 'wholesale only' condition. However, such a condition would appear to be unfairly restrictive as auctions would be unable to sell a vehicle that failed to sell at auction (a vehicle that was passed in).

Some participants mentioned that the NSW licensing scheme is quite different in that there are 7 different categories of licence including dealers' licences, auto-dismantlers' licences, wholesalers' licences, and motor vehicle consultants' licences. Although the differences in the Victorian and NSW schemes were pointed out, there did not seem to be wide support for adoption of the NSW licensing categories. However, some participants did suggest a different licence category for auto-recyclers and others that only buy from, rather than sell to, the public.

One problem that might arise from the creation of different licence categories is the restriction of traders' freedom to diversify their businesses. For example, if there were a separate licence for motor cycle traders, would such traders be able to accept trade-ins of vehicles? And similarly, would other traders be able to accept trade-ins of motor cycles?

A further problem that may occur is that enforcement of the different restrictions placed on each of the licence categories may be hard or costly to monitor and enforce.

Without an impending threat of enforcement activity, traders may have an incentive to apply for the licence that had the lowest fee, or the least onerous conduct requirements, but to trade outside the limits of the licence.

A number of traders also suggested different licence fees for different types of traders — the practical implementation of which may necessitate different licence categories. These suggestions are outlined below under the heading 'licence fees'.

3.3 Licence application and approval process

An application for a licence may be made by an individual who is at least 18 years of age or by a partnership or body corporate. When considering applications, the Authority must grant a licence if it is satisfied that the application complies with the Act; the relevant information has been provided; the licence fee has been paid; and there are no grounds for refusal under the Act.

There are a number of grounds for refusal of an application under the Act. For example, for an individual application, these grounds include that the applicant⁴:

- is disqualified under the Act or an Act in another state from holding a licence
- does not have, or is not likely to continue to have, sufficient financial resources to carry on the business of trading in motor cars, as proposed in the application
- does not have sufficient expertise or knowledge of the Act and regulations to enable the applicant to carry on such a business
- does not have, or is not likely to have, premises in which the applicant can lawfully carry on such a business
- has been convicted or found guilty of a serious offence (although there is provision in the Act for such a person to be granted permission to hold a licence).

⁴ Similar grounds apply to applications from partnerships and corporations.

The above restrictions imposed by the Act aim to ensure that the standards of consumer protection provided for in the Act will be upheld by the applicant when trading in motor vehicles. In addition, the screening of applicants, and the refusal of applications in certain situations, is designed to limit the possibility of dishonest dealings by excluding persons who, on the basis of past conduct, have demonstrated a likelihood that they will behave in an inappropriate manner.

Issues concerning the licence application and approval process were raised consistently at each of the meetings and focus groups held throughout the consultations. Concerns often related to the perceived ease in which new licences could be obtained. There were generally two aspects to such concerns:

- First, that the continued issue of new licences meant that existing licences weren't worth anything (see above discussion on the 'open' licensing scheme), and
- Second, the assertion that licences were being issued to individuals, partnerships or bodies corporate in situations where the applicant was not in a position to uphold the standards of consumer protection provided for in the Act, and as a result, claims on the Guarantee Fund were increasing.⁵

These concerns were generally raised in the context of the criteria for refusal of a licence; the granting of licences to people who are engaged in other business activities; the training and qualifications of licensees; and the level of licence fees.

3.3.1 Criteria for refusal of a licence

As outlined above, the Authority must refuse to grant applications where applicants do not meet certain criteria. The most comment during the consultations was on the 'financial resources' and 'suitable premises' criteria. Section 13(4) of the Act states, among other things:

The Authority must refuse an application for a licence if it is satisfied that –

(d) the applicant does not have, or is not likely to continue to have, sufficient financial resources to carry on the business of trading in motor cars proposed by the applicant, or

(h) the applicant does not have, or is not likely to have, premises in which the applicant can lawfully carry on such a business.

This provision gives the Authority discretion regarding what is 'sufficient financial resources' and what type of premises is required. Although many traders intimated that the Authority was not applying strict enough criteria in relation to these matters, very few seemed to be aware of the current tests being applied. This lack of awareness of current requirements was also a concern to some traders, who suggested that the Authority was not currently accountable to traders.

A large number of traders argued that new licensees are often under-capitalised, resulting in more claims against the fund. To prevent under-capitalised operators from obtaining licences, it was suggested that all new licensees should be required to pay a bond or deposit to the Authority. This would then be returned after a sufficient period of operation (for example, 10 years), if there were no infringements against the Act or claims against the fund. Although this was a common idea, what traders felt was a suitable amount for this bond or deposit was often not indicated. However, amounts that were suggested ranged from \$30 000 to \$100 000.

⁵ Although claims on the Fund have increased in recent years, data provided by the Motor Car Traders Guarantee Fund Claims Committee does not support the assertion that more claims arise from new entrants to the industry.

Currently, the Authority is able to impose conditions on licences. The Act specifically provides that

'the Authority may require as a condition that the person who holds, or is to hold, the licence must provide the Authority with a guarantee or an indemnity in a form, and secured in a manner, specified by the Authority' (s. 14(3)).

During the consultations, the Authority itself suggested that this provision be amended to provide for a payment of a bond as an alternative to providing a bank guarantee or indemnity. This bond would be refundable in full if no claims were made on the fund within a specified period following the surrender or cancellation of the licence.

The Authority's suggested amendment is aimed at providing more flexibility to applicants and licensees to meet this licence condition. It would also likely make compliance with the conditions less onerous. For example where an applicant or licensee experiences undue delays in obtaining a bank guarantee for some reason, yet was able to provide a bond.

The current provision regarding guarantees can be applied to both licence applicants and licensees. Data provided by the Authority indicate that this condition is imposed relatively often, with 27 new licensees (around 22 per cent of applicants) and 5 existing licensees required to provide bank guarantees in 2003-04. The average amount required to be provided by a new licensee was \$27 000, although individual amounts ranged from \$5000 to \$150 000.

The suggestion of traders that applicants be required to pay a deposit, if implemented, would remove the discretion of the Authority to require applicants to provide a bank guarantee (or bond), and make such a condition mandatory.

Again, requiring applicants to provide a large sum of money as a bond would increase the barriers to entry into the industry significantly. It is uncertain how much of a problem under-capitalisation is in relation to new licensees, and whether claims are made against the fund, which can be traced to under-capitalisation at the time of licence issue.

In addition to questioning the financial stability of licence applicants, many focus group participants also thought there should be ongoing monitoring, or at least periodic checking, of finances once a licence is obtained.

Some thought that perhaps licence renewal should be contingent on satisfaction of certain financial checks rather than automatic as it currently is. However, such checking would involve significant administrative cost and the benefits would be contingent on any financial problems being readily identifiable from the financial checks conducted.

Given the current power of the Authority to impose a licence condition requiring licensees to provide financial reports or bank guarantees, there would be little extra benefit to be obtained from annual financial checks on all licensees.

The other ground listed above for refusal of a licence is that the applicant does not have premises in which they can lawfully carry on such a business.

In general, traders did not know how this provision was currently applied by the Authority. Many seemed to think that the Authority just required applicants to provide a photo of a retail premises in order to satisfy this requirement. Traders saw a number of problems with a photo being able to satisfy this provision. First, and most obviously, applicants could take a photo of a premise that was not theirs.

The Authority indicated that applicants were required to show they had all the relevant council approvals necessary to conduct the business. Councils may impose restrictions on how a premises may be used, or specify that a business must have certain facilities. If such restrictions or conditions are imposed, the applicant must comply with these in order to obtain a licence. The Authority said the current test facilitates a range of trading operations and provides flexibility in the way licensees conduct their business.

Notwithstanding the misconception regarding how this provision is interpreted and applied by the Authority, many traders queried how people were able to obtain licences and operate from garages and other non-caryard premises. For example, anecdotal evidence was provided that some traders buy and sell cars from a garage out the back of their house or from farms and orchards.

Inherent in these concerns is that traders did not think that the existing requirements that there be 'premises in which the applicant can lawfully carry on such a business' was a sufficient criteria. Instead, it was implied that there should be some assessment of the suitability of the premises to conduct a motor trading business.

Traders suggested that premises should have to be equipped with certain minimum customer service facilities, such as toilets, in order to satisfy the requirement. It also seemed that traders thought only applicants that had premises where cars could be displayed and inspected should be granted licences. For example, some suggested that Councils and hospitals, which are currently able to obtain licences, should be refused licences on the grounds that they do not have 'car yard' type premises.

In contrast to traders seeking more stringent criteria for premises, some participants said it was obsolete to require a licensee to have premises given that business could be conducted entirely over the Internet. However, unless vehicles are only ever delivered to internet purchasers, licensees trading online will still require premises to store cars and display them when the purchaser collects the vehicle. Without a requirement to have premises, licensees may appear to be a private seller, in which case the consumer would not be aware they were entitled to the protections under the Act. It is difficult to imagine a situation in which traders can conduct their business entirely online and at the same time afford consumers appropriate protection.

Another ground for refusal of a licence is if an applicant has been convicted or found guilty of a serious offence within the last 10 years. The Act defines a serious offence as an offence involving 'fraud, dishonesty, drug trafficking or violence punishable by imprisonment for 3 months or more'. The VACC raised concerns regarding the interpretation of 'serious offence' and the Authority's application of the term in relation to both licence refusals and licence cancellations. It questioned whether other types of offences, not involving fraud, dishonesty, drug trafficking or violence punishable by imprisonment for 3 months or more, could be found by the Authority to be sufficiently serious to warrant licence cancellation (or refusal). To clarify the operation of this provision, the VACC requested that an exact list of offences that would lead to automatic cancellation (or licence application refusal) be provided.

The VACC's concerns regarding interpretation of this provision are an example of where the industry would be likely to benefit from a central contact point within Consumer Affairs Victoria or the Business Licensing Authority, who they could contact with these concerns.

This issue is discussed further below under 'traders' contact with Consumer Affairs Victoria.

A conviction for a serious offence is not an absolute bar to obtaining a licence. Under s. 29B, the Authority may grant a licence to a person who has been convicted or found guilty of a serious offence, if it is not contrary to the public interest to do so.

Several traders commented that licences should not be given to people with any kind of criminal record. These comments may be interpreted in three ways:

- that the traders misunderstood this to be the present law and were just asking for the existing law to be applied
- that the traders wanted the Authority's power under s. 29B to issue licences to applicants notwithstanding a criminal conviction, to be removed, or
- there is reason for extending the existing provision to exclude applicants with any type of criminal offence.

If interpreted in the first of these ways, the comments were a result only of a misunderstanding about the present law and concerns should be resolved following clarification of the provision. If either of the other interpretations is correct, it is not clear what traders' concerns were with the present requirement, or what benefit the suggested changes would have. On this basis, the current provisions should remain.

The Business Licensing Authority raised two other issues regarding licence applications. The first related to its ability under the Act to have regard to an applicant's associates when considering whether to grant or refuse a licence application. Relevant considerations under the Act are whether the applicant:

- is an associate of a person who has been convicted or found guilty of a serious offence
- is an associate of a body corporate that has a director or secretary that has been found guilty of a serious offence.

The Authority suggested extending the relevant provision to include associates who:

- have had a claim admitted against them (or a company or partnership in which they were involved)
- the Authority is satisfied are not fit and proper persons to hold a licence, if they were to apply for one.

Recommendation 2

That the Act be extended to allow the Authority to consider associates who:

- **have had a claim admitted against them (or a company or partnership in which they were involved)**
- **the Authority is satisfied are not fit and proper persons to hold a licence, if they were to apply for one.**

The second issue regarded the situation where a company licensee has a claim on the Fund admitted against it. In November 2003, s. 29A (1A) was inserted into the Act. It provides that a person who was a director of a corporation or a partner in a partnership may apply to the Authority: for permission to hold a licence or to be employed in a customer service capacity; to prevent a suspension of a licence; to be employed in a customer service capacity; or for permission to be a partner or a director of licensee.

The provision was introduced to capture directors of companies that had claims admitted against them. The intent of the provision was to put these directors in the same position as individual traders who had claims admitted against them.

The Authority and the Motor Car Traders Guarantee Fund Claims Committee said the intention of the provision was not clear from its drafting and it required clarification. For example, it was not clear whether directors of a company that had a claim admitted against it could continue to be a director of another company licensee, or whether the second company could apply for a licence.

The Authority said it was aware of traders who had raised concerns regarding the interpretation of this provision and who had argued that it did not apply to them.

Recommendation 3

The impact on directors of companies (and partners of partnerships) against which a claim has been admitted on the Fund should be clarified in the legislation.

3.3.2 Granting of licences to people engaged in other business activities

It can be seen from the criteria used to assess applications that licences may be issued to existing businesses who conduct other types of trade or business activities. It is not a requirement that applicants intend to only conduct the business of motor car trading. This allows businesses that are closely connected to motor car trading to diversify their businesses and make use of synergies between the two areas of operation. For example, there are many panel beaters or smash repairers who are also licensed motor car traders, which enables them to purchase a car in the course of their trade, repair it, and sell it again.

The Business Licensing Authority said such businesses may decide to become licensed that many panel beaters who decided to become LMCTs did so in order to take advantage of the good reputation they have built up amongst their customer base. To preserve this reputation, such traders are unlikely to sell poor quality cars or infringe the law. Further, these licensees may present less of a financial risk because they can show they are able to run a business successfully, and should something go wrong or the motor retail industry suffer a downturn, they have an existing business to fall back on.

There are also examples of where existing, unrelated businesses acquire motor car traders licences. For example, Councils and hospitals may obtain licences in order to sell their fleet cars. It was suggested that such businesses obtain licences to avoid paying stamp duty and transfer fees when they purchase their company cars, because LMCTs do not pay stamp duty when they purchase cars.

Some traders expressed concern regarding the ability of these licensees to comply with various provisions of the Act and also that these licensees represent a greater proportion of claims against the Act because they do not understand the business. Traders claim their sales were less likely to be at arms length or legitimate under the Act. Further, they suggest they are unlikely to comply with the Act in terms of information disclosure to purchasers.

Allegations were made that licensees who operate as a secondary business are not monitored by investigators, who 'do not see them as a serious act'. No evidence was provided to support claims that a relatively high proportion of claims made against the fund stemmed from these types of licensees. Traders said they would like more information on where claims against the fund were stemming from.

At the Motor Industry Forum in March 2004, the Motor Car Traders Guarantee Fund Claims Committee presented information on the types of traders that had had claims admitted against them in the 3-year period to 31 January 2004. This data showed that only 9 per cent of traders who had claims admitted against them were also involved in wrecking and repairs, and these claims only represented 3 per cent of the value of total claims.

Rather than advocating a prohibition on the Authority issuing licences to applicants who intend to use their licence as part of a non-core business activity, traders concerns could be addressed by other means. For example, improving monitoring compliance and enforcement with the Act and ensuring that these businesses have sufficient knowledge of the Act and regulations. It could be argued that the second of these is already a requirement to the issue of a licence, and therefore traders' claims are unjustified.

Some traders said they thought there would be less of a problem if applicants were required to pay a bond (as outlined above), because many of these non-core traders would no longer wish to obtain licences.

Given that all applicants must meet the same requirements in order to obtain a licence, regardless of whether they already operate a business, and data on claims against the Fund does not indicate a problem with regard to non-core licensees, there is no reason why licences should not be granted to applicants who operate another business.

3.3.3 Qualifications and training of licensees

The qualifications and training of licensees was raised by almost all stakeholders who participated in the consultations. The issue was raised in two separate but related contexts:

- the qualifications or knowledge required to obtain a licence, and
- the ongoing training or testing of knowledge once a licence has been granted.

At present, one of the grounds for the Authority refusing an application is if the ‘applicant does not have sufficient expertise or knowledge of [the] Act to enable the applicant to carry on [the business of a motor car trader]’.

During the consultation process, the Authority explained that applicants were tested on their knowledge of their obligations to protect consumers under the Fair Trading Act and their obligations under the Motor Car Traders Act. The Authority said applicants were required to complete a written test rather than a multiple choice test in order to test their comprehension of the legislation.

Many traders indicated that they thought that whatever the test currently applied, it was not adequate to ensure new licensees fully understood their obligations or how to conduct a motor car trading business. Some said testing on knowledge of the Act and licensee obligations was not, in itself, sufficient and that there should also be testing of an applicant’s knowledge and skills relating to customer service, business management and the paperwork involved in a motor car trading business.

Traders said that trading in motor cars involves a lot of complicated paperwork and transactions, particularly in relation to used cars. For example, there are VicRoads Acquisition and Transfer Forms, stamp duty and GST requirements, security interests, Dealings Books, Form 7s, and consumer contracts.

In each of the focus groups, the possibility of a minimum qualification requirement for applicants was raised. However, this received mixed opinion.

Traders in support of this proposal advocated a scheme similar to that which applies to real estate agents. That is, licensees should be required to have a minimum qualification and a minimum number of years experience in the industry. A qualification, most likely at TAFE level, would help ensure that new licensees had sufficient skills and knowledge of the relevant legislation and general business practice in order to run a motor car trading business successfully. Traders said that requiring a qualification would reduce the number of complaints or disputes in the industry and result in less claims against the fund.

It was noted that in order to obtain a motor dealer’s licence in Queensland, an applicant must have a prescribed educational qualification as specified in the Regulations, and have a minimum of 3 years experience in the industry.

Traders who were not in favour of a qualification requirement said that it would add unnecessary red tape and be too costly for new entrants. At present, traders said there were not any relevant courses available to obtain a qualification, and that a course would have to be developed by an educational institution. However, it was noted that Kangan Batman TAFE has a College of Automotive Business Management, which offers two relevant courses.⁶ Some traders said this course was not ‘pitched at the right level’ and was aimed more at business management than legal rights and obligations. Some traders also said these courses were inaccessible for people in regional areas.

⁶ A Certificate IV in Automotive Business Management and a Diploma of Automotive Business Management. The VACC also offers short courses in people management, marketing and advertising.

A number of traders raised the possibility of a training course for applicants being provided by Consumer Affairs Victoria or the VACC. The VACC submitted that the application process undertaken by the Authority needed to be supplemented by a mandatory short training course that all applicants had to undertake prior to consideration of their application by the Authority. It suggested that a registered training organisation would provide the training course and noted that it already had links with Kangan Batman TAFE and had done some preparatory work on the modules that could constitute the course.

As noted earlier, there was mixed response to the suggestion that applicants be required to hold a minimum qualification or to have experience in the industry. The majority view was perhaps that traders should be tested more on their knowledge of the industry, law, people skills and teaching how to interact with consumers and fill in the paper work correctly prior to being granted a licence.

Recommendation 4

That the Business Licensing Authority, in collaboration with Consumer Affairs Victoria, VicRoads, the VACC and possibly the Office of Small Business, develop an information package for new licensees containing information on the application of the law and general information on how to conduct a motor car trading business.

Ongoing training and awareness of legislative changes once a licence had been granted was also raised. Although the Authority tests knowledge of the legislation prior to granting a licence, there is no further periodic testing of this knowledge after a licence is obtained.

Many traders felt that the Authority should offer refresher courses, or provide information periodically on the various pieces of legislation. This information should not necessarily only follow from legislative amendments, but be aimed at reinforcing existing legislation. Perhaps something along the lines of a series of fact sheets, which are issued on a two-year cycle, each dealing with a particular area of the legislation or regulatory framework. Such information could assist traders understand not only their rights and obligations, but also to understand the rationale for the regulation.

Recommendation 5

That information on relevant legislation and other areas of interest be provided to licensees on a regular basis through a newsletter (or other suitable format).

3.3.4 Licence fees

The Act provides that licence applications and renewals must be accompanied by a fee, which is prescribed in the Regulations. Currently, the licence application fee is \$778 and the first and subsequent annual licence fee is \$973.

Licence fees are paid into the Motor Car Traders Guarantee Fund and are applied to a variety of things, including administration of the licensing scheme and payment of claims made as a result of dishonest conduct of traders. The application of money from the Fund is discussed in further detail in section 8.

There was very little comment on the fees in the course of the consultations. A few licensees suggested that the initial application fee should be increased to between \$3000 and \$10 000. This suggestion was proposed as an alternative to a requirement for applicants to provide a bond (discussed above), with the obvious difference that the fee would not be refundable.

Only a couple of traders said they thought the annual licence fee was too high, and although some suggested it should be increased, this received mixed reaction.

Some traders said they would be willing to pay more in terms of annual licence fee if their licences were worth more. For example, if the total number of licences was capped (a closed licensing scheme) or if there was greater enforcement and prosecution of unlicensed traders.

The current fees apply to all applicants and licensees regardless of the area of the industry they work in, their annual turnover, or their conduct. A number of licensees raised the idea of having different fees based on experience, conduct or nature of business. For example, suggestions included:

- That annual fees be differentiated based on number of years they have held a licence (or total number of years in the industry). This would involve a sliding scale with less experienced traders paying a higher fee. The rationale for this is that traders with less experience are more likely to have claims to the fund made against them.
- That annual fees either be reduced if no complaints (or claims) have been received about them from consumers, or increased if complaints (or claims) have been made in the previous year. Again, the rationale for this is that those more likely to have claims made against them should be required to pay more.

- That licensees who trade only in motor cycles should pay a lower fee than licensees in other areas of the trade. This was suggested because it was argued that very few claims against the fund are made in relation to motor cycle purchases.
- That licensees with a 'wholesale only' condition should pay a lower fee than licensees who can trade with the public. The rationale for this being that traders aren't able to claim against the Fund, so wholesale licensees should not be expected to contribute as much to the Fund.

A number of traders opposed differentiation of fees on the first two of these grounds, saying it would be difficult (and costly) to administer and that differentiation on these grounds would be quite arbitrary and would not necessarily reflect the number or amount of claims made against the fund. It should also be remembered that the fund (and therefore licence fees) is applied to a range of expenses, not just claims against the Fund. Therefore, licence fees should not be based solely on claims made against the Fund.

The introduction of different (and reduced) licence fees for motor cycle traders and wholesale licensees cannot be dismissed as readily as differentiation on the other two grounds. However, in considering a reduction in these fees, regard must be had to the purpose and use of licence fees. For example, licence fees are used to fund enforcement activity as well as claims against the Fund and it may be that greater costs are incurred in enforcement activity relating to wholesale licensees (to ensure they do not sell to the public) than enforcement relating to other licensees. Regard must also be had to the benefits obtained by licensees from being licensed and whether existing fees are proportionate to these benefits.⁷

Recommendation 6

That consideration be given to introducing different fees for different areas of the industry, having regard to the effects on the industry and the purposes of licence fees.

⁷ However, such considerations are not relevant if licence fees are purely a cost recovery measure.

Other comments relating to fees included:

- That a separate fee should be re-introduced for each premises from which a licensee carries on the business of trading in motor cars. The Authority also requested that consideration be given to granting the Authority power to refuse to endorse additional premises on a licence in certain circumstances. For example, where it is satisfied that the additional yard will not be properly supervised by the licensee, that conduct from the additional premises is not financially viable, or that the licensee may allow an unlicensed trader to conduct business from the premises.
- That a fee be introduced for 'permission applications', where an applicant or licensee may apply to the Authority for permission to hold a licence despite a claim on the Fund being admitted against them, or despite a conviction for a serious offence.
- That, following the dissolution of a partnership, consideration be given to exempting a partner wishing to continue the business from payment of a licence application fee, or to changing the requirement that they must apply for a new licence.

Recommendation 7

That consideration be given to introducing additional fees for extra/additional premises held by a licensee, fees for permission applications and the exemption of partners from licence fees or the application process following dissolution of a partnership.

3.4 Restrictions on employees

In addition to restrictions on who may obtain and hold a motor car traders licence, the Act also prohibits motor car traders from employing, in a customer service capacity, certain people. For example, a motor car trader must not employ any person who the trader knows:

- has had a claim admitted against the fund (unless that person has obtained permission from the Authority pursuant to the Act)
- has been convicted or found guilty of a serious offence (unless that person has obtained permission from the Authority pursuant to the Act)
- is for the time being disqualified from holding a licence, or from being employed in any capacity in connection with the business of a motor car trader
- has had their last application for a licence refused by the Authority.

During the consultations, several traders said that people who have had a claim admitted against the fund should not be able to work in the industry. They gave a number of examples of where traders who had their licences cancelled following claims admitted against the fund had re-entered the industry in a sales capacity. Some of these traders were not aware that such employees were, at present, only able to be employed in the industry with the permission of the Authority following the application of a public interest test. Others, who were aware of this provision, wondered how it could be in the public interest for these people to be employed in the industry.

One reason why the Authority might allow traders to re-enter the industry following a claim against the Fund is to allow them to earn a living and to provide them an opportunity to repay some of the money claimed from the Fund. However, such permission would be subject to conditions, including that employment would be in a supervised capacity where the licensee is responsible for the employee's actions.

A further concern of traders was whether this provision applies to brokers, or people working for brokers in the industry. If it did not, traders said dishonest traders could circumvent the Act and re-enter the industry in this capacity.

As will be discussed below, brokers may need to have a licence depending on how they operate. For those who do not require licences, traders are concerned that persons who are not permitted to be employed by licensed traders may still be able to work as brokers in the industry, without requiring permission from the Authority.

The Act states:

A person who is not permitted to be employed in a customer service capacity by a motor car trader... must not participate in a customer service capacity in the business of a motor car trader.

'Customer service capacity' is defined in the Act as:

any position that requires the holder of the position to deal with members of the public who are buying, selling or exchanging motor cars or who are seeking to buy, sell or exchange motor cars.

Recommendation 8

The application of the above provision to brokers should be clarified, and if necessary to uphold the objectives of the Act, should be reconsidered.

In addition to queries from traders whether 'customer service capacity' was broad enough to encompass brokers, the VACC suggested that the definition of 'customer service capacity' be extended to include aftermarket service and finance to assist dealers in applying a consistent policy.

Recommendation 9

The definition of 'customer service capacity' should be extended to include aftermarket service and finance, unless evidence can be provided as to why they should not be added.

The Business Licensing Authority also provided comments on the provisions of the Act that deal with employees in the industry. The Authority suggested that an:

'obligation be imposed on LMCTs to take reasonable steps that are necessary to ensure that a prospective customer service employee is not prohibited before employing the person. The following would be sufficient to discharge the obligations:

- Received a notice of eligibility from the prospective employee
- Sighted a police records check not more than 6 months old
- Conducted a search of the Register of Motor Car traders to ascertain that no claims have been admitted against the prospective employee.

The Authority further recommended that the grounds on which a person is prohibited from being employed in a customer service capacity be reviewed to determine their applicability and, in particular, whether:

- (a) they should be extended to include circumstances where:
 - The person was a director of a company, or partner in a partnership, that had its last licence application refused by the Authority
 - The person's motor car trader licence, or a licence held by a company that he was a director of or a partnership in which he was a partner, has been cancelled under section 31, and
- (b) there should be capacity for a person who is prohibited under any of the grounds (not just the grounds covered by sections 35A(1)(a) and (b)) to apply to the BLA for permission to work in a customer service capacity.

3.4.1 Licensing of sales staff

The suggestion of licensing sales staff was raised at each of the focus group meetings. Many individual traders thought this was a good idea and a way of 'cleaning up the industry'. However, the VACC did not support a licensing scheme for employees.

There was some anecdotal evidence during the consultations that some employees, who did not uphold the consumer protection provisions of the Act, moved from one trader to another within the industry. A licensing scheme could 'clean up the industry' by excluding certain persons from entering the industry, or by allowing only those with certain skills or qualifications to enter the industry. However, the effectiveness of a licensing scheme would depend on the ability of the entry criteria to identify those who should be excluded from the industry.

Although there are some existing restrictions on who can be employed in the industry, as indicated above, there is no general 'quality control' of employees. Under the Regulations, traders are required to 'supervise and control each servant and agent of the trader, so as to ensure that the provisions of the Act and the Regulations are complied with'. However, many said it was difficult to obtain reference checks or information on work history, or to ensure that applicants were suitable employees. They also said that they could not watch their employees all the time.

There are different variations of licensing scheme, each imposing different costs and achieving different aims. Although the details of a licensing scheme were not discussed, traders generally agreed that there should be better screening of employees. At a minimum, police checks should be conducted and claims against the fund should be checked. There was some indication that this was not currently being done by licensees when hiring new staff.

Although traders noted that they were currently able to obtain a police report, many argued that because the industry was not united, people failing this check would simply go to a trader who didn't require it. They said introducing a licensing scheme and making a police report a criteria for issue of a licence, was the only way to ensure integrity of the industry.

A training course or qualification was also discussed in the context of licensing sales staff. Again, the course currently offered by Kangan Batman TAFE was noted. Some traders suggested that anyone wanting to enter the industry should be encouraged (or required) to undertake this, or a similar, course to ensure they know the law and rules. Although traders did comment that they could require, without legislation, their employees to undertake such a course, they again said that because the industry was not united, the integrity of the industry could not be ensured. They also said that they would have difficulty finding employees if they made this a prerequisite to employment, and it would be too expensive to pay for employees to undertake a course after commencing employment. Traders in regional areas stated that the costs of paying for employees to undertake this course were particularly prohibitive for regional traders, given that accommodation would also have to be provided.

Although most traders seemed to agree that the training of employees was a good idea, there was mixed opinion as to whether such training should be the responsibility of traders, or whether it should be mandated by government through a licensing scheme.

A licensing scheme would have costs for both traders and government.

Licensing schemes impose a barrier to entry into the industry. If sales staff were required to be licensed, there would be fewer sales staff who were able to work in the industry, as some would be unable to meet the licensing requirements or the costs of obtaining a licence. Staff may seek higher wages to cover the cost of obtaining a qualification, or may simply be able to command a higher wage through less competition in the industry.

In addition, licensing schemes involve significant administrative costs, which would have to be recovered through licensing fees for employees, or perhaps through increased fees for licensed motor car traders.

Traders said that licensing sales staff would make sales staff responsible for compliance with the Act, and alleviate the current impracticalities inherent in making traders responsible for all actions of their employees. Traders said it was not possible to monitor their staff all the time.

3.5 Processing of licence applications

It was observed in one focus group that a licensing scheme could only be successful if there was a way of deterring bad conduct and disciplining employees who did not comply with the legislative requirements. It was suggested that simply losing the ability to work in a car yard probably wasn't disincentive enough, and there would have to be monetary fines imposed.

Several traders mentioned that sales staff in Western Australia are licensed and are required to undergo a 3-day training course, and in Queensland there is a registration system for employees of motor dealers. In Queensland, the *Property Agents and Motor Dealers Act 2000* provides that a 'person must not act as a motor salesperson unless the person holds a registration certificate as a motor salesperson' (s. 335). A person is eligible for registration as a motor salesperson if they are over 18 years of age and they meet the educational or other qualifications prescribed in the Regulations. An application for registration may be refused if they are not found to be a suitable person to obtain registration after considering certain criteria specified in the Act.

Recommendation 10

Given that the introduction of some kind of licensing scheme or regulation of sales staff was raised at each of the focus groups, it is an area that requires further investigation. The benefits and costs of the different types of regulation should be further explored.

Apart from the above remarks on the eligibility criteria, traders did not really have any comments relating to the processing of applications by the Authority. However, one licensee stated that the Authority took too long to process his application (3 months). He said that the owner of the yard he wanted to purchase was unable to wait this long and as a result he says he lost a business opportunity. Other traders indicated that their applications had been processed much quicker than this and that they had no problems. It should be noted that the year their applications were processed varied substantially among the traders at the meetings.

A general point that was raised, is that traders would like more information from the Authority on the applications that are granted and rejected. Suggestions included statistics on how many are granted or rejected, and who they are granted to or why they were rejected. The Authority noted that it does maintain a register (that is now available online), which lists the names of all traders granted a licence as well as applications that have been refused in the last two years.

“ Section 4 Regulation of Conduct ”

The Act and Regulations contain a number of requirements affecting business conduct and contractual relations between sellers and buyers of motor vehicles. These provisions apply mainly to the sale of used vehicles between traders and consumers. However, some provisions also apply to new vehicle sales and private sales.

These conduct provisions include the following:

- Traders must attach display notices on used cars containing key identifying details of the vehicle such as odometer reading, cash price (except when offered or displayed for sale at public auction), year of manufacture and first registration, engine number and registration number (if any), and previous owner's details. This display notice is known within the industry as a 'Form 7'.
- Advertisements for trader's businesses must contain their LMCT number. In addition, advertisements offering used cars for sale (whether by a trader or other person) must contain a price of the vehicle and certain identifying details of the vehicle.
- Traders must keep a dealings book on the premises outlining key identifying details of motor cars purchased, sold or exchanged.
- Traders must supply a non-waivable statutory warranty of 3 months or distance of 5000 kilometres (whichever occurs first) against defects for used cars which are less than 10 years old and which have travelled less than 160 000 kilometres. This provision does not apply to vehicles sold at public auction.
- Traders selling used cars must observe a cooling-off period of 3 clear business days to allow buyers (other than motor car traders or bodies corporate) to re-consider and terminate the agreement if desired. During this period, a trader must not sell or dispose of a trade-in vehicle provided by the buyer as part payment for the car. This provision does not apply to vehicles purchased at public auction.
- All registered cars (whether registration is suspended or not) and regardless of age, distance travelled, or price must be sold with a roadworthy certificate that has been issued within 30 days prior to the sale. This requirement applies to both motor car traders and private sellers but does not apply to vehicles sold on consignment at public auction or if the buyer is a motor car trader, financier, or manufacturer.
- Traders must not sell cars on consignment unless it is on behalf of a financier, manufacturer, other licensed motor car trader, or unless the sale is at public auction.
- Traders must ensure the cancellation of any security interest in used cars offered for sale.
- Traders must supply purchasers of a new or used car with the contract of sale at the time of purchase. These contracts must include the terms and conditions prescribed, unless the trader is dealing with another trader, a financier or a manufacturer. If additional conditions are included in the agreement they must not derogate from the prescribed terms and conditions.
- The Act prohibits any person, whether a trader or private seller, from tampering with, or falsely representing the accuracy of, an odometer reading of a used vehicle. Traders must record the odometer reading at the time of purchase, display it on the car and state it in the contract for sale.

The provisions on the previous page are not an exhaustive list of the restrictions or positive obligations imposed under the Act. However, these are the main provisions that were commented upon during the consultations.

4.1.1 Form 7

It was perhaps this requirement that raised the most concern during the consultations.

As noted above, the Form 7 is the notice prescribed by the regulations (Reg 11) that, pursuant to s. 52 of the Act, must be displayed in the window of a used car that is offered or displayed for sale by a motor car trader. The details that are required to be displayed include:

- the name and address of the last person registered as the owner of the motor car, or the previous owner of the car, who was not a motor car trader or special trader under the Act
- the odometer reading, and
- the cash price of the motor car (except in the case of a motor car offered or displayed for sale at a public auction).

The Form 7 must also distinguish between those cars subject to the statutory warranty under s. 54 and those that are not. This information must be in red font. Some traders commented that stipulating the font colour was unnecessarily restrictive, given that these forms were printed electronically and many traders did not have colour printers. They suggested that these details be required to be printed in bold instead of red font. However, it was observed during the consultations that many traders used pre-printed forms rather than printing them themselves.

In considering this suggestion, the various costs and benefits must be examined. Relevant considerations include the costs to traders of a colour printer or alternative means of satisfying the legislative provision, whether these costs are passed on to consumers, and whether red font is more noticeable to consumers than bold font.

Recommendation 11

That replacing the requirement of stipulating in red font whether there is a statutory warranty, with a requirement to stipulate this in bold font, be given further consideration.

The rationale behind the requirement to display these particulars is to improve the bargaining position of buyers. The Form 7 provides buyers with the minimum amount of information necessary to sensibly negotiate over the vehicle. Also, the Form 7 helps to establish a paper trail of essential information, which can provide key information for dispute resolution, the disciplining of traders if required, and the tracking of stolen vehicles in some cases.

Traders' main concern with this provision related to the requirement to display previous owner's details. The purpose of such a requirement is that the previous owner's details provide consumers with a source of independent advice about the car they are considering purchasing.

Some traders mistakenly thought they were only required to disclose this information if they knew the details of the previous registered owner. However, the Act provides that these details must be displayed by a trader when they offer or display a used car for sale and does not make this contingent on these details being known. Therefore, to avoid infringing the Act, where the previous owner is unknown, traders can only offer or display the vehicle for sale if they receive an exemption from compliance.

The Act currently provides that where a used motor vehicle has been brought from a place outside Victoria for the purpose of sale, and the required particulars are not known, the Director of Consumer Affairs may, by notice in writing, direct that such particulars need not be included in the Form 7 in relation to this particular vehicle.

Traders expressed concern regarding the interaction of this requirement with the *Commonwealth Privacy Act* 1988 and some thought they were in breach of this Act by displaying previous owners' details. The National Privacy Principles contained in the Privacy Act restrict the way in which organisations can collect, use and disclose personal information. However, s. 3 of the Act provides that it does not 'affect the operation of a law of a State or of a Territory that makes provision with respect to the collection, holding, use, correction, disclosure or transfer of personal information'. Therefore, traders who disclose the personal details of previous owners on a Form 7 are not in breach of the Commonwealth Privacy Act.

The VACC, and some individual traders said that even if traders were exempted from complying with the Commonwealth Privacy Act, this requirement was inconsistent with modern community attitudes to, and expectations of, privacy. Some traders said although this information may be used by potential purchasers, there was also potential for it to be misused. For example, anyone could visit a car yard and obtain an individual's personal details or even compile a list for marketing or other purposes.

They claimed that they receive many complaints from previous owners about having their personal information publicly displayed. However, Consumer Affairs Victoria has not received any complaints from consumers about this requirement. Similarly, the RACV and the Consumer Law Centre observed that they had not received complaints from previous owners about the Form 7. In fact, these organisations supported the disclosure of previous owners details and noted they were aware of consumers who used this information to contact previous owners and find out information about the vehicle.

Throughout the consultations, a number of participants suggested alternatives to the current arrangements to protect individuals' privacy. These included:

That previous owners details be kept in the dealings book, which could be made available to prospective purchasers upon request, and upon proof (and recording) of identification. This would make the details less public and minimise the risk of misuse of this information.

That previous owners could be able to 'opt-out' of having their details made available to prospective purchasers. A record of this opting out would have to be kept by the trader and provided upon request to an inspector checking for compliance with the Act. Traders and/or previous owners could be required to sign a statutory declaration.

Several traders suggested the adoption of a 'vendor statement' which is required in Queensland. Among other things, this vendor statement could enable a previous owner to indicate they did not want their details disclosed.

However, it was also pointed out that these alternatives would create more paperwork and introduce further complexities into the system.

Perhaps of greater concern to traders than these privacy concerns, are claims by the VACC, and many individual traders that many traders find it hard to obtain this information and are therefore forced to breach the Act.

Traders gave a number of examples of where they are either unable to obtain or have difficulty obtaining this information:

- (a) Where cars are sourced from interstate – particularly if they are sourced from finance companies, auction houses or other traders – disclosure of previous owner’s details may be contrary to the Commonwealth Privacy Act as there is no statutory provision exempting such disclosure from compliance.

Some traders acknowledged that there was a process for obtaining an exemption under the Act, others did not seem to be aware of this provision. However, all traders argued that the current process of applying to the Director for exemption in each individual case is impractical, particularly given the time that this would take and the cost of having unsaleable stock during this time. Traders also noted that this process of exemption is only available where vehicles are brought from outside Victoria, and is not relevant to the other examples below.

- (b) Where previous owners do not wish to disclose such information.

Traders said this was common, particularly in relation to prestige cars or where the previous owner did not wish to be contacted for some reason. The above suggestions for enabling previous owners to opt-out of this requirement would alleviate these concerns – provided of course that traders were exempt from compliance where there had been an opting out.

- (c) Where auction houses, wholesalers or finance companies are unwilling to provide this information due to concerns that such disclosure is in breach of the Commonwealth Privacy Act. Some traders said that they were losing trade channels because of the refusal of some auctions or wholesalers to supply this information. As noted above, the Privacy Act exempts organisations from compliance with that Act if their disclosure of information is required in order to comply with state or territory legislation. Therefore, wholesalers and finance companies would be in breach of the Privacy Act unless disclosure of previous owners’ details is required under the Motor Car Traders Act, or other Victorian legislation. It is not clear that such information is required, as wholesalers and special traders (including finance companies) are exempt from the definition of a motor car trader, and only motor car traders are required to display this information.

Recommendation 12

The inability of wholesalers and finance companies to provide previous owners’ details for inclusion in the Form 7 due to restrictions under the Commonwealth Privacy Act should be further investigated.

Based on the difficulties of complying with this provision and changing social attitudes to privacy, the VACC and the vast majority of traders attending the focus groups called for the abolition of this requirement, at least in its present form.

Although there is no indication of how many people contact previous owners using these details, both the RACV and the Consumer Law Centre (and a number of traders) submitted that these details were used. For example, prospective purchasers may contact the previous owner to find out if the odometer reading is correct, or if the vehicle has been in an accident or subject to water damage. However, some traders said many of the customers who they knew had contacted the previous owner, did so in order to find out the trade-in price, with an expectation that they could purchase the car for a similar price without regard to reconditioning costs.

One suggestion for amending the Act, apart from those discussed above in relation to privacy concerns, was for traders to be exempt from the requirement to display previous owner's details where these details are not known to the trader.

Recommendation 13

The benefits and costs of requiring the disclosure of previous owners' details in the Form 7 should be explored in further detail. In particular, options allowing previous owners to 'opt out' or to minimise the disclosure of personal information should be explored.

4.1.2 Advertising (and application to Internet Sales)

The Act requires traders to display, and make clearly visible, their LMCT number at each place at which their business is carried on. Although no traders had a problem with this particular requirement, some wondered whether, and how, this applies to websites operated by traders, and other websites which they use to sell vehicles. For example, does their website constitute a place of business? The VACC argued that 'websites should carry exactly the same responsibilities and obligations as LMCTs under the Act, who are operating from a fixed location'.

The regulations further prescribe certain requirements in relation to advertising of traders' businesses and used cars. In any advertisement or statement in relation to a trader's business of trading in motor cars, the trader must include their LMCT number. Again, the VACC questioned whether this applied to sales over the Internet. If it did not, the VACC submitted that it would be difficult for a consumer to differentiate a licensed trader from an unlicensed trader and the ambiguity may lead a consumer to believe they were dealing with a licensee when in fact they weren't. The VACC also expressed concern that the Internet will create a growth in consignment sales if the identity of the owner of the car can be concealed.

The regulations relating to advertising of used cars are more prescriptive and received more comment during the consultations. Under the regulations, traders are required to include certain particulars in any advertisement for the sale of a used car. These particulars include the cash price of the car and the registration number (if registered) or the engine, chassis or vehicle identification number (if unregistered).

Similarly, there are also restrictions on persons other than motor car traders in relation to the advertisement of used cars for sale. Regulation 22(4) states:

If a person (other than a motor car trader...) publishes or causes to be published an advertisement offering a used motor car for sale in a newspaper generally circulating in the whole or any part of Victoria or in a motor car specialist magazine generally circulating in the whole of Victoria, the person must include in the advertisement... the cash price of the car and [registration number (if registered) or the engine, chassis or vehicle identification number (if unregistered)].

There is a penalty of 10 penalty units for failure to comply with this regulation. However, where the car is for sale by auction, the cash price is not required to be included, unless it is available for purchase before the auction, and the vehicle identifying details are not required to be included if these are provided in writing on request to persons attending the auction.

Provision of this minimal and easily obtained information prevents traders enticing buyers to their dealerships by advertising desirable vehicles at value for money prices which do not exist or which, on arrival at the dealership, 'have just been sold'. A requirement to include an LMCT number in the advertisement indicates to buyers the conditions of sale with respect to regulatory obligations. It also prevents traders posing as private sellers in order to sell vehicles without meeting the regulatory requirements to provide information and assurances to buyers.

Again, traders queried how this provision operates with respect to the Internet. Traders gave examples of cars advertised for sale through national car sales websites (such as carsales.com.au) or internet auctions sites (such as ebay.com.au). Cars are advertised on these sites by traders, private sellers and unlicensed traders, who may reside in Victoria, interstate or overseas. Traders asked whether they were required to put these details on advertisements on these sites, and if so, whether all advertisements on these sites should have these details.

Recommendation 14

Clarification of the application of this provision to traders advertising on the Internet is required. Also, an examination of whether internet advertisements by non-traders are captured by regulation 22(4) – that is, the restrictions on newspaper and magazine advertising – is required. If necessary, the Act and Regulations should be amended to ensure traders are required to include their LMCT number in all advertisements, regardless of whether the advertisements are published on the Internet.

Another issue that was raised in the consultations was the application and effect of this provision in relation to advertising the sale of buses. One trader who only trades in buses, said that the market for buses was a national market and that these advertising restrictions had an unfair effect on Victorian traders. He said that the nationally circulated trade magazines (and one in particular) are the primary mechanism for buying and selling buses in Australia.

According to this trader, many of the advertisements in this national magazine do not comply with the regulations in that they do not include the price of the bus or the vehicle specifications. In addition, many traders do not include their LMCT number. There are several aspects to this trader's concerns. The first is whether traders and other persons, who conduct business or reside either within or outside Victoria, are required to comply with the regulations when placing these advertisements. The trader believed that he, as an LMCT in Victoria, was required to include the cash price and vehicle specifications when advertising in this national magazine because it was available in Victoria. However, he was unsure whether traders in other states, or non-traders were required to comply. Clarification of the application of this provision to national magazines and traders (and other persons) outside Victoria would be beneficial.

The trader said that, as he understood the regulations to apply to him but not to traders in other states, there was an issue of unfair competition as a result of the advertising requirements. He said he was at a disadvantage compared to interstate traders by being required to include a price of a bus in his advertisements. The trader argued that as the market was so small, and there was effectively only one place to advertise buses, that if he were to purchase a bus and refurbish it, the previous owner would be able to tell what his mark-up was.

The bus trader argued for a level playing field, either through the extended application of this provision to interstate traders, or the abolition of this provision in relation to Victorian traders advertising in national magazines. He also called for greater enforcement of this provision as it currently stands. First and foremost however, it is clear that clarification of the application of this regulation would be beneficial.

In the course of the consultations, comments were also made regarding Regulation 23, which requires traders selling new cars to disclose the amount of any dealer charges that are additional to the price advertised. This does not mean that these charges must be included in the price, only that the amount of these charges must be disclosed. Dealer charges, or 'dealer delivery charges' as they are commonly known, include things like:

- the cost of transporting the vehicle to the dealer's premises
- the cost of cleaning the vehicle after transportation
- boarding costs, which cover storage rental, insurance and floor plan charges
- temporary registration costs
- petrol costs
- the costs of a trade-in valuation.

The aim of this regulation is to ensure that consumers are not misled by advertisements excluding mandatory charges into thinking they will pay no more than the advertised price. In a submission to the consultation process, the RACV expressed concern that dealer delivery charges were not always disclosed in advertisements and that enforcement of this regulation could be improved. In addition, the RACV commented that where dealers did comply with this regulation, dealer charges were often in very small print and in an inconspicuous place and it was unlikely that consumers would notice them.

It should be noted that traders who fail to disclose dealer charges in advertisements, or who include them in fine print or in an inconspicuous position in the advertisement, may be in breach of the Fair Trading Act for misleading advertising. However, data obtained from Consumer Affairs Victoria's consumer enquiries database indicate that very few enquiries (less than 4 per cent) are received from consumers regarding undisclosed charges or misleading advertising.

The RACV noted that:

Dealer delivery charges can add significant amounts to the price of a new vehicle above its advertised price... dealer charges alone can add around 10 per cent to the advertised price on cheaper vehicles.

The RACV also observed that in addition to dealer charges, other ad-ons such as stamp duty and registration can mean the 'drive-away price' is around 15 per cent higher than the advertised price.

Dealer delivery charges can vary from dealer to dealer and can be subject to negotiation. In some cases, dealer delivery charges may even be waived by traders. However, the RACV suggested that these charges are often added on after negotiations had concluded and that many consumers are unaware of these charges, or think they are non-negotiable like Government stamp duty charges.

It noted that in a typical transaction for the purchase of a car, there are numerous components that may each be open to negotiation including, the trade-in value of a previous car, the sale price of the new vehicle, and dealer charges. The RACV argued these various components can be confusing for consumers and that traders should have to advertise a single all-inclusive price for new cars.

It noted that the advertisement would not necessarily result in this one price being paid by all customers, but it would allow customers to negotiate on a single price and it would be transparent in that customers would not be faced with additional charges once a price had been negotiated.

Conversely, advertising a single price would remove transparency in the different components that make up that price. Consumers would be unable to see exactly what they were paying for.

The VACC suggested that dealer delivery charges are simply cost recovery of expenses incurred by traders. These charges are calculated using a formula and necessarily vary from trader to trader. If prices were 'all-in-one', consumers could no longer distinguish the dealer charges component of the price from the profit margin added by the trader.

Rather than requiring traders to advertise a single price, the transparency of dealer charges and consumers' awareness of these could be improved by regulating the way in which dealer charges are disclosed in advertisements. For example, traders could be required to include dealer delivery charges in a minimum of 10 point font, or in a particular position in an advertisement. A requirement could also be imposed on advertisers not to accept advertisements that did not comply with such a requirement.

The ACCC is currently developing guidelines for motor vehicle advertising, which are likely to outline advertising practices relating to dealer delivery charges that may contravene the Trade Practices Act.

Recommendation 15

Most of the concerns regarding dealer charges could be alleviated by improved enforcement of the current Regulation and perhaps by extending this Regulation to require dealer charges to be disclosed in a minimum of 10 point font.

4.1.3 Dealings book

The Act requires motor car traders to keep a 'dealings book' containing certain particulars for each acquisition and disposal, which are specified in the Regulations. The particulars required include the registration number, make and type of vehicle, vehicle identification or engine number, the name and address of the persons from/to whom the vehicle was acquired/sold, the roadworthy certificate details, the odometer reading and the details of any security interest. Another important detail that must be kept in the dealings book is the signature of the person from whom the vehicle was received.

The dealings book and the records contained therein provide a paper trail of information, which can assist with dispute resolution, the disciplining of traders and the tracking of stolen vehicles.

Some traders questioned whether there was still a need for a dealings book to be prescribed in the Act and Regulations, given the amount of information now recorded and kept by VicRoads. Some suggested that there was no longer a need for traders to keep information and that most of the information would never be accessed by anyone (especially in the auto-recycling trade).

They argued that there was too much paperwork and too much duplication within this paperwork, and that the Act and Regulations should be revisited to identify areas where the paperwork could be streamlined.

One trader explained the process that traders often have to go through when selling a car to another trader, describing this process as 'antiquated' or 'old-fashioned'. He said that when a wholesaler sells a car to another trader, this is usually arranged by phone. The trader then sends a slip containing the necessary details from the dealings book to the wholesaler for their signature. The wholesaler signs (or stamps) the slip and posts it back to the trader, who then glues it in to the appropriate place in their dealings book. In this situation, the traders' compliance with the Act depends on the wholesaler signing this slip and sending it back – traders are not able to compel them to do so.

Another issue that was raised in relation to the dealings book was that of electronic record keeping. It was suggested that most traders now maintain electronic records (primarily for GST and inventory purposes) and there are a variety of software packages available that enable an electronic version of the dealings book. The Act allows traders to keep a dealings book in electronic form. However, traders are required to copy or print the entries relating to a transaction on to paper, which must then be signed as prescribed, and kept together with other printed entries relating to other transactions.

Traders said this requirement of printing the electronic dealings book and having it signed effectively counteracted any benefit in having an electronic dealings book. They said it was impractical to do this and therefore, they must also maintain a physical dealings book, which could be signed by the customer in order to meet the regulatory requirement. It is unclear why traders claimed it was impractical to fill in all the details electronically and print it in order to record a signature. Perhaps it is because not all the details can be filled in prior to the customer leaving the premises, or perhaps there is a limitation in the current software available.

Many traders questioned why a signature was required. They said any arguments that signatures were required as proof of transactions were flawed. This is because there was no way for traders to authenticate signatures if they were sent in the mail (see the scenario described above) and traders could not verify a signature if an intermediary takes delivery of a vehicle on behalf of the owner.

Some traders mentioned they already kept invoices that contained signatures and said it did not make sense to have a signature in the dealings book when all information is already available in different forms. Is there any reason why all information should be on the one form (the dealings book) rather than having the relevant information on multiple forms (such as the roadworthy certificate, invoice and transfer form)?

Recommendation 16

The inability of traders to keep only an electronic version was often raised as a concern throughout the consultations. Given the prevalence of these concerns, the dealings book requirements should be revisited, both in terms of their rationale and whether the paperwork requirements can be improved. For example, a workshop involving traders, regulators and software companies could be organised.

There is no clear indication of the benefit of requiring a physical signature in the dealings book. Unless strong reasons can be provided as to why it should be maintained, this requirement should be removed.

4.1.4 Statutory warranties

The legislation requires traders to supply a mandatory statutory warranty covering three months or 5,000 kilometres (whichever occurs first) for used vehicles which are less than 10 years old and have travelled less than 160,000 kilometres. The warranty is intended to clarify the notions of 'merchantable quality' and 'fitness for purpose' contained in general legislation such as the *Fair Trading Act 1999* in relation to used motor vehicles.

Provision of a warranty improves buyers' bargaining position by providing them with some degree of confidence in the reliability of the vehicle for which they are negotiating. In effect, the warranty requires traders to supply vehicles that resemble the representations they make regarding quality. These representations are made through mechanisms such as the vehicle's generally 'polished-up' appearance and through discussions with the buyer.

The warranty acts as a proxy for information on vehicle quality by providing buyers with some assurance that the vehicle is of reasonable condition given its age and distance travelled at the time of sale. It is not intended to provide an assurance, or information on, the vehicle's likely condition at some time in the future and hence only applies for a limited period. This is considered a sufficient time for defects existing at the time of sale to become apparent and be repaired and also limits the number of defects which may have been caused or exacerbated by the owner's treatment. The trader is not responsible for repairs of such defects. Nor is the trader responsible for repair of defects in the tyres, battery or prescribed accessories which include items such as: audio equipment; body hardware or rear window demisters which are not standard to the car; light globes and sealed beam lights.

The statutory warranty represents a minimum warranty that traders must provide on certain used vehicles. Traders may offer extended warranties or warranties on vehicles where the statutory warranty does not apply if they wish to do so. The statutory warranty applies only to newer used vehicles in recognition of the fact that at some cut off point, reflecting age and/or distance travelled, the costs of providing an assurance that the vehicle is not unreliable are excessive, even if the warranty period is brief.

The statutory warranty does not apply to commercial vehicles, motor cycles, vehicles bought at public auction, vehicles bought by motor car traders, special traders or employees of traders. In a report prepared for the RACV, the Consumer Law Centre recommended that used motor cycles and commercial vehicles purchased privately should also be subject to the statutory warranty (where the vehicle falls within the relevant mileage and age limits).

Recommendation 17

Traders should be required to provide a statutory warranty for commercial vehicles that are less than 10 years old and have travelled less than 160,000 km, where such vehicles are purchased by private individuals.

Although it is not open for the trader to waive the statutory warranty, the trader may exclude certain defects under the Act by affixing to the car a notice describing the defects and a reasonable estimate of their cost of repair. However, the trader must still provide a roadworthy certificate.

Where the statutory warranty does not apply to the vehicle due to its age or distance travelled, the Form 7 displayed in the window of the vehicle must clearly state that the statutory warranty does not apply.

The statutory warranty provided by motor car traders is separate from any manufacturers warranty that may still apply to the used vehicle.

The statutory warranty was not a major issue of concern raised during the consultations. Although some traders commented that perhaps there was no longer a need for it, given extended manufacturers warranties and the availability of purchasing an extended warranty. Also, a few traders pointed out that this kind of statutory warranty was unique to used motor vehicles and that no other industry, including those dealing with similar goods (such as yachts and boats) was required to provide one.

Some traders suggested that the removal of the statutory warranty would have a positive impact in reducing the number of old cars and improving the quality of vehicles on the roads.

The RACV also raised the issue of statutory warranties. It claimed that, based on calls to its Motoring Advisory Service, consumers often do not know what is covered by the warranty, and in some cases are not even aware that there is a statutory warranty. There is no requirement under the Act for details of the statutory warranty to be provided in the agreement for sale.

Although a purchaser must be provided with a copy of the Form 7, which states whether the car is, or is not, covered by a statutory warranty, the RACV argues this is not sufficient. It suggested that traders should be required to provide information on what is and is not covered by the warranty, and how the warranty works. For example, it suggested that many consumers were unaware that the warranty period extended if the vehicle was being repaired during the initial warranty period.

Although the VACC has a standard form describing the statutory warranty, not all traders provide this form to customers and there is no requirement under the Act for them to do so.

The RACV also expressed concern that consumers did not know that if they moved after purchasing a vehicle and the vehicle needed repairs, they may be responsible for the cost of transporting the car back to the place of purchase in order for the repairs to be covered by the statutory warranty.

Similarly, the RACV noted that some consumers were not aware that the vehicle they were purchasing was not covered by a warranty. This was particularly so in relation to vehicles classified as commercial vehicles, and which are therefore excluded from the statutory warranty.

The Motor Car Traders Guarantee Fund Claims Committee expressed a further concern that some consumers are misled into thinking that an extended warranty applies to their vehicle due to the practice of advertising extended warranties on the Form 7. It said that some suppliers of extended warranties sponsored printed Form 7s or advertised on them. Such practices may give the impression that the car is covered by an extended warranty when it is not.

Recommendation 18

That options be examined regarding ways to improve consumers' awareness of the existence or otherwise of a statutory warranty and their rights and obligations in relation to such warranties. At a minimum, traders should be required to provide consumers with a statement of their rights and obligations under a warranty, where such warranty applies (similar to the standard form supplied by the VACC).

4.1.5 Cooling-off period

The Act provides that persons (other than motor car traders) who purchase a used car are entitled to terminate the agreement for sale anytime within 3 clear business days of signing the agreement. Unlike the statutory warranty, this cooling-off period may be waived by the purchaser using a form prescribed in the Regulations.

The cooling-off period does not apply to commercial vehicles, vehicles bought at a public auction or new vehicles (with the exception of off-trade-premises sales⁸ of new cars).

The 3 day cooling-off period is primarily designed to remedy an information asymmetry which exists with regard to the contract and pressure selling which can result in a purchaser entering an agreement where, on cool consideration, it is apparent that they will be unable to discharge it. It counters consumer ignorance of contractual terms and problems that may be associated with buyers having little opportunity to carefully read or assimilate all details of a contract presented to them at point of sale.

The cooling-off period provides buyers with a second chance to study the terms of the contract of sale and to seek independent advice on any terms which may be of concern or which are not clearly understood. In many cases it allows buyers to organise finance and cancel an agreement if suitable finance cannot be found. While it is likely that the bulk of buyers organise finance prior to purchase, some may commit themselves to a purchase that is beyond their budget. This may occur when encouraged by a trader who emphasises that a better vehicle can be purchased with minimal additional finance. Traders have an incentive to up-sell for higher revenue and often also have an incentive to up-sell in order to arrange additional or larger finance packages which will earn higher commissions.

During the cooling-off period, a trader is not permitted to sell or otherwise dispose of a vehicle which has been given as a trade-in by the purchaser as part of the agreement for sale.

Buyers who terminate an agreement of sale during the cooling-off period are required to pay \$100 or 1 per cent of the purchase price of the vehicle (whichever is greater). Further, if the purchaser has accepted delivery of the vehicle but terminates the agreement within the cooling-off period, the purchaser is liable for any damage occurring while the vehicle is in their possession. Due to the financial penalty involved in cancelling sales, it is unlikely that many buyers would enter into contracts with the prior intent of cancelling, but rather would use the option as an 'insurance' reserved for unanticipated or exceptional circumstances only.

One trader suggested that the financial penalties for terminating an agreement during a cooling-off period should be higher. He said that, at present, purchasing a car and returning it within the cooling-off period could be used as a very cheap way of renting a car for a weekend. Although he acknowledged that he could ask the customer to waive the cooling-off period, he said this would look 'dodgy' and was not good business practice. Other traders commented that traders were not under any regulatory obligation to deliver the car during the cooling-off period, and that if they had concerns regarding a purchaser's legitimacy, they would keep the car until the cooling-off period had expired.

Again, the RACV expressed some concern that consumers were not always aware whether there was a cooling-off period that applied to their purchase. It cited the following problems experienced by consumers calling their Motoring Advisory Service:

- the customer didn't realise they had a cooling-off period
- the customer didn't realise they did not have a cooling-off period
- the customer was told by the trader that they didn't have a right to a cooling-off period when in fact they did
- the customer signed the waiver form without realising they had done so.

Although information relating to the cooling-off period is required to be included in the Form 7, there is no requirement under the Act for either the cooling-off period or a waiver of this period, to be specified in the contract of sale.

⁸ An off-trade-premises sale includes situations where a trader takes a demonstration vehicle to a consumer's residence or place of business with the hope of making a sale. The rationale for having a cooling-off period apply to such sales is to prevent consumers being ambushed by high pressure sales tactics.

The RACV suggested that a statement (in bold) which sets out the consumer's right to the cooling-off period (and their obligations should this right be exercised), be made a prescribed particular in the agreement of sale. Alternatively, it submitted that at the very least, the current paragraph in the Form 7 should be changed to highlight the exceptions to the cooling-off period. Perhaps the font size of the relevant paragraph in the Form 7 could also be increased.

The Consumer Law Centre, in a report prepared for the RACV, also supported such an inclusion. It suggested that traders should have to advise the consumer of their right to cancel the agreement in a similar manner to that prescribed in relation to contact sales under the Fair Trading Act. This would require traders to attach a notice to the front page of the agreement informing them of their cooling-off right together with information on how to exercise this right.

The RACV pointed out that the cooling-off period also applies to 'off-trade premises sales' of new motor cars, yet there is no requirement for purchasers under such circumstances to be informed of this right. Traders selling new cars do not have to display a Form 7 in the vehicle, and the presence or absence of a cooling-off period is not a particular that is required to be included in the agreement for sale. Both the RACV and the Consumer Law Centre argued that traders should be required to make this information known to consumers at the time of purchase, perhaps in a form similar to that outlined above in relation to used cars.

The Consumer Law Centre went a step further and recommended that the cooling-off period be extended to apply to new vehicles, as the same information asymmetries and potential for pressure sales tactics can arise in relation to sales of new cars.

A further point that was raised by the RACV and Consumer Law Centre was that private purchasers of commercial vehicles should also have a right to a cooling-off period.

Recommendation 19

That options be examined regarding ways to improve consumers' awareness of the existence or otherwise of a right to a cooling-off period and how to exercise such a right. In particular, a consumer's right (or otherwise) to a cooling-off period should be made a required particular in contracts for sale.

Also, the extension of the cooling-off period to new and commercial vehicles should be considered with regard to the objectives of the provision.

4.1.6 Roadworthy certificates

The legislation requires anyone selling a registered motor car, whether a motor car trader or not, to provide a current roadworthy certificate to the purchaser of the vehicle. However, this section does not apply if the vehicle is being sold to a motor car trader, or if the vehicle is sold at a public auction by a person acting on behalf of the owner of the car.

The roadworthy certificate indicates to buyers that the vehicle satisfies the legal requirement for minimum levels of safety contained in the *Road Safety Act 1986* and that it is suitable for registration. This provides buyers with a basic assurance that the vehicle, once purchased, can be used immediately without undergoing unanticipated repairs to bring it to the standard required for registration.

Traders did not seem to have any concerns regarding how this provision affects them. However, roadworthy certificates were often raised in two contexts. The first was the exemption that applies when vehicles are sold at auction. This issue is discussed together with other exemptions relating to auctions under the 'Auctions' heading below.

The second context was a general suggestion that all vehicle registrations and renewals should have to be accompanied by a roadworthy certificate. It was said that such a requirement would improve the quality of vehicles on the roads and make the roads safer. Many traders made comparisons with cars sourced from NSW, where roadworthy certificates are required, saying that these cars were much safer than the average car registered in Victoria.

4.1.7 Consignment selling

Motor car traders are prohibited from selling or offering to sell a motor car by consignment, and from having a motor car in their possession for the purpose of selling it by consignment. The Act defines 'selling a motor car by consignment' as 'selling, exchanging or otherwise disposing of a motor car, or any interest in a motor car, as an agent for a person who is not a licensed motor car trader or a special trader'. Therefore, traders are able to sell cars on consignment on behalf of other traders, for example where one trader sells a car from their lot, which is a vehicle that has been traded in and is owned by another trader. The section also does not apply to sales at public auction.

The rationale for prohibiting consignment selling is that it offers broad opportunities to defraud consumers by allowing the possibility for traders to misrepresent the sale price of a vehicle to the owner, or by allowing the possibility that sales proceeds will not be forwarded to the owner. A further objection to consignment selling is that it allows traders to effectively rely on the public to finance their stock. This practice may be particularly attractive to traders who are in financial difficulty. However, if such dealers were to cease trading, there would be a number of consumer losses that would have to be reimbursed from the Fund.

Despite this rationale and concerns that consumers would suffer detriment if consignment sales were allowed, many traders noted that Victoria is the only state that prohibits consignment sales. It should be noted that consignment selling was not prohibited in Victoria until 1985, following a review of the Act, which found that consignment selling was causing problems for consumers.

Although there was some opposition, most traders seemed to support the current prohibition. Traders generally recognised that there were problems when consignment selling was allowed and said there was 'no point turning back the clock'. Traders in favour of the current provision also said that consignment selling may lead to confusion about other provisions of the Act including responsibility for roadworthy certificates and the applicability of (and liability for) the statutory warranty.

A couple of traders questioned the rationale for a prohibition on consignment selling in relation to commercial vehicles, arguing that the rationale did not apply. One trader suggested that there should be some kind of legally recognised document that could cover consignment sales of commercial vehicles. This document could have provision for disclosing the sales price and agreed commission, and indicate agreement by both parties.

A number of traders indicated that they were aware of traders who did sell cars on consignment and said there was a problem with enforcement of this provision.

4.1.8 Cancellation of security interests and obligation to provide clear title

The Act requires motor car traders to procure the cancellation of any security interest that is registered under the *Chattel Securities Act 1987*, before selling, exchanging or otherwise disposing of a motor car. Traders, like all other sellers of goods, also have an obligation under the *Goods Act 1958* to transfer good title when they sell goods. In recognition of this obligation and the possible detriment to consumers if this is not met, the Motor Car Traders Act provides that a trader's failure to transfer good title is grounds to make a claim against the Motor Car Traders Guarantee Fund.

The requirement for traders to ensure cancellation of any security interest in a car provides the buyer with an assurance that the vehicle will not be re-possessed. Importantly, it protects the previous owner from being pursued by a financier for a debt which the trader should have discharged. This is relevant for buyers who have a vehicle they wish to trade-in as part payment for another vehicle.

During the consultations, many people said that a trader's failure to discharge security interests was one of the first signs that a trader was in financial difficulties. They said that bad debt and non-compliance with this section was one of the primary drains on the Fund. This issue will be discussed below in the Motor Car Traders Guarantee Fund section.

The VACC has recommended that this section be reformed. Instead of requiring traders to 'procure the cancellation of a security interest', the VACC suggested traders be prohibited from 'selling, exchanging or otherwise disposing of a car if it has an interest recorded under the *Chattel Securities Act 1987*'. This suggestion arises because the VACC says that, 'at times, it is difficult to 'procure' the cancellation of a security interest'.

A couple of traders noted that the current provision only required traders to discharge the interest prior to sale, rather than at the time it was acquired. They said that although most traders cancelled the security interest within 48 hours, some traders could use a strict interpretation of the provision to stock and offer cars for sale in their yard that were effectively still owned by a finance company (similar to consignment selling). It was suggested that the Act could be amended to require cancellation of the security interest within a reasonable time of acquiring the vehicle.

Alternatively, the Motor Car Traders Guarantee Fund Claims Committee suggested that the section be extended to create an offence of:

failing to remit money to pay out a finance company (or to remit money to any other person) where the motor car trader has agreed to do so (either in contract or verbally) when purchasing a motor car from a consumer.

To determine if a car is subject to a security interest, traders are able to check the Vehicle Securities Register (VSR), which is maintained by VicRoads. The VSR can also be used to check that a vehicle has not been stolen. The VSR can be checked over the phone or at a VicRoads office, and is available for both private purchasers and traders' use.

One trader said that he found the VSR difficult to interpret and that it did not give him all the information he required. For example, he said the VSR discloses whether there are registered encumbrances on a vehicle, but there is no way of verifying who owns the vehicle as the registration certificate may be in the name of a person who is not actually the owner. In addition, some traders had concerns that other encumbrances, such as those under the Family Law Act, were not included in the register, yet may prevent a trader transferring good title.

Many traders also raised the issue of a finance company's obligation to cancel a security interest once the trader has paid the debt. The *Chattel Securities Act 1987* requires a financier to cancel a security interest within 14 days of the financier having knowledge of the interest being cancelled (by the trader). Traders generally said 14 days was too long and was not necessary in the age of electronic transactions. They said this time frame prevents them on-selling the car during this time because a purchaser would not be able to get finance on the car owing to the uncleared encumbrance. A time limit of 7 days was suggested as an alternative.

The Australian Finance Conference (AFC) commented on this suggestion, stating that, rather than a 7-day time limit, it would prefer the current provisions of the *Chattel Securities Act 1987* to be strengthened by:

- (a) requiring the cancellation of a security interest within 14 days of all money secured being paid out, and
- (b) implementing a system of penalty notices and fines for late cancellation of security interests.

The AFC noted that there were similar requirements to this in NSW.

A further issue that was raised by the VACC relating to the obligation on motor car traders to cancel security interests and transfer good title was the difficulty in determining such interests in relation to unregistered motorcycles. According to the VACC, over 50 per cent of motorcycles sold in Victoria are unregistered as they are used in recreational off-road or agricultural applications. The Vehicle Security Register does not include information on unregistered vehicles.

The VACC submitted that there is no federal or state database that contains the Vehicle Identification Numbers (VINs) of unregistered motorcycles in order for them to check any security interests and verify that the motorcycle is not stolen. It said that this lack of checking mechanism 'frustrates traceability and creates opportunistic or organised theft on a large scale'. In addition, motorcycle traders argue it is unfair that claims can be made against them, which have serious adverse consequences for them, when the Government does not provide the necessary database to check title of unregistered motor cycles.⁹

The motorcycle division of the VACC submitted that they had approached both the Australian Department of Transport and Regional Services (DOTARS) and the National Motor Vehicle Theft Reduction Council (NMVTRC) requesting the inclusion of VINs for unregistered motorcycles on the national database. However, DOTARS and the NMVTRC have not supported such inclusion, citing among other reasons, the high cost. The VACC argued that such costs would be offset by the reduction in costs associated with motorcycle theft.

This suggestion, being a federal issue, is beyond the scope of these State consultations. However, it is open to the Minister to refer these comments to his federal counterpart for consideration at a national level – although it would appear the issue has already been considered by the Department of Transport and Regional Services and the National Motor Vehicle Theft Reduction Council and been dismissed.

Recommendation 20

The Chattel Securities Act should be amended to require financiers to cancel a security interest within 7 days of the financier having knowledge of the cancellation of the interest by the trader.

Should this recommendation not be adopted, consideration should be given to amending the Chattel Securities Act as proposed by the Australian Finance Conference.

⁹ In the course of the consultations, the Motor Car Traders Guarantee Fund Claims Committee recommended that a provision be inserted into the Act enabling it to take into account the conduct of the parties when determining a claim (see section 8). The inability of traders to verify clear title of motor cycles may provide an example of how such discretion could be exercised.

The obligation to provide clear title is not contained in the Motor Car Traders Act, but in the Goods Act. Therefore, excluding motor cycle traders from this broad obligation does not seem an appropriate response to the difficulties faced by motor cycle traders in ensuring clear title. The problem for motor car traders may lie more with the ability of a person to make a claim against the Fund for a traders' failure to transfer good title. One possible approach may be to clarify that implications for a trader of such a claim against the Fund (such as suspension of a licence) will only result where the trader has failed to take reasonable steps to ensure that the person selling the vehicle actually owns the vehicle.

4.1.9 Agreements for sale of new and used cars

The Act and Regulations require traders to include certain terms and conditions in agreements (or contracts) for the sale of new or used cars. These terms and conditions are set out in schedules 3 and 4 of the Regulations.

By prescribing certain terms and conditions, the Act ensures that the contract does not unduly favour one party to the transaction at the expense of the other. The required particulars on the sale of a new car are minimal and include only identifying details of the employee who negotiated the agreement on behalf of the trader, the trader's licence number, a description of the vehicle sufficient to identify it, the engine number, price and other charges and the manner in which these are to be paid.

The agreement for the sale of a used car requires these details as well as information relating to the registration number, odometer reading (including whether the trader believes it to be true), that the agreement is subject to approval of finance in cases where this applies, conditions relating to trade-in if relevant, and termination conditions. Both types of agreement may include additional conditions negotiated by the parties to the transaction, provided that they do not reduce the rights conferred by the Act.

Traders did not comment on the content of these prescribed terms and conditions. However, the RACV suggested, as discussed above, that information on the statutory warranty and cooling-off period also be included. Also, the Motor Car Trader's Guarantee Fund Claims Committee suggested that the contract should state the date by which any security interest on a trade-in car is to be paid off, and stipulate who is to be responsible for the payment of the stamp duty and transfer fee.

Many traders commented on the agreements for sale in the context of the recently introduced provision in the *Fair Trading Act 1999*, which requires terms and conditions in consumer contracts to be in a minimum 10 point font.

Prior to the amendments to the Fair Trading Act, many traders used standard contracts prepared by the VACC, which used a font smaller than 10 point. These contracts could be printed on a double-sided foolscap page.

Following the introduction of the 10 point minimum, the VACC issued a new standard form contract that complies with the Fair Trading Act. Although this contract is still printed on a double-sided page, it is an A3 page. The timing of the focus groups seemed to coincide with the release of this new contract format, which generated some discussion at these focus groups.

It is not the intent of this report to comment on the contract prepared by the VACC. However, a number of broader issues relating to the contract were raised during the discussions.

Traders are required to provide consumers with a copy of the agreement for sale once completed. Many traders remarked that consumers rarely read these agreements and that it was just a waste of paper to provide them with a copy. This paper wastage has just been exacerbated by the new requirement to have a minimum 10 point font, as contracts now print out as 5 pages, rather than 2. A number of traders suggested alternative arrangements. These included:

- that consumers be given a (one page) summary of the agreement instead of the full agreement, or
- that consumers be shown a copy of the terms and conditions of the agreement (perhaps one laminated on the wall) and asked to tick a box acknowledging that they have read them.

The Consumer Law Centre and other consumer representative bodies viewed the provision of the contract to the consumer as essential, and strongly opposed any reduction in this obligation. In addition, they suggested that perhaps a summary of the main terms and conditions (or even just a contents list) should be provided as a supplement to the actual full agreement. This could assist consumers in understanding their rights and obligations and be likely to reduce consumer complaints.

4.1.10 Other issues relating to conduct requirements

Although not presently a requirement of the Act, the VACC and several individual traders asked that consideration be given to the introduction of a mandatory Vendors Statement to be completed by a vendor when selling a car to a trader (as in a trade in). The VACC submitted by including information regarding the vehicle's usage history, technical specifications and general bona fides of the vehicle, the vendor statement could remove some of the uncertainty surrounding these issues and aid in dispute resolution.

As noted above, the statement could also be used to provide vendors with a choice as to whether their particulars were displayed on the Form 7 or not. A Vendors Statement is currently used by traders in Queensland. It is not clear what additional benefit would be gained from the introduction of a Vendor's statement given the existing amount of paperwork and records that accompany a transaction. However, the introduction of such a statement could be considered when revisiting the dealings book and Form 7 requirements as recommended above.

A further issue raised by the VACC was the application of section 37 – 'Dealing with Young Persons'. The section provides that

'A motor car trader must not, and must not purport to, buy from, sell to, give or take from in exchange or receive possession of a used motor car from a person who is apparently under the age specified in relation to the motor car or a class of motor cars in which the motor car is included in section 8 of the Road Safety Act 1986.'

The VACC submitted that it was unclear what was meant by this provision, given that s. 8 of the Road Safety Act was repealed in 1998. It pointed out that, at common law, contracts entered into with persons under the age of 18 are void, with the exception of contracts for 'necessaries'. This position is confirmed in sections 49–51 of the *Supreme Court Act* 1986. However, the VACC also noted that Regulation 201 of the Road Safety (Vehicles) Regulations 1999 provides that a person is eligible to be the registered operator of a vehicle at the age of 18 for heavy vehicles, and 17 years and 9 months for motor cycles.

Recommendation 21

That section 37 be amended to reflect the repeal of section 8 of the Road Safety Act and to clarify the application of this provision.

“ Section 5 Application of the Act to auctions, wholesalers and brokers ”

Auctions, wholesalers and brokers were a major topic of discussion in each of the focus group meetings and one-on-one meetings with industry participants and representatives.

As noted in the previous section, auctions and wholesalers are currently exempt from complying with some of the conduct provisions that apply to other motor car traders. For example, cars that are sold at public auction or by wholesalers do not have to have a roadworthy certificate and there is no statutory warranty or cooling-off period.

Traders expressed concerns that the wholesale, auction and broker areas of the industry had developed to circumvent the Act, and as a result, consumers were not receiving the level of protection intended by the Act. They said that having restrictions apply only to one way in which cars are sold draws traders to other areas where they can circumvent consumer rights and reduce compliance costs. Most argued that the growth of brokers was particularly worrying as the rights of consumers when dealing with brokers was often unclear. Many participants suggested that the law, and the existing licence framework, should be updated to encompass these new practices, remove the current loopholes and ensure consumer protection.

Some participants argued that there were very unclear lines distinguishing wholesale, retail and auction, particularly given the growth of brokers in the industry. For example, licensees with an auction endorsement might also sell off the floor outside auction times.

A number remarked that the use of the words ‘wholesale’ or ‘auction’ in trading names, particularly when the licensees operate on a retail basis, must be very confusing for consumers. For example, it was said that use of the word ‘wholesale’ in a retail trading name could be construed to be false, misleading, fraudulent or deceptive as consumers may think they are getting a wholesale price. Vulnerable consumers may be particularly susceptible to any misleading marketing practices of traders.

Participants also suggested that consumers were not aware, or did not understand, the different restrictions that applied to different areas of the industry or the corresponding protections.

The Business Licensing Authority recommended that options for dealing with misleading and deceptive usage of terms such as ‘auctions’ and ‘wholesale’ be considered. Options it suggested included:

- use of condition making powers
- enforcement under the Fair Trading Act
- insertion of a generic provision in the Business Licensing Authority Act, or a specific provision in the Motor Car Traders Act enabling the Authority to refuse to grant a licence, or to require a licensee to change its name, if it is satisfied that the name may mislead consumers.

5.1 Auctions

Each of these suggested ways of addressing the use of possibly misleading names has different advantages and disadvantages. Neither of the first two suggestions would necessitate legislative change – requiring instead the use of the Authority’s existing condition-making power or Consumer Affairs Victoria’s enforcement powers under the Fair Trading Act. If the Fair Trading Act were relied upon, the evidentiary burden required to establish a breach of the misleading and deceptive conduct, or misleading advertising provisions may prevent effective enforcement.

The third suggested approach would require legislative change – either of the Business Licensing Authority Act or the Motor Car Traders Act. If the Authority were given power under one of these Acts to refuse to grant licences or to require licensees to change their name, the Authority would have a great degree of discretion. There would have to be an avenue to appeal any decision made under this power, otherwise the Authority would become the final arbiter of what names were potentially misleading or deceptive to consumers.

Recommendation 22

The Business Licensing Authority and Consumer Affairs Victoria should give consideration to use of the Authority’s condition making power and possible enforcement activity under the Fair Trading Act to prevent use of the terms ‘auction’ and ‘wholesale’ where these would be misleading to consumers. If these options do not adequately address the concerns raised, consideration should then be given to legislative change.

Typically, auctions, wholesalers and brokers were discussed in the context of calls for a ‘level playing field’. That is, traders argued that the current exemptions, in particular in relation to auctions, were unfair and should be removed from the legislation.

Whether there should be a ‘level playing field’ is essentially an issue of competition and requires an examination of the rationale for current exemptions and an assessment of whether the objectives of the legislation are being achieved. Auctions, wholesalers and brokers are discussed in turn over the following pages.

There is no separate licence type for licensees wishing to sell vehicles by auction. However, the Act provides that licensees may apply to the Business Licensing Authority for an endorsement to their licence authorising them to conduct sales of motor cars at public auction. As at 30 June 2004, there were 14 licensees with auction endorsements.

The Act also provides that motor car traders must not sell cars at public auction unless they are authorised to do so. There is no restriction in the Act on licensees selling cars by private auction to other licensees. Licensees with an auction endorsement may own the cars they sell at auction, or may sell cars on consignment on behalf of others (the prohibition on consignment selling does not apply to sales at public auction).

Once a licensee has obtained an endorsement on their licence, there is no requirement that they actually conduct public auctions. However, the Authority may be able to use its condition making power to impose conditions or restrictions on the authority of the holder to conduct sales by public auction. For example, some traders suggested that rather than being an endorsement on a licence, the ability to trade by public auction should be a condition of a licence that precludes auction businesses from selling in a normal retail capacity. The Authority noted that it does require some licensees with an auction endorsement, particularly new licensees, to provide documentation on the number of auctions conducted and the volume of cars sold at auction. It recommended that consideration be given to extending the Authority’s power to cancel an auction endorsement to specifically cover circumstances where it is satisfied the licensee is not genuinely carrying on an auction business.

Some traders argued that unless licensees with an auction endorsement conducted public auctions within a specified time limit, and on a regular basis, their auction endorsement should be cancelled. There was some indication during the consultations that many licensees with an auction endorsement did not conduct auctions at all, or only conducted trade auctions.

In addition, some traders argued that unless licensees had an auction endorsement they should not be able to use the term 'auction' in their trading name. They argued this would remove any confusion consumers may have about their rights when purchasing from such licensees. Some also said that the use of the term 'auction' misled consumers into thinking they were getting a better deal as purchases at auctions are perceived to be cheaper than retail purchases.

Broadly, the rationale for these exemptions is that consumers purchasing at auction typically do not expect the same standard of service and are willing to accept more risk regarding the quality of the car purchased.

The following exemptions contained in the Act relate to auctions:

- Where a car is offered or displayed for sale at a public auction, the licensee does not have to include the cash price of the car in the Form 7.
- Where a used car is advertised for sale by auction, the advertisement does not have to include the cash price of the car, unless the car is owned by the auction business or an associated business, or the car is available for purchase before the auction.
- Where a used car is sold by auction at a public auction by a person acting on behalf of the owner of a car, the motor car trader does not have to provide a statutory warranty.
- Where a car is purchased at public auction, there is no cooling-off period.
- Where a used car is sold by auction at a public auction by a person acting on behalf of the owner of a car, the motor car trader does not have to provide a roadworthy certificate.
- The prohibition on consignment selling does not apply to sales at public auction.

As noted above, traders generally said that some, if not all, of these exemptions were unfair and called for their removal.

The exemption that generated the most discussion was that in relation to roadworthy certificates. Many traders questioned why private sellers selling by consignment at auction did not have to provide a roadworthy certificate, given that other private sellers are required to provide a roadworthy certificate (when selling registered cars). Traders said that auctions should either have to provide roadworthy certificates, or remove number plates (and de-register cars) prior to sale.

One issue that would arise is at what point a roadworthy certificate would be required. Under the Act, the roadworthy certificate must be 'current' or issued within the past 30 days. For a private sale, or a sale by a trader, a roadworthy certificate need only be provided at the time of sale.

That is, a seller could wait until they have entered an agreement to sell the car before obtaining a roadworthy certificate. However, where a car is offered for sale at auction, it is not available to the vendor to then obtain the certificate. In order to provide a roadworthy certificate at the time of sale, a certificate must be available when the vehicle is first put up for auction. This may have two implications – the car may not be sold within the 30 days the certificate is valid for, or the car may be sold to a licensed trader or special trader where a roadworthy certificate is not actually required.

The VACC mentioned that a feasibility study had previously been carried out whereby cars sold at auction without roadworthy certificates had a sticker placed on them. They noted that the study found that the costs of such a program were too onerous. However, they submitted that in NSW, an alternative system exists, which requires number plates to be removed from cars if they are sold without a roadworthy certificate to a private individual.

The VACC submitted that all cars sold retail, whether by the trade or at auction, should have to have a roadworthy certificate as a matter of public safety. Traders expressed concern about the number of unsafe cars that ended up on the roads as a result of this exemption. They also suggested that if unregistered cars were sold at auction, the licence plates should have to be removed (which does not always occur at present).

If vendors at public auctions were required to provide roadworthy certificates, this would increase the attractiveness of auctions to purchasers. Consumers who would normally purchase a car from a retail trader because they were unable to determine the quality of vehicles sold at auction may commence purchasing at auctions if roadworthy certificates were provided. In order to ensure consumers were protected, the integrity of the roadworthy testing and certificate system would need to be monitored and upheld to prevent consumers purchasing vehicles that were not roadworthy despite having a certificate.

If traders argued for the removal of the roadworthy certificate exemption for auctions on the basis of unfair competition, such removal could in fact have the opposite effect of increasing the competitiveness of auctions.

Recommendation 23

Consumer Affairs Victoria should examine the effects of introducing such requirements, with consideration given to the objectives, and associated costs and benefits.

In particular, the removal of the exemption from providing a roadworthy certificate where a registered vehicle is sold at public auction should be given serious consideration. However, regard must be had to the likely resulting effects on the auction system and the objectives designed to be achieved by the legislation.

There was also a lot of discussion as to whether the exemptions applied where cars were available for purchase outside auction times and whether they applied where the licensee conducting the auction was the owner of the car. And, if they did apply, whether there was a sound rationale for their application.

Apart from the exemption from advertising prices, none of the provisions specifically stipulate whether they still apply where a car is available for sale prior to an auction. Traders suggested there be some clarification of this. The main issue that was discussed in this context was the price on the Form 7. Many traders said that consumers were at a disadvantage where the price is not displayed because they are unable to compare prices. They were particularly concerned about this where brokers operate on the premises. It is unclear why there is no exception to this exemption where the car is owned by the auction business or is available for sale prior to auction (as there is for the exemption relating to advertising prices).

Although some of the provisions refer to where a car is sold at auction 'on behalf of the owner of the car' it is not clear whether this limits the exemption to cars sold on consignment. This is particularly so, given that the exemption in relation to advertising prices is expressly excluded from applying where the car is 'owned by the auction business'.

Some traders seemed to be happy with the exemptions for auctions where cars are sold on consignment. However, they did not understand or agree with the rationale for exemptions where cars are owned by the auction business. In this situation, the exemptions were often seen as a loophole enabling traders to circumvent the consumer protection provisions of the Act.

It was evident that many of the focus group participants did not fully understand the application of the Act to auctions, particularly in relation to sales prior to auction and cars owned by the auction business. Upon clarification of the existing provisions, it may be that traders' criticisms of the legislation as being unfair and inadequate in its differing treatment of auctions and retailers may actually be criticisms of the enforcement of the Act.

Recommendation 24

There should be clarification of the existing provisions in relation to auctions and an examination of whether these are achieving the objectives of the legislation.

At a minimum, the legislation should require Form 7's on cars for sale at public auctions to include a price range, in the same way that real estate advertised for sale at auction indicates an anticipated price range. Also, if the vehicle fails to sell at auction, the passed in value should be displayed on the Form 7.

Apart from comments on the various exemptions, traders also raised three other issues relating to auctions. These were:

- the supply of cars to backyarders through auctions
- the sale of Government fleet cars at auction, and
- dummy bidding.

Many traders viewed auctions as the main source of cars for backyard traders. This is because where a car is registered, it is possible to on-sell the vehicle without transferring the registration. This means there is a limited paper trail through which unlicensed traders can get caught. Although traders acknowledged that there is an obligation on the purchaser to lodge the relevant transfer documents with VicRoads within a specified time limit, they said that many did not.

Traders at several focus groups argued that only traders should be able to purchase at auction. A number of traders mentioned that this was the law in the United States and said this would cut the supply chain to unlicensed traders and reduce unlicensed activity. However, it is also possible that this suggestion may have been made because traders do not like the competition provided by auctions, or because traders did not think that auctions provided consumers with an adequate level of protection, given the current exemptions in the Act.

As an alternative to allowing only traders to purchase at auction, traders suggested that auctions should be required to keep a record of who purchases at auction, which could then be used to identify unlicensed traders. Traders may currently be required to keep this information under the dealings book requirement outlined above. Alternatively, it would be open to the Authority to impose a condition on licences with an auction endorsement to record (and report) such information. However, it is not certain how much this information would assist in the identification and prosecution of unlicensed traders, given the difficulties in proving unlicensed activity. Also, the administrative burden this would place on auctions could be quite significant.

Recommendation 25

Further consideration should be given to requiring auctions to record details of vendors and purchasers of vehicles sold through their auction business where this information would assist enforcement activity.

Some traders drew a distinction between vehicles that had been written off and other vehicles sold at auction. Traders said that backyarders could purchase repairable write-offs at auction, do some repair work and sell it to a consumer who may have no way of telling the quality of the repairs or that the car was a write-off. One trader gave the example of airbags, the operation of which is undetectable without a computer, but which could have serious consequences for the purchaser in the event of an accident.

It was suggested that auctions should only be able to sell written-off vehicles to licensed dismantlers or licensed body shops so that the public is protected from unlicensed traders. However, this would prevent legitimate sales to members of the public who wished to purchase these cars for parts, or who were capable of repairing them satisfactorily for their own use. Without an indication of what proportion of private sales are legitimate, and what proportion are sales to unlicensed traders, the impact of such a restriction cannot be readily determined. Further, not all repairs carried out by unlicensed traders would be unsatisfactory and present a risk to public safety. If the risk to consumers as a result of non-traders being able to purchase written-off vehicles at auction is low, then restricting such purchases would likely be over regulation.

Recommendation 26

Restricting the sale of written-off vehicles to trade-only auctions should be given further consideration, subject to a deeper analysis of who presently purchases these vehicles, what the risks are to consumers and what the impact would be on private purchasers.

The sale of government cars at auction was also an issue that was raised at most focus groups. Some traders suggested that because the Government uses auctions to dispose of its fleet cars, it has a conflict of interest in imposing any restrictions on auctions that might affect its revenue, or enforcing such provisions where they currently exist.

Some traders said it was against the spirit of the Act for the Government to sell its fleet cars at auction. They said the Government should be promoting consumer protection, not denying purchasers of government vehicles the various protections afforded under the Act which would be available if purchased through a licensed trader. A number of traders thought it was a good idea if the Government only sold its cars to LMCTs, even if this was by consignment at auction. Although it was pointed out that the Government currently puts to tender the right to purchase its cars, and therefore traders were able to purchase government fleet cars, traders said they did not have the capacity to do so individually.

A number of traders suggested that the recently introduced restrictions on dummy bidding at real estate auctions should be extended to apply to motor car auctions. In real estate auctions, following amendments made to the *Sale of Land Act 1962* in 2003, persons other than the auctioneer are prohibited from bidding on behalf of the vendor. In addition, if the auctioneer bids on behalf of the vendor, they are required to announce that it is a 'vendor's bid'. These amendments were introduced to improve the protection afforded to consumers when purchasing real estate, to prevent the artificial inflation of prices and to ensure the auction process is fair and transparent.

There are a number of features that may distinguish real estate auctions from motor car auctions, which may mean there are reasons why the dummy bidding prohibition should not also apply to motor car auctions. For example, real estate is typically of much higher value, the real estate market is subject to greater price fluctuations, and price may not be the primary concern of vendors selling cars (for example, they may just want to get rid of it without a roadworthy certificate).

Recommendation 27

An investigation should be conducted into the benefits to be obtained from the introduction of dummy bidding restrictions at motor vehicle auctions, having regard to the differences between the motor vehicle and real estate industries.

5.2 Wholesale licensees

There is no separate 'wholesale' category of licence. However, the Business Licensing Authority may impose a wholesale condition on a licence, which restricts the licensee to trading within the trade. A wholesale condition is usually imposed at the request of a trader, often because there is no need to demonstrate financial capacity to meet the warranty provisions of the Act. As at 30 June 2004, 12 per cent of licensees had a wholesale condition imposed on their licence.

It is important to note that wholesale traders, who only purchase from and sell to licensed traders, do not actually require a licence at all, as they are exempt from the definition of 'trading in motor cars' under the Act. However, at the Motor Industry Forum held in March 2004, it was suggested there was an incentive to be licensed, even though this was not required, because stamp duty is not paid by licensees, but would be paid if they were not licensed.

Like auctions, traders who buy and sell wholesale are exempt from some of the provisions in the Act. However, these exemptions are not specifically for wholesale licensees, but rather are general exemptions where cars are purchased by licensed motor car traders.

The rationale for these exemptions is that because consumers are not involved in the transactions, there is no need to regulate them in order to protect consumers.

During the consultations, no one questioned the exemptions that apply to wholesalers, as they did the exemptions that apply to auctions. However, wholesalers were often raised in the context of brokers and also unlicensed trading. Many traders expressed concern with the growth of brokers in the industry, and often blamed wholesalers for their existence, saying that without wholesalers, brokers would not be able to operate. The issue of brokers is discussed below.

A number of general allegations were made that some wholesalers were knowingly supplying unlicensed traders, and were therefore in breach of the Act, which makes it an offence to aid or abet an unlicensed trader. It should be noted that a wholesaler who sells to the public (including to unlicensed traders) is in breach of their wholesale licence condition.

5.3 Brokers

Brokers in the industry was generally one of the first issues raised at each of the focus group meetings, and emerged as one of the main concerns of traders, particularly in the metropolitan area. Again, a 'level playing field' and perceptions of unfair treatment under the Act was the main context in which brokers were raised.

Traders said that brokers were a big growth area in the industry, particularly in Melbourne. This growth may reflect a change in the market and an increase in demand for brokers' services from time-poor or non-mechanically minded consumers. The emergence of brokers was explained by participants who said that some traders used to source cars from auction houses for customers who had specific requests that they could not quite meet. For example, for the customer who says, "I like everything about that car but the colour", the trader would arrange a similar car of the correct colour to be delivered to their premises for the customer to view and then, hopefully, purchase. Since this practice was potentially quite expensive for no return, it became more convenient for the trader to offer to take the customer to the auction house to view it there. Eventually, some traders found it most convenient to set up their operations at the auction houses.

Under the example given above, it may be that the marketplace is evolving in response to consumer demand and legislation that allows such practices may be to the net benefit of consumers.

In contrast, many traders argued that the growth in brokers was a result of loopholes in the Act and deliberate attempts to increase profits at the expense of consumers.

The term 'broker' does not appear in the legislation and there seems to be a number of different variations in the way brokers operate. For example, according to focus group participants:

- Brokers may operate from a fixed location, for example, an office co-located at an auction house or in a wholesale premise and sell cars owned and displayed for sale by the wholesaler. Alternatively, they may operate from separate business premises where cars are not displayed for sale, and source cars from a variety of locations, including auctions, wholesalers, traders and the Internet. Many participants referred to brokers operating in the second of these alternatives as operating 'out of a car boot using a mobile phone'.
- Brokers may act as agents for a particular trader, or may act independently.
- Brokers may purchase cars from a wholesaler, a trader or at auction then on-sell to a consumer. Alternatively, they may merely introduce the consumer to the wholesaler, trader or vehicle at auction.
- Brokers may receive a commission from the owner of the car, or charge the purchaser (consumer) a set fee for their services and these arrangements may or may not be transparent.
- Brokers may also provide finance, or be associated with finance providers.

There were differing opinions to whether brokers were required to have a licence, and if so, whether they had to comply with the same requirements as other traders. It is clear that there is no single definitive answer to this question given the different types of businesses that are collectively referred to as brokers.

Confusion regarding the application of the Act may be exacerbated by the fact that certain transactions of finance companies are exempt from the definition of 'trading in motor cars' under the Act. These legitimate transactions may be mistaken for illegal activity by casual observers. There may be confusion about whether brokers fall within this exemption because many brokers also provide finance for purchasers.

Because the application of the Act to brokers is not clear to traders, it is uncertain whether their concerns related to alleged infringements and enforcement of the Act, or to inadequacies of the legislation itself.

Confusion regarding the application of the Act to brokers is illustrated in the following sample of questions and issues raised at the focus groups:

- Why don't brokers have to have a licence?
- How do brokers get a licence without 'proper' premises?
- Why don't brokers have to display a Form 7, including a price?
- How can brokers advertise without an LMCT number?
- How can brokers use wholesale floor stock when VicRoads won't register a transfer from a wholesaler?

Many traders said that brokers did not exist when the Act was last reviewed, or at least were not as prevalent. They expressed concern that brokers were not adequately captured by the current regulatory framework. For example, if licensed under the Act they would be required to display a Form 7 when offering a car for sale to a consumer. The question then arises whether brokers are able or should have to do this when the cars displayed to consumers are owned by a wholesaler or someone other than the broker. Traders argued that the same rationale in protecting consumers from unexpected price increases and enabling them to compare prices applied to brokers, and therefore they should be subject to the same legislative requirement.

A number of focus group participants said that brokers targeted vulnerable and disadvantaged consumers through advertisements offering cheap financing and use of slogans like:

- "1000s of cars to choose from"
- "vehicles available at wholesale prices"
- "your choice of vehicle within 24 hours"
- "no application refused"
- "best rates available" or "lowest interest rates"

Several participants also alleged that some brokers use unfair practices, such as driving people around until they wear them down and convince them to purchase a car.

Recommendation 28

Given that so many participants raised the issue of brokers, and that this area of the industry appears to have emerged only recently, it is recommended that further work be carried out on the issue, including the following:

- **a clarification of how the existing provisions apply to the various practices of brokers, and**
- **once the application of the existing provisions is clarified, the adequacy of the provisions in protecting consumers who deal with brokers should be assessed, and**
- **if found to be inadequate, options for legislative change should be identified and examined, including the possibility of restricting brokers to operating only as introduction agents.**

“ Section 6 Compliance and enforcement ”

Broadly, issues raised during the consultations relating to compliance and enforcement can be separated into two categories:

- enforcement of the Act against unlicensed traders, and
- ensuring compliance with the Act by LMCTs.

Each of these categories is discussed separately below.

6.1 Unlicensed traders

Unlicensed trading, or ‘backyarding’ as it is commonly referred to, was among the main issues that were raised during the consultations. The issue came up at every focus group meeting and in all one-on-one meetings with industry participants. It was certainly an issue that traders felt strongly about and the vast majority expressed concern with the current level of unlicensed activity.

As noted above, the Act makes it an offence to carry on the business of trading in motor cars without a licence. The penalty for such an offence is 100 penalty units for each motor car bought, sold or exchanged or offered to be bought, sold or exchanged. In addition to, or in substitution for this penalty, the court may order the person to pay a fine of 15 per cent of the sale price of each motor car for which the offence was committed.

Although the Act exempts certain transactions from the definition of trading in motor cars, it also deems certain activities to be trading in motor cars for the purposes of the Act. Section 7A of the Act provides that:

A person who buys, sells or exchanges, or offers to buy, sell or exchange, 4 or more motor cars in any period of 12 months (whether as a principal or as an agent) is deemed to be a motor car trader... [unless that person] can prove that she, he or it did not, in that period, carry on the business of trading in motor cars and did not hold herself, himself or itself out as carrying on the business of trading in motor cars.

It is important to note that a person who buys, sells or exchanges less than 4 cars in a 12-month period may still be found to be a motor car trader. The section also clarifies that ‘an offer to sell includes an invitation to treat and the publishing (or authorising the publication) of an advertisement’. The VACC recommended that this be further clarified to include internet-based advertising by the insertion of the phrase ‘including publishing by electronic means’.

Recommendation 29

The inclusion of publishing an advertisement by electronic means should be clarified as constituting an offer to sell a motor car for the purposes of section 7A.

A number of participants also queried whether auto parts recyclers and car removalists were required to have a licence. Most, including the VACC, argued that because such businesses purchased, exchanged or sold used or damaged vehicles, they fell within the definition of ‘trading in motor vehicles’.

Many traders said that there were numerous auto parts recyclers and car removalists advertising without LMCT numbers. Throughout the consultations, traders provided many examples of advertisements offering 'cash for cars' that did not contain LMCT numbers and criticised CAV's lack of enforcement in this area. Some traders suggested that many auto parts recyclers merely had second hand dealers licences rather than licences under the Motor Car Traders Act.

Although the rationale of protecting consumers and minimising consumer detriment may not apply as much in the auto recycling industry because cars are generally not sold to consumers, other reasons for bringing them within the scope of the Act were proffered. These included that unlicensed operators generally sold cars for scrap metal rather than recycling, and if cars were recycled, they may not be recycled in a way that minimises environmental impact. Several traders said that if auto-recyclers were required to hold licences, they should have a different category of licence and be subject to a lower annual fee as there was less likely to be claims against the Fund because they did not sell to consumers (see discussion in section 3).

Recommendation 30

That it be made clear that auto-recyclers and car removalists who purchase vehicles from the public are required to hold a licence.

Unlicensed traders pose a risk for consumers because they do not provide the legal protection afforded by LMCTs and can therefore place consumers' money at risk. For example, consumers do not receive a statutory warranty, nor are they entitled to a cooling-off period. Traders also said that unlicensed traders were more likely to tamper with odometers to mislead consumers in order to obtain higher prices and profits.

A number of different enforcement actions may be undertaken against unlicensed traders. Under the *Fair Trading Act 1999*, the Director of Consumer Affairs has the power to prosecute breaches of the Act, and also has the power to require persons to enter into enforceable undertakings (for example, undertakings that they will comply with the relevant legislation in the future).

In addition to these powers under the Fair Trading Act, the Motor Car Traders Act provides that the Director may apply to the Magistrates Court for an injunction to stop a person trading in motor cars where they are not licensed to do so.

In 2003-04, the following enforcement outcomes were achieved against unlicensed traders:

- 5 successful prosecutions under the Act, with fines totalling \$55,200
- 4 injunctions were obtained, and
- 2 people were required to enter into enforceable undertakings.

Despite this enforcement activity, most traders attending the focus group meetings argued that there was not enough enforcement activity against unlicensed traders.

Many traders said they were not aware of this enforcement activity. The typical sentiment of traders was well expressed by one trader who said he doubted there had been more than \$50,000 in fines imposed in the past five years. Traders generally said they wanted more information about enforcement activity, and that it was not sufficient only to include it in the Annual Report, rather than send it directly to traders.

Most attendees said unlicensed traders were prevalent in the industry and whatever the current level of enforcement activity, it was clearly insufficient. Many argued that the lack of enforcement activity had rendered the Act ineffective in protecting consumers. In addition, they said that without adequate enforcement, there was an incentive for licensees to surrender their licences and trade unlicensed as the absence of compliance costs would greatly increase profit.

Traders said a large proportion of private to private sales involved unlicensed traders and pointed to the growth in these sales over the last five to ten years as an indication that unlicensed trading was also more prevalent. They expressed concern that consumers did not understand the risks involved in purchasing from an unlicensed trader. Some suggested that Consumer Affairs Victoria should increase its efforts to raise consumer awareness of these risks and of the benefits of purchasing from a licensed trader. The VACC noted the brochure 'Better Car Deals', which was a joint initiative of Consumer Affairs Victoria and the VACC, was a good example of how the message can be distributed.

6.2 Compliance with the Act by licensed motor car traders

A number of traders highlighted the loss of government revenue from GST and stamp duty where cars are purchased from an unlicensed, rather than licensed trader. GST is not paid because unlicensed traders are not registered businesses with an ABN and although stamp duty is paid when registration is transferred, the amount paid is based on the value of the car, which is often underestimated by unlicensed traders. Traders pointing to this loss of revenue said they thought it should be an incentive to enforce the Act and argued that the gains in revenue would more than offset any additional resourcing costs required to increase enforcement. The extent of underestimation is not known. Therefore, it is impossible to determine whether the resourcing costs would be offset by additional stamp duty revenue. It was suggested that significant underestimation of vehicle value and resulting underpayment of stamp duty is not a problem. This is because VicRoads currently uses the Glass's guide as an indication of the value of the vehicle and queries any transfers where the value recorded is significantly different.

The VACC and some individual traders commented that the penalties for unlicensed trading were not high enough. They submitted that current fines did not act as a disincentive and many told anecdotes that they had seen unlicensed traders back at auctions purchasing cars a week after they had been warned or prosecuted. The VACC called for the introduction of a minimum penalty of 10 penalty units for each car bought, sold or exchanged. A number of traders also suggested there should not be a maximum penalty stipulated in the Act. Many did not understand why all identified unlicensed traders were not prosecuted, and instead received warnings or injunctions or were only required to provide undertakings.

Recommendation 31

Penalties for unlicensed trading should be increased.

A number of different options are available to ensure that licensed traders comply with the licensing provisions and conduct requirements imposed under the Act. For example, traders not complying with the Act may face monetary penalties or administrative sanctions, such as cancellation or suspension of their licence.

The following actions may be taken under the Act:

- The Director may prosecute breaches of the Act (such as failure to comply with the conduct requirements), pursuant to his powers under the Fair Trading Act. Among the remedies available are:
 - substantiation notices – the Director can require any person making a representation in trade or commerce concerning the sale of goods to substantiate claims made
 - show cause notices – the Director can seek persons who make representations in the course of trade and commerce to show cause why their conduct should not be treated as in breach of the Fair Trading Act
 - corrective advertising orders
 - cease trading injunctions
 - enforceable undertakings
- The Director may apply to the Magistrates Court for an injunction order.
- Infringement notices may be issued for certain offences specified in the Regulations, with each attracting a penalty specified in the Regulations.

- The Director or Chief of Police may apply to the Tribunal (VCAT) to conduct an inquiry to determine whether there are grounds for taking disciplinary action against the licensee. Such disciplinary action may include:
 - a reprimand
 - an order to pay a penalty
 - suspension or cancellation of licence
 - a requirement that the trader enter into an undertaking to perform, or not to perform, certain tasks
 - imposition of a licence condition
 - an order to pay compensation.
- The Business Licensing Authority may impose conditions on a licence, or
- In some circumstances, there is automatic suspension of a licence.

In 2003-04, four licensees were prosecuted under the Act for offences including odometer tampering, failure to discharge security interests, and non-compliance with licence conditions. In the same period, 33 infringement notices were issued to licensed motor car traders.

The provisions relating to disciplinary action and compliance with the Act by LMCTs were not typically raised at the focus group meetings, with traders' concerns directed more toward unlicensed trading. However, the Authority proposed a number of recommendations relating to clarification or amendment of the legislation in relation to disciplinary action. Where amendments were proposed, the Authority asked that consideration be given to amending the Business Licensing Authority Act rather than just the Motor Car Traders Act. The Authority's proposed amendments were:

- The amendment of the Act to impose a maximum period on the suspension of a licence, after which the licence is cancelled.
- Where a business is conducted by an administrator or executor as representative of a licensee who has had their licence cancelled, clarification of whose licence the business is conducted under is required.

- The automatic cancellation of a licence following the death of a licensee (in the case of a sole trader); or the deregistration of a company (in the case of a company licensee); or the dissolution of a partnership (in the case of a partnership licensee).
- The expansion of offences that can attract infringement notices to include other offences relating to the licensing functions of the Authority and breach of licence conditions. For example, for failure to produce a licence for endorsement, variation or revocation of a condition or restriction imposed on a licensee (as required under s. 15¹⁰).
- The expansion of the Authority's powers to include the power to issue infringement notices relating to offences under Part 2 of the Act (dealing with the licensing scheme), and
- The expansion of the Authority's powers to include the power to issue show cause notices to a licensee if the Authority is satisfied that any of the grounds for disciplinary action are present. The notice would require a licensee to show cause why the licence should not be suspended. The Authority said a decision to suspend following a show cause notice would be reviewable by VCAT.

6.3 Consumer Affairs Victoria's enforcement strategy

Apart from an across-the-board criticism that Consumer Affairs Victoria was not doing enough there were also more specific issues raised relating to Consumer Affairs Victoria's enforcement strategy.

As noted above, there was a general criticism that Consumer Affairs Victoria was not doing enough to enforce the Act, particularly in relation to unlicensed traders. At the Motor Industry Forum in March 2004, Consumer Affairs Victoria announced a renewed enforcement approach to unlicensed trading, saying it would pursue both civil remedies in the form of fines (15 per cent of the sale price of each car) and criminal prosecutions and court imposed sanctions.

¹⁰ The Authority also suggested extension of the offences that attract infringement notices to include sections 16(9), 17, 18, 19, 19A and 21.

Some traders who attended the forum, and who subsequently attended a focus group meeting, applauded this new approach. However, they often commented that they had not seen any evidence of this new strategy.

Some traders noted that, at the Forum, Consumer Affairs Victoria outlined a number of investigations that were occurring at the time, yet six months later they had not heard any more about these investigations or their outcomes. Many expressed frustration at the slowness of the process and the lack of information provided to traders about progress and eventual outcomes.

However, the Shepparton Car Dealers group criticised wider publicity of enforcement activity in newspapers, saying traders acting within the law were tarnished with the same brush as the 'shonky' dealers, which was detrimental to their business and reputations. They said publicity should be kept within the trade and that the media and public at large did not need to know.

Many traders wondered why the level of enforcement was so low, given that it is clear to them when illegal activity (both licensed and unlicensed) is occurring. Some traders recognised they were not aware of what was involved in a prosecution and it is suggested that greater communication with the industry may resolve some of these issues and improve relationships.

A number of theories were put forward for the perceived low level of enforcement including that CAV had insufficient resources, or that the investigators did not understand enough about the industry to be able to analyse the issues and detect illegal activity. In relation to the latter of these arguments, they said unless investigators had a detailed understanding of the industry, including the paperwork and practicalities of trade, it was easy for people to operate illegally and pass themselves off as operating within the law.

Many of the attendees at the focus groups said they would be happy to provide Consumer Affairs Victoria with information regarding illegal activity, in particular unlicensed trading. However, there were generally traders at each focus group who said they had provided, or attempted to provide, Consumer Affairs Victoria with information and were disillusioned with the response they had received from Consumer Affairs Victoria.

Some said they had tried to report infringing activity, but they did not know who to contact, or how to contact them (one trader said he spoke to four officers before anyone wanted to talk to him). Of those who had provided information, many said they did not receive any follow up (despite being told they would) and when they contacted Consumer Affairs Victoria again they were told the issue was not being pursued without any adequate reasons being provided. One trader said that if Consumer Affairs Victoria did not have the resources to follow up the information provided by traders, they should at least pass it on to the Police who can investigate before the evidence disappears.

Traders often said they thought Consumer Affairs Victoria's enforcement activity was unfairly biased towards them rather than unlicensed activity because they were 'easy targets'. A couple of traders said Consumer Affairs Victoria officers had told them they concentrated on traders because it was 'too hard' to prosecute unlicensed traders. These sentiments were widely held among the traders who participated in the forums. However, it should be noted that two of the focus groups occurred not long after Consumer Affairs Victoria had undertaken enforcement activity in the area. Further, following Consumer Affairs Victoria's enforcement action in September, traders in Shepparton requested a meeting as part of the consultations to raise their concerns.

There was mixed opinion regarding these regional enforcement activities. Although some traders said it was the first time they had ever seen any sign of an inspector and viewed it as a positive indication that Consumer Affairs Victoria was enforcing the Act, others said it was just 'revenue raising' and unfairly targeted those who were trying to comply with the Act. Most seemed to think that unlicensed trading was more of a concern for consumers than licensed traders and therefore should have been accorded greater priority. However, an alternative view is that because consumers do not generally expect to receive any protection when they deal with unlicensed traders, illegal or unscrupulous conduct of licensed traders (where consumers do expect protection) is a bigger concern.

Many traders expressed resentment toward the inspectors who undertake these regional enforcement activities. Traders said inspectors were never available to help them or to explain the Act or traders' obligations under the Act.

They were not interested in assisting those traders genuinely wishing to comply with the law, but were interested only in imposing fines and getting revenue.

It seems that implementation of two things would help ease traders' concerns in relation to compliance and enforcement:

- promotion of a contact point (including phone number) within Consumer Affairs Victoria who could assist traders understand the Act and who could receive information from traders on alleged illegal activities, and
- regular communication on enforcement activity, either through emails, letters or a website traders could access.

Implementation of the above mechanisms to improve communication with traders would not be without cost. Therefore, it is reasonable for the adoption of these measures to be accompanied by an increase in licence fees to cover the costs of these activities.

6.3.1 Suggestions for improving enforcement and compliance

At each of the focus group meetings, traders put forward a number of ways in which they believed enforcement of the Act could be improved. Although targeted more toward the prosecution of unlicensed trading, some of these suggestions were also said to be relevant to improving enforcement of licensees' compliance with the Act.

Suggestions included:

- monitoring of VicRoads counters, processing of transfers and registration of vehicles
- monitoring of roadworthy testers and who they issue roadworthy certificates to
- making it an offence for a roadworthy tester to issue, or even to test, a vehicle suspected of being presented by, or on behalf of, an unlicensed trader
- monitoring of the Vehicle Identity Validation (VIV) test central booking system and frequency searches of the booking database¹¹

- placing odometer readings on the portion of the roadworthy certificate that goes to VicRoads, which could then be entered into their database and used as evidence to prove odometer tampering
- increased monitoring of advertisements, for evidence of unlicensed trading and to ensure licensees complied with the advertising requirements in the Act (disclosure of LMCT number, vehicle details and price)
- establishment and wide publication of an illegal trading hotline so unlicensed traders are aware that their activities are being observed and are reportable
- increased coordination and cooperation between Consumer Affairs Victoria, Vic Police, VicRoads, and VIV testers
- lowering the burden of proof for unlicensed trading
- that a system be established whereby persons wishing to sell a car within six months of the purchase date must complete a statutory declaration saying they are not trading in motor cars. (However, it is not clear where this declaration would be lodged)
- that an offence be created prohibiting unlicensed traders from selling cars on consignment. Although this was not expressly stated as a measure to curb unlicensed activity, this recommendation by the VACC is likely aimed at catching backyarders who sold cars to consumers without first transferring the vehicle into their own name.

Most of the above suggestions are beyond the scope of these consultations as they involve other agencies not within the consumer affairs portfolio. However, these comments have been included for consideration by the relevant agencies involved. The suggestion that odometer readings be included on both portions of the roadworthy certificate and recorded on the VSR received wide support from traders during the consultations. This inclusion is considered to have potential and it is recommended that VicRoads give consideration to its implementation. Where the suggestions involve the enforcement activities of Consumer Affairs Victoria, regard should be given to these when developing enforcement strategies.

¹¹ Vehicle Identity Validation Inspections are required when registering a statutory write-off (for cars written off prior to 1 May 2002) or repairable write-off (for cars written off after 1 May 2002). The purpose of the certificate is to ensure that the identity of the repairable write-off is that of the previously damaged vehicle, and not a re-birthed stolen vehicle.

“ Section 7 Interaction with government agencies ”

A major theme of the consultations was traders' interaction with government agencies. Although not to do with the legislation itself, these interactions relate to the implementation and administration of the regulatory framework and are an important part of the daily operations of a motor car trader.

The main agencies dealt with are the Business Licensing Authority, Consumer Affairs Victoria and VicRoads. These agencies are discussed below. Traders may also have interaction with the Motor Car Traders Guarantee Fund Claims Committee, which is discussed in the context of the Motor Car Traders Guarantee Fund in section 8.

7.1 Consumer Affairs Victoria and the Business Licensing Authority

The Business Licensing Authority is responsible for administering the licensing scheme and maintaining a register of motor car traders. The Authority has the power to issue licences and to impose conditions on licences. However, it does not have power to take disciplinary action. Pursuant to its powers under the *Business Licensing Authority Act 1998*, the Authority has entered into an arrangement with Consumer Affairs Victoria for Consumer Affairs Victoria staff to assist the Authority.

Consumer Affairs Victoria has a licensing branch which assists the Authority with the administration of the licensing scheme pursuant to the arrangement mentioned above. Other areas of Consumer Affairs Victoria also have a role in the regulation of motor car traders, including the policy area and, in particular, the compliance and enforcement branch, which is responsible for disciplinary action and prosecution under the Act. Traders' comments on Consumer Affairs Victoria's enforcement activities were outlined above. This section will focus on comments about the administration of the licensing scheme.

The relationship between the Business Licensing Authority, Consumer Affairs Victoria and the Motor Car Traders Guarantee Fund Claims Committee did not seem to be well understood by individual traders who participated in the consultations. This may be in part because there have been changes to the structure of these organisations during the lifetime of the legislation. For example, when the Act first commenced in 1973, there was a single body – the Motor Car Trader's Committee – that performed all the functions now performed by these three organisations. Also, Consumer Affairs Victoria has had a series of name changes in this time and has been known at different times as the Office of Fair Trading, and Consumer and Business Affairs Victoria.

During the consultations, traders referred to Consumer Affairs Victoria by a variety of names, but most commonly as the Office of Fair Trading, 'the Committee', or 'the Fund'. Such mistaken names indicate that Consumer Affairs Victoria and its role are not widely known amongst traders. This lack of understanding of Consumer Affairs Victoria's role lends support to traders' main criticism that Consumer Affairs Victoria does not communicate enough with traders.

Some traders noted an improvement in communication in the past year, with activities such as the Motor Industry Forum in March, which was a collaborative effort of Consumer Affairs Victoria and the VACC. The VACC noted in its submission that ‘the flow of information to traders has improved, especially with the establishment of the forum earlier this year, and VACC would recommend that further forum events be held in order to maintain the communication’.

Some traders also commented favourably on the decision to undertake this consultation process. Positive feedback about the consultations was received at each of the focus groups, and those traders in regional areas particularly welcomed the opportunity to be involved. However, despite these efforts, many individual traders expressed dissatisfaction with Consumer Affairs Victoria and its activities.

Comments regarding Consumer Affairs Victoria’s activities can be separated into two broad categories – traders’ contact with Consumer Affairs Victoria; and Consumer Affairs Victoria’s contact with traders.

7.1.1 Traders’ contact with Consumer Affairs Victoria

Some traders remarked that, at times, they had wanted to find out some information about the licensing scheme or the Act and Regulations, but did not have any relevant contact details. Other traders said they had contact details but were confused about whether to contact the Authority, the Claims Committee or Consumer Affairs Victoria, and which area within Consumer Affairs Victoria. There were also a number of traders who said they had tried calling the Authority or Consumer Affairs Victoria, but there was never any answer.

Traders generally said they would like to have a contact point within Consumer Affairs Victoria, who they said could act as a central contact:

- For advice regarding compliance with the Act and Regulations
- For advice regarding licensing issues
- To receive information regarding unlicensed activity, and
- To hear concerns from traders regarding the regulatory scheme

Recommendation 32

A central contact point for all matters relating to the regulatory scheme, including licensing, compliance and enforcement, should be established and promoted. This contact point could be within the Business Licensing Authority or within Consumer Affairs Victoria.

7.1.2 Consumer Affairs Victoria’s contact with traders

Generally, traders said that Consumer Affairs Victoria did not communicate with traders enough and often said they wanted ‘more for their money’. Many said what little contact there was, was generally in the negative context of compliance and enforcement. A number of traders claimed they had had no contact with Consumer Affairs Victoria until the recent series of enforcement activities. As noted above, many traders felt targeted by these actions and resented Consumer Affairs Victoria for contacting them only for what they saw as revenue raising.

Many traders saw an opportunity for Consumer Affairs Victoria to improve its relationship with traders through the provision of regular information such as:

- information aimed at training licensees and improving their knowledge and understanding of the various pieces of legislation, together with advice on good customer service and business practice
- information on compliance and enforcement activities
- details of disciplinary action taken
- details of claims against the fund, including amounts claimed and the types of traders these claims are paid out against.
- information on licence applications.

Some traders noted that some of this information was already available in CAV's Annual Report. However, they said this was not sufficient and that traders should be provided with this information directly (and not just through the VACC).

Recommendation 33

That CAV examine its communications strategy with traders and identify ways in which communication might be improved.

7.2 VicRoads

Although not directly related to the Act or its implementation, at each of the focus group meetings, traders raised issues regarding their dealings with VicRoads. These issues and concerns are noted here and it is recommended they be passed on to the Minister for Transport for his consideration.

Trading in motor cars requires frequent contact with VicRoads for the transfer of vehicle registrations and the payment of associated stamp duty, which VicRoads collects on behalf of the State Revenue Office (SRO). VicRoads also administers the Vehicle Securities Register, which as discussed above, traders use to check security interests in vehicles. Therefore, interactions with VicRoads are important to traders.

The main concerns of traders related to general customer service and communication with traders. For example, traders said they spent too much time waiting in queues at VicRoads offices trying to lodge transfer forms. Given that they collect stamp duty for VicRoads (or more correctly, the SRO) without any reward, they said VicRoads should treat them better and recognise they had businesses of their own to run and that they could not afford to spend time in queues. Suggested improvements included allowing traders to lodge more than three transfers at a time and establishing a 'fast track' lane for traders' use only.

The focus groups in late July and August followed shortly after a VicRoads fee increase, which became effective from 1 July. Many traders expressed frustration and displeasure with the way this increase was communicated to traders, saying that they were not notified of the change until August. A couple of traders mentioned that VicRoads used to hold seminars to explain the various forms and fees, particularly when they changed, and that these seminars were a good idea and should be held again.

Traders were also dissatisfied with the amount of time it takes VicRoads to process registration transfers. They said that delays could have implications for both traders and consumers because fines, letters, registration renewals and other mail relating to the vehicle could be received during this time. Some traders, particularly near the NSW border, compared the level of service to that offered by the Road Transport Authority in NSW, which they said processed transfers much quicker.

Traders expressed concern that consumers did not receive any notification when the transfer is processed by VicRoads. They said without such notification, consumers could assume it had been done, where in fact it hadn't and as a result they could be driving an unregistered car. However, a notification system would only alert consumers to the traders' failure to register the transfer if the trader had told them to expect such notification and explained what to do if they did not receive it. One trader wrote that VicRoads used to mail a receipt for the transfer of the vehicle to the purchaser, which clearly stated from whom the vehicle had been purchased, but noted this had been stopped as a cost-cutting measure. The trader also noted this would reduce backyard trading by highlighting any intermediary transfers backyarders tried to use to avoid detection.

Stakeholders also said that a traders' failure to process transfers (requiring payment of fees and stamp duty) was one of the first indications that a trader was having financial difficulties. They argued that a notification scheme could help detect traders in financial difficulty and that VicRoads was in a position to notify the Business Licensing Authority, which could then impose a condition on a licence to provide a bank guarantee. Many traders said that greater cooperation between VicRoads and the Authority could limit the number of claims made against the Fund.

On a similar issue, some traders criticised the current system of registration renewals where it is possible to put a new registration sticker on a vehicle without paying the registration. They noted that although they could check security interests on a vehicle through the VSR, VicRoads does not provide any information on whether a registration has been paid. As a consequence, they said it was possible for them to purchase a trade-in vehicle that has a current registration sticker and on-sell it to a customer, without the registration actually being valid.

Another comment that was made in relation to VicRoads was that some of the fees it charged were too high. For example, a duplicate registration label cost \$13.50, which at least one trader said was excessive. A further suggestion coming from traders was that registration fees should be suspended while a car is in a traders' yard.

Recommendation 34

That the points raised in relation to VicRoads be forwarded to the Minister for Transport for his consideration.

7.3 State Revenue Office

The State Revenue Office (SRO) has an interest in motor car trading due to the motor vehicle duty (stamp duty) that is paid upon the registration or transfer of a vehicle. As noted above, stamp duty is collected by VicRoads so traders do not have any direct contact with the SRO. However, stamp duty is an issue that was raised throughout the consultations and the issues are noted here for referral to the Treasurer for consideration.

Stamp duty is calculated based on the 'dutiabale value' of the vehicle, which means either the price paid for the vehicle or its market value, whichever is higher. If GST is applicable, it is included in the price of the car. There are different rates of stamp duty payable depending on the dutiable value and whether the car is new or used. The current rates are shown in the following table¹²

Vehicle type	Value of vehicle	Stamp duty rate
New passenger vehicle	\$0 – \$35 000	\$5.00 per \$200 of the market value or part thereof
New passenger vehicle	\$35 001 – \$45 000	\$8.00 per \$200 of the market value or part thereof
New passenger vehicle	\$45 001 upwards	\$10.00 per \$200 of the market value or part thereof
New non-passenger vehicle or motor cycle	All values	\$5.00 per \$200 of the market value or part thereof
Used vehicle	All values	\$8.00 per \$200 of the market value or part thereof

During the consultations, traders suggested two possible changes to the above rates.

1. The different rates be replaced with a single rate.

This would simplify the system and remove some of the incentive for 'dodgy deals' surrounding recorded prices and values that occur under the present system in order to reduce stamp duty. Of course, any charge calculated as a rate or percentage of value creates incentives for a lower value to be recorded. Traders said that most cars sold are subject to the lowest rate of stamp duty (2.5 per cent) so a single rate of around 3 per cent applying to all vehicles would provide roughly an equivalent amount of revenue.

2. Increase the rate of stamp duty where a car is sold privately. Traders said this would counteract the competitive advantage that private sellers had over traders as a result of the GST. However, it was also noted that this would just increase the incentive for private sellers to record a lower sale price. Different rates suggested included 5 per cent or 10 per cent.

¹² Taken from the VicRoads website at www.vicroads.vic.gov.au (accessed on 4 November 2004).

Many traders said there was currently a huge gap in revenue that the government was missing out on as a result of the undervaluation of cars to VicRoads. However, a number of traders questioned these assertions, saying that VicRoads currently used the Glass's guide as an indication of vehicle valuation and queried transfers where the vehicle was significantly undervalued. Nonetheless, a number of suggestions were made to improve the accuracy of valuations provided to VicRoads. These included:

- The establishment of accredited stamp duty assessment centres where new owners who purchased their car privately would have to take their car in order to get an assessment of the car's value prior to transferring the registration. Although it was recognised there would be a high cost involved, it was put forward that the increase in stamp duty would more than offset the costs of the centres. If owners had to provide the name of the person they purchased the car from, this would also identify backyard traders.
- That stamp duty payments be calculated based on the Recommended Retail Price (RRP) for new cars and the current valuation in the Glass's Guide (or similar publication) for used cars. This would allow stamp duty calculations to be computerised and any errors or underpayments to be detected with perhaps a monthly audit.

A number of traders also raised concerns with the 'tax-on-tax' effects of stamp duty, saying it was unfair. For example, stamp duty is calculated based on the value of the car, which includes GST when sold by a business with an ABN. Also, one trader noted that the stamp duty traders collect goes into their bank accounts and debit taxes are paid on this money. He thought this was unfair considering this was not money he was able to keep but was merely money he was collecting on behalf of the government (a task for which he does not receive payment). However, it is noted that debit taxes will be abolished from 01 July 2005, so this will not be an issue beyond this date.

Recommendation 35

That the points raised in relation to stamp duty be forwarded to the Treasurer and Minister for Finance for consideration as appropriate. In particular, it is thought that the idea of establishing an assessment centre has some merit.

“ Section 8 Motor Car Traders Guarantee Fund ”

The Act establishes the Motor Car Traders' Guarantee Fund. The purpose of this Fund is to provide compensation for persons who suffer loss by reason of the actions of licensed motor car traders and to pay for the administration of the licensing scheme.

The Fund primarily receives revenue from licence fees as well as fines imposed under the Act and any interest earned through investment of monies held by the Fund. It is used to meet the costs of administering the regulatory scheme and to pay claims to consumers for certain losses incurred as a result of motor car traders' actions. The Fund acts as an avenue of last resort for loss recovery to any person (other than a motor car trader, financier¹³, manufacturer or related company) who may make a claim against the Fund for losses incurred as a result of a motor car trader failing to:

- comply with specific provisions of the Act
- transfer good title to a car
- comply with an agreement to pay the purchase price to a person who sold a car to the trader or to remit all, or part, of the purchase price to another person
- pay transfer fees, registration fees or stamp duty on a new or unregistered car or to provide a roadworthy certificate or other document required to enable the car to be registered
- remit money paid to the trader as a premium or purchase price for an insurance policy or warranty to the person who was to provide the insurance or warranty, or
- satisfy a court order, order of VCAT, or order made by the Authority for a licensee to pay compensation to persons losing money arising from the licensee's trading in motor cars.

The Fund grants claims only to persons who have incurred a loss as the result of dealing with a licensed trader or where, on reasonable grounds, the buyer thought the seller was a licensed trader. The Regulations establish the maximum claim that may be paid out of the Fund to any one person in relation to one matter. This maximum amount is currently \$40 000. Maximum limits are set in order to protect the viability of the Fund.

The Motor Car Traders Guarantee Fund Claims Committee (the Committee) is an independent statutory authority established under the Act to determine claims for compensation. In determining claims, the Committee's aim is to balance the protection of the Fund against unsubstantiated claims, against the provision of a quick and informal method for genuine complainants to access compensation.

The Committee noted that it encourages persons enquiring about making a claim to attempt to first resolve the problem with the trader concerned. They might do this independently or may seek assistance from the dispute resolution branch of CAV. Once a claim is made, the Committee continues to encourage resolution of the dispute throughout the claims process, which often results in a claim being withdrawn prior to determination by the Committee.

Where a determination is made by the Committee, any person whose interests are affected by a decision of the Committee may apply to the Tribunal for a review of the decision.

¹³ However, there are limited circumstances in which a financier can make a claim against the Fund.

In 2003-04, 171 claims totalling \$649,782 were admitted against the Fund. Of this amount, \$246,457 has been recovered from the traders involved. In total, 307 claims were made on the Fund during the year. However, 44 claims (with a value of \$250,729) were refused, and 92 claims (worth \$1 058 622) were withdrawn. The total number of claims on the Fund has increased significantly in the past couple of years. For example, only 84 claims were finalised in 2000-01, and only 65 in 2001-02.

By far the majority of complaints admitted in 2003-04 (75 per cent) arose from a trader's failure to pay stamp duty or transfer and registration fees, or to provide a roadworthy certificate. However, these claims represented only 18 per cent of the amount paid. In contrast, 39 per cent of the money paid was a result of 19 claims that traders had failed to pay the purchase price of a vehicle to a person who sold the vehicle to the trader, or to remit the purchase price to another person. A further 11 claims, representing 21 per cent of total money paid, related to traders' failure to transfer good title.

Revenue	\$
Licence fees	\$2,314,916
Fines	\$30,020
Investment income	\$70,189
Recovery of claims paid	\$240,137
Other income	\$3,402
Total revenue	\$2,658 664
Expenditure	\$
Employee costs	\$1,422,437
Community agency funding	\$164,440
Claims on Fund	\$659,322
Other CAV operating costs	\$554,750
Total expenditure	\$2,800,949
Fund closing equity	\$972,029

Apart from paying claims, money in the Fund is also used to cover the costs of administration of the licensing scheme. The following table shows the revenue and expenditure items for the Motor Car Traders Guarantee Fund in 2003-04.¹⁴

It can be seen from these figures that in 2003-04 expenditure exceeded revenue. This was also the case in 2002-03 and the equity in the Fund is diminishing. During the consultations, the level of equity in the Fund was raised and concerns were expressed that it was no longer sustainable or adequate to meet future claims.

Despite the availability of revenue and expenditure information in the Annual Report, some traders criticised the accountability of the Fund. They said information on revenue and expenditure should be provided to traders directly, and Consumer Affairs Victoria and the Business Licensing Authority should not rely on distribution by the VACC or through Consumer Affairs Victoria's Annual Report.

Apart from information on the figures involved, traders also said they would like information on the circumstances that result in claims against the Fund. Some traders expressed a perception that only relatively new licensees are involved in claims against the Fund. Such perceptions were used to justify some of the suggestions outlined above, including the payment of bonds and higher licence fees for those with less experience in the industry. Also, there were perceptions that certain types of traders had more claims admitted against them than others. Few traders seemed to be aware that information about the admission of a claim has to be included in the public register of motor car traders which the Authority is required to maintain, and which is available on the Authority's website.

In a presentation at the Motor Industry Forum in March 2004, the Chairperson of the Committee, Mr Stuart Ward, provided summary statistics on the traders against whom claims had been admitted in the three years from 1 January 2001. During this time, the average length of time that a licence was held before a claim was admitted was 8.5 years.

¹⁴ The Committee is not responsible for administering the Fund. The figures in this table were provided by Consumer Affairs Victoria. The figures in the text were provided by the Committee and are based on the number of claims finalised in the year. The figures in the table are based on revenue and expenditure entering and exiting the Fund in the year, not on when claims were finalised. This may result in discrepancies in some of the figures.

8.1 Issues raised during the consultations

Further, a third of claims were admitted against traders who held a licence for greater than ten years, and a third against traders with between five and ten years experience. This indicates that, contrary to many traders' opinions, the majority of claims are admitted against 'established' traders rather than new licensees.

Of the claims admitted in the three years since 1 January 2001, almost three quarters of the traders against whom claims were admitted, were either franchise dealers or traders operating dedicated retail yards. Only 9 per cent of traders whom claims were admitted against, carried on a mixed business involving wrecking or repairing cars in addition to motor car trading, and claims against these traders represented only 3 per cent of the amount paid out of the fund. The admission of a claim against the Fund has serious implications for traders. Under the Act, the admission of a claim against the Fund results in automatic suspension of the relevant trader's licence within 30 days of the claim being admitted, unless the trader applies to the Authority for permission to continue trading, and such application is allowed. In order to grant permission, the Act requires the Authority to be satisfied:

- that the trader has refunded, or agreed to refund, all the amounts paid out of the Fund in respect of the claim, and
- that, having regard to the conduct of the trader before and after the claim, there is no reasonable expectation that the person will not comply with the Act and the regulations in the future, and
- that the granting of the application is not contrary to the public interest.

In addition to suspension of their licence, the trader is also prohibited from working for another trader in a customer service capacity without the permission of the Authority. Traders may also face enforcement action by CAV, and the Authority may impose conditions on their licence (if this is not suspended), such as a requirement to provide a bank guarantee.

During the consultations, the Authority and the Committee noted that when a claim is admitted against a company or partnership licensee, it is unclear what impact this claim has on the individual directors or partners. For example, are they precluded from working in the industry in a customer service capacity or a role concerned with the management of a motor car trading business without the permission of the Authority?

The main issue raised in relation to the Guarantee Fund regarded who could make a claim against the Fund. Specifically, the VACC, individual traders and the Committee raised the issue of VicRoads and other entities dealing with traders in the normal business sense being able to claim against the Fund.

The Act provides that 'Any person (not being a motor car trader or a special trader) may make a claim against the Fund' if they have incurred loss as a result of a trader's failure to comply with the Act or to do specified things. As noted by the Committee, the current wording of the Act leaves the claims process open to trading entities (other than motor car traders and special traders) who deal with motor car traders on a commercial basis. This enables VicRoads to make a claim against the Fund in circumstances where a trader has failed to pass on transfer fees or stamp duty that they have collected on behalf of VicRoads and the State Revenue Office.

In a case before VCAT in 2000, the Committee submitted that the phrase 'any person' should be interpreted in light of the purpose of the Fund to protect consumers and that if the Fund was available to protect (insure) persons in the trade it would be exhausted quickly. Although VCAT accepted that the intent of the Act was to limit claims to consumers, it nevertheless held that the words 'any person' were sufficiently broad to cover VicRoads. The Tribunal held that VicRoads had suffered the required loss as a result of the failure of a trader to pay transfer fees and stamp duty and was therefore entitled to make a claim against the Fund.

The VACC and individual traders submitted that it was inappropriate for VicRoads to claim against the Fund and this was contrary to the intention of the legislators when the Act was introduced. The VACC claimed:

There is no valid business reason why VicRoads or any other Statutory Authority should have access to the Fund. VicRoads acts as an agency of the Government and makes no contribution whatsoever to the Fund.

A ramification of VicRoads having the ability to claim against the Fund is that VicRoads may have a reduced incentive to monitor transfers and payments of stamp duty by traders. Several traders said that VicRoads were currently in a position to avoid, or at least minimise, their loss by chasing up traders who were in arrears.

If VicRoads can recover losses from the Fund, then this may be an easier and less costly way of recovering funds than monitoring and pursuing traders directly.

The Committee suggested that if the purpose of the Fund is only to protect consumers, this should be specified clearly in the Act. Alternatively, the Committee said consideration should be given to:

- excluding VicRoads and similar organisations (statutory authorities) from being able to make a claim
- excluding persons from being able to claim in circumstances where a motor car trader receives money as agent (or delegate or in any other authorised manner) for that person
- excluding persons from being able to make a claim where they would reasonably be regarded as a motor car trader, but for the fact that the transactions in which they engage are exempt from the definition of trading in motor cars under s. 3(3).

Recommendation 36

That the purpose of the Fund be reviewed. If the intended purpose is only to compensate consumers, consideration should be given to the above amendments suggested by the Committee. However, if the intended purpose is to compensate all persons who suffer loss, then no legislative amendment is necessary but consideration will need to be given to increasing the amount in the Fund.

Under s. 76(2), financiers are also able to make a claim against the Fund where they suffer loss as a result of the trader failing to cancel a security interest as required under the Act. The Australian Finance Conference noted that if the financier were not able to make a claim against the Fund, the financier's only option would be to encourage the innocent consumer who the trader has on-sold the car to, to make a claim against the Fund and then pay out the financier. Therefore, s. 76(2) represents a procedural saving for the financier and avoids further inconvenience for the innocent consumer. The Conference supported the retention of this provision.

The Committee also commented on this provision. It suggested an amendment to the section providing that such a claim may be refused if the financier has not given notice to the Director of Consumer Affairs as required by s. 49.

Other than the ability of VicRoads (and other statutory authorities) to claim against the Fund, and the limited discussion of a financier's ability to claim, traders did not raise any other issues relating to the Fund. However, a number of issues were raised by the Committee as set out over the following pages.

8.1.1. Section 76(1)(f)

The Committee suggested that it be given standing to apply to set aside a court or VCAT order made against a motor car trader. It said this standing could then be invoked in

'circumstances where it has information suggesting that the court order was based on incorrect or incomplete information and where the trader against whom the order is made has no interest or ability to defend the action'.

In the alternative, the Committee put forward that section 78 – which prevents a second claim being made against the Fund in relation to the same matter – be extended to apply to the situation where a claim has been refused and a default order obtained on the same facts.

This section allows persons to claim against the Fund if they have incurred a loss as a result of a trader failing to satisfy a court order or an order of the Tribunal. For example, the Tribunal may have ordered a trader to pay compensation to a consumer, which the trader has not done. This consumer may then apply to the Fund to recover the amount owed to them by the trader.

The Committee expressed concern about possible misuse of this provision by persons whose claims are refused on merit, who then obtain a default order from a court and lodge another claim under s. 76(1)(f). In such circumstances, there is no scope for the Committee to consider the merits of the court's default judgment, it is sufficient to allow the claim on the mere existence of the default order. Therefore, there is potential for claimants whose claims are refused on merit to still receive a payment from the Fund.

8.1.2 Section 76(1)(b)

This section allows persons to claim against the Fund if they have incurred a loss as a result of a trader failing to transfer a good title to a motor car.

The Committee recommended clarifying when a failure to transfer good title has occurred. It suggested that a failure to transfer good title can occur by –

- not delivering a car that was paid for (as opposed to the car that was delivered not meeting the description of the car that was purchased)
- the car being subject to a registered security interest, and
- the car being a stolen car.

8.1.3 Time limit on claims

The Committee recommended that a time limit for making a claim on the Fund be introduced. It suggested a time limit of:

- two or three years from the transaction giving rise to the loss (for claimants other than finance companies), or
- 12 months from the transaction giving rise to the loss (in the case of finance companies).

In the alternative, the Committee suggested that it be given 'a discretion to refuse a claim if there has been an unreasonable delay by the claimant in making the claim and to enable the Committee to take the delay into account in determining a claim'.

8.1.4 Failure to return a deposit as a new ground for a claim

The Committee recommended that a new ground for a claim against the fund be included in the Act. Under this ground, persons who have suffered loss as a result of a trader failing to return a deposit (and any other payment) where the contract is terminated and/or the trader agrees to refund the whole, or part, of the deposit (and/or other payment) but doesn't.

8.1.5 Section 76(1)(a)

The Committee pointed out a technical error in this section with the word 'and'. Where it appears between sections 54(2C) and 56(2), it should be replaced with the word 'or'.

8.1.6 Section 76(1)(d)

The Committee said that the current wording of this section leaves some confusion about whether a trader's failure to pass on stamp duty to VicRoads is covered, where this stamp duty is paid to the trader for the transfer of a registered (used) motor car.

Also, the Committee would like some clarification in the Act of what is encompassed by 'registration fees' and 'transfer fees'.

The Committee also requests that it be made clear that the Committee does not have jurisdiction for the validity of a roadworthy certificate (as opposed to whether one is provided).

8.1.7 Section 76(4)

The Committee posed the following questions in relation to the operation of this section:

- What is the amount the 'trader should have remitted' – the amount specified in the contract at the time of purchasing the trade-in car, the amount required to discharge the security interest when the trader sells the car, or the amount outstanding at the time of lodging or determination of the claim?
- Can this prevent a claimant recovering the full amount paid to a financier after a car is sold, if that amount is more than the amount specified in the contract?
- Should the Committee be able to authorise payment of all amounts lost by the claimant, even if they exceed the original pay-out amount identified in contract?
- What if the contract pay-out amount is described as being an approximate amount, or not specified?
- What is the situation for financier claims?
- Should it be extended to cover situation where a trader purchases car on understanding finance agreement to be paid out but trader goes into liquidation before selling car (that is, there has been no failure to procure cancellation of security interest in accordance with section 48)? (Should section 76(4)(e) be repealed? What if the trader does not sell the car, and therefore there is no breach of section 48? Or should 76(4)(e) be optional?)

8.1.8 Section 76(2)

Financiers are currently able to make a claim against the Fund for loss incurred from the failure of a licensed motor car trader to procure the cancellation of a security interest in a motor car that is registered under the *Chattel Securities Act 1987*, with the exception of an inventory security interest.

The Committee recommended extending the exemption for inventory security interests to

also cover a finance contract with respect to a car entered into by a director of a company motor car trader (unless satisfied that the financier did not know the person was a director of the motor car trader company).

The Committee also recommended repealing s. 76(3) which currently requires a financier claim to be made in the prescribed form and verified by statutory declaration.

8.1.9 Conduct of hearings

Although the Act does not specifically require the Committee to conduct a hearing when determining claims, the Committee would like the Act to specify that it is not required to conduct such hearings.

8.1.10 Power to require information

The Committee recommended that a provision be included in the Act enabling it to require a claimant, a motor car trader or any other person, body or source it sees fit to provide information relevant to the claim. This power would be similar to that given to the Business Licensing Authority under s. 12(1)(b) in relation to the consideration of licence applications.

In addition, the Committee suggested that:

- failure of the claimant to provide the required information within a reasonable time entitle the Committee to refuse the claim, and
- failure by the trader to provide the required information within a reasonable time entitle the Committee to admit the claim against the trader.

8.1.11 Power to postpone a determination

The Committee recommended that a provision be inserted into the Act allowing it to postpone a determination of a claim for such a period as it considers necessary. It suggested circumstances that may give rise to a postponement may include:

- where there are related court proceedings pending
- where the status of the subject car may change
- where there is a reasonable expectation of the resolution of the claim, and
- where the Committee gives a preliminary view that the claim will be admitted unless resolved by the trader.

8.1.12 Power to request reports

The Committee suggested that a provision be inserted into the Act enabling it to request a report from CAV, the Business Licensing Authority, VicRoads and/or the police.

8.1.13 Clarification of use of information provided

The Committee suggested it be clarified that:

All information provided to the Committee with respect to a claim may, in the discretion of the Committee, be disclosed to the claimant, the motor car trader and any other person the Committee considers it necessary to release the information to (eg. police, VicRoads, Consumer Affairs Victoria).

8.1.14 Conduct of the parties

The Committee recommended that a provision be inserted into the Act enabling it to take into account the conduct of the parties when determining a claim. For example, where a trader disputes they were involved in the transaction, the Committee suggests it be able to take into account (and base a decision on) the following facts:

- the trader was the registered operator of the car
- the trader is identified in the contract or other document such as a finance agreement or invoice (by name or LMCT number) as the vendor or supplier of the car
- the trader (by action or omission) facilitated or ratified the transaction in a manner that would give the impression that it was a party to the transaction (such as, by allowing a person to hold out that they are associated with or employed by the trader, or that a car being offered for sale privately is a car that is owned or being sold by the trader)
- the trader allowed (or did not take sufficient action to prevent) an unlicensed person using the trader's LMCT number or otherwise representing him/her/itself as, or as being associated with, the licensed motor car trader.

Further, the Committee recommended that 'consideration should be given to whether the Committee should be able to admit a claim against the trader unless it is satisfied that the trader did not sell or deal with the car'.

The Committee also suggested that it be able to take into account the conduct of a claimant. In particular, whether the claimant has contributed to their own loss and whether they have made a reasonable attempt to recover from the trader.

The Committee noted that, in NSW, a claim cannot be admitted unless the claimant has '... taken all reasonable steps to exercise such legal remedies and other rights of action available in respect of the loss incurred by the claimant' (s. 40(4) *Motor Dealers Act 1974* (NSW)).

8.1.15 Reasons for determination

Currently, under s. 71 any person may request a copy of the reasons for a determination of the Committee. The Committee suggests this be limited to persons whose interests are affected, in order to be consistent with the right of review.

8.1.16 Quantum

The Committee recommended that the Act be amended to specify that, in determining the quantum of a claim to be paid, the Committee may take into account such matters as it thinks fit, including the claimant's use of the car, and wear and tear caused to the car as a result of the claimant's use of it.

The Committee also suggested clarifying that, 'for the purposes of determining the quantum of a claim, the loss incurred by a claimant is restricted to the direct loss on the transaction, which does not include:

- legal costs
- consequential loss (such as car hire expenses, loss of income or fines incurred)
- loss arising from any improvements made to the car after it was purchased from the trader, or damages for stress.'

The Committee noted that the admission of a claim does not prevent entitlement of claimant pursuing legal action against trader for such losses in court.

8.1.17 Name and status of the Committee

The Committee asked that consideration be given to changing the name of the Committee to one that is less cumbersome.

Further, the Committee asked for clarification regarding whether it was able to take legal action in its own name, despite not having a separate status recognised by statute, or whether legal action must be taken in the names of the members of the Committee.

8.1.18 Proof of debt owing by trader

The Committee recommended that the following be clarified in the Act:

Subject to the Committee's decision being reviewed, a certificate issued by the Secretary to the Committee attesting to the payment of a claim against a motor car trader to be sufficient proof of a debt owing by the trader for the purpose of any recovery proceedings initiated by the Committee against the trader.

8.1.19 Timing of payment from Fund

The Committee requested the Act be amended to provide it with discretion to delay payment of a claim to a claimant for 28 days following its determination to allow a trader to seek a review of the decision. Where an application is lodged, the Committee suggests it be able to postpone payment until the outcome of the review. However, if a trader initiates a review application, they must provide evidence to VCAT of the availability of funds to cover the claim if the review is not successful. Without the ability to postpone payment pending an appeal, should the trader win the appeal, the Committee would have difficulty recovering the claim already paid to the claimant.

8.1.20 Abeyance of claim where an application for rescission is pending

Section 45 of the Act sets out a number of situations in which a consumer can apply to a Magistrates' Court for an order rescinding an agreement for the purchase of a vehicle. Subsection 45(5) provides that where such an application is pending, the consumer cannot make a claim against the Fund for any loss arising from the same circumstances. This prevents a consumer from effectively double-dipping by receiving a claim from the Fund as well as having the contract rescinded.

The Committee recommended the extension of this subsection, or the insertion of a new section, to allow the Committee to hold in abeyance any claim where the enforceability of the contract leading to the claim is the subject of legal proceedings.

8.1.21 Application by Committee for imposition of conditions on licence

The Committee recommended that the Act be amended to enable it to apply to the Authority for the imposition of conditions on a trader's licence, including that the Authority impose a condition requiring the licensee to lodge a guarantee in favour of the Committee.

8.1.22 Extension of section 50A

The Committee suggested extending

'section 50A(1)(b) to cover an offence of aiding or abetting, or causing or permitting a licensee to carry on business as a motor car trader in breach of a condition on the licensee's licence (for example, a trader or person who assists a wholesale trader to deal directly with members of the public).'

Section 9

Dispute resolution

The Motor Car Traders Guarantee Fund is one avenue by which consumers can seek redress for loss suffered as a result of dealings with a motor car trader. As indicated by the number of claims that are withdrawn prior to a determination by the Motor Car Traders Guarantee Fund Claims Committee, the Fund also has an important role in dispute resolution. Claims may be withdrawn for a number of reasons, including that the matter has been resolved between the consumer and the trader, or because the consumer gains an increased understanding of their rights and realises their claim will not be successful. There is, of course, an incentive for traders to resolve disputes prior to a determination, owing to the adverse consequences on their licence of a claim being admitted against them.

As discussed above, a claim can only be made against the Fund where the conduct falls within one of the specified grounds. Most of the grounds on which a claim can be based relate to obligations on traders imposed under the Motor Car Traders Act and to pay associated stamp duty and registration or transfer fees. However, traders also have obligations under the Fair Trading Act. Offences under the Fair Trading Act include engaging in misleading, deceptive or unconscionable conduct, making false representations and harassing or coercing consumers.

In 2003-04, Consumer Affairs Victoria received almost 7,000 enquiries and around 500 written complaints from consumers in relation to motor car traders. These represented around 3 per cent of enquiries and 7 per cent of complaints during the period.

In addition to enquiries and complaints received by Consumer Affairs Victoria, community agencies such as legal centres and financial advisory services also receive complaints and assist consumers in resolving disputes with motor car traders. The VACC also submitted that it assisted in settling disputes between traders and consumers. The RACV also operates a Motor Advisory Service which consumers can call for advice.

Owing to the large number of complaints received by community agencies in relation to motor car traders, the Consumer Law Centre (CLC) has called for the establishment of an industry ombudsman to deal not only with motor car traders but repairers as well. However, it noted that most of the complaints it received regarding the industry related to motor car traders. The CLC observed that industry ombudsman schemes provided free, fast resolution of complaints and identification of recurrent or system-wide problems. It suggested licensees could be required to be members of an industry dispute resolution scheme through the imposition of a condition on their licence.

As part of the consultations, the RACV submitted a paper prepared by the CLC to support its calls for an industry-based dispute resolution scheme. In this paper, the CLC compiled data from a sample of five community agencies that receive and deal with complaints from consumers relating to motor car traders. Between the five agencies, over 400 complaints had been received within a 13 month period, which the CLC noted represented only a handful of the 115 community financial counselling services and 40 community legal centres across Victoria.

The CLC reported that the types of complaints received indicated there were five main issues relating to disputes with motor car traders:

- Misleading and deceptive conduct on the part of the trader – including false statements about the quality of vehicles or consumers’ rights in relation to warranties and cooling-off periods.
- Unconscionable conduct – where the trader has taken advantage of a vulnerable characteristic of the consumer such as age, lack of business skill, intellectual disability, or a culturally or linguistically diverse background, and the contract is disadvantageous to the consumer.
- Harassment and coercion – for example where a trader uses threats to prevent a consumer cancelling a contract, even where they are exercising their rights under a cooling-off period.
- Car finance and/or insurance – where traders arrange finance or insurance without the customer fully understanding the agreement.
- Lack of consumer awareness of contractual rights and obligations – particularly in relation to cooling-off rights and warranties.

In the report, the CLC outlined several case studies experienced by the various agencies, which provided examples of these issues. Although most of the case studies seem to have been resolved (either through negotiation with traders or through VCAT), the CLC argued that current dispute resolution mechanisms were inadequate. It recommended ‘research should be undertaken into the viability of an independent industry dispute resolution scheme to cover complaints against motor car traders and, potentially, repairers’.

It claimed that dealing with motor car trader disputes was time consuming and resource intensive for community agencies, which generally do not have the technical or mechanical expertise to assess claims regarding the quality or condition of vehicles. It also noted that conciliation (through CAV) is often inappropriate for such disputes as the traders and consumer’s knowledge and bargaining positions are so imbalanced. In addition, it observed that resolving disputes through VCAT may involve long delays and significant cost, particularly where expert evidence is required.

Although the VACC suggested that, given the size and nature of the transactions in the industry, the level of complaints was low, it did say that improvements could be made to the dispute resolution process between traders and consumers. It called for the establishment of

a Motor Car Trading Disputes Resolution Committee with the power to hear, conciliate and assist customers and traders to resolve disputes, without the expense of time and the cost of either attending VCAT or alternatively, a Magistrate’s Court.

The VACC submitted that disputes could be handled better by an industry body with people experienced in the industry and who understand the trade and the mechanical aspects involved. However, the VACC suggested that many disputes could be avoided altogether through the provision of information to traders and consumers. Information to traders could include customer service tips and further information on their legal obligations, while consumers could benefit from more information regarding their rights and obligations, particularly in relation to warranties, insurance and cooling-off periods.

The RACV submitted that an industry specific dispute resolution scheme should be established owing to the adverse impacts such disputes can have on consumers. The purchase of a car, whether new or used, tends to be the second-largest purchase a consumer will make, after the purchase of a house. If something goes wrong, in addition to direct financial expenses relating to the car, there may also be costs associated with breakdown services, transporting a car to a repairer, and even loss of income where a vehicle represents the sole means of transportation to a job.

Recommendation 37

The ways in which consumer and trader disputes are currently resolved should be examined to determine their effectiveness and adequacy, and options for improvement should be considered, including the establishment of an industry-specific dispute resolution scheme.

The financially (and sometimes physically and emotionally) devastating effects that a car purchase can have on a consumer were illustrated by a number of consumers who participated in the consultation process. These effects appear to be greater when a consumer's complaint involves repeated repairs under a new car warranty, or more colloquially, 'a lemon'. One consumer who made a submission to the consultations indicated that, owing to his regional location, he had travelled over 1800km in a 6-week period in order for repairs to be undertaken to his new vehicle under the manufacturer's warranty. During this time, he had also been without his vehicle for 12 days.

Another consumer told how her new vehicle had cost her career and health. She said it was impossible for consumers to enforce new car warranties given the cost of bringing an action in court (VCAT's jurisdictional limit is \$10 000) and the extremely unequal bargaining power of the consumer and the multi-national car manufacturing company.

The RACV and CLC also gave examples of consumers who had had great difficulty resolving disputes with traders and/or manufacturers in relation to lemon vehicles.

Recommendation 38

Consumer protection in relation to new car warranties and 'lemons' is an area that requires further investigation, particularly given the large amounts of money involved and the unequal positions of consumers and vehicle manufacturers. Such an investigation could occur in the context of a broader examination of 'lemon laws' and their possible application to other types of products as well as cars.

