

Recommended Amendments to the Motor Vehicle Sales Act 2003

Discussion Paper

March 2007

ISBN 978-0-478-30476-3 (PDF)
ISBN 978-0-478-30477-0 (HTML)
ISBN 978-0-478-30478-7 (paperback)



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Foreword from the Minister

Motor vehicles are amongst the biggest financial commitments consumers make, often using finance arrangements. These transactions can be technically complex, making it difficult for the average consumer to judge the merits, or otherwise, of purchasing a vehicle. It is vital that consumers receive useful and accurate information to allow them to make informed decisions.

Many New Zealanders rely on advice from motor vehicle traders. While there are many good motor vehicle traders, the motor vehicle sales industry has also attracted some less scrupulous business practitioners.

The Motor Vehicle Sales Act 2003 was developed to regulate the industry. Its purpose is to promote and protect the interests of consumers in relation to motor vehicle sales. This creates an environment where consumers have the information and confidence to make informed purchases.

The Act says that consumers who buy motor vehicles through registered motor vehicle traders are entitled to certain additional protections compared with those who buy privately. The Act requires consumers to be provided with adequate information to make informed purchases and provides a dispute resolution procedure for consumers and the industry (the Motor Vehicle Disputes Tribunal) should something go wrong with the transaction.

The Motor Vehicle Sales Act is just over three years old, and followed a major review of the then motor vehicle sales legislation. At the time the new legislation was passed, the government made a commitment to undertake a review after two years of operation to ensure the Act was meeting its objectives. This review, undertaken by the Ministry of Consumer Affairs, was tabled in Parliament in March 2006.

The Review of the Operation of the Motor Vehicle Sales Act 2003 suggested some possible amendments to the Act. This discussion paper provides an opportunity for stakeholders and interested parties to comment on specific proposals to amend the Act.

I welcome your submissions on the recommendations to improve the operation of the Motor Vehicle Sales Act 2003.

Hon Judith Tizard
Minister of Consumer Affairs

Call for Submissions

Submissions on this paper should be sent by **14 May 2007** to:

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1. Introduction

The Motor Vehicles Sales Act 2003 (MVSA) came into force in December 2003, replacing the Motor Vehicle Dealers Act 1975. The MVSA made fundamental changes to the way in which sales of motor vehicles were regulated. A registration regime, administered and enforced by government agencies, replaced the previously industry controlled licensing regime. Some restrictions on who could participate and how they could participate in this market were lifted. The Motor Vehicle Fidelity Guarantee Fund was discontinued and the scope of claims that could be taken to the Motor Vehicle Disputes Tribunal was widened. New information disclosure requirements were imposed in the form of a Consumer Information Standard under the Fair Trading Act 1986.

As required by section 163 of the MVSA, the Ministry of Consumer Affairs undertook a review of the operation of the MVSA that was reported to Parliament in March 2006.

The purpose of the Review of the Operation of the Motor Vehicle Sales Act 2003 was to report to Parliament on how the new legislation was meeting its intended objectives as well as to identify any areas of the legislation that may need to be amended with the benefit of two years of operational experience.

General conclusions of the Review

The Ministry's Review of the Operation of the MVSA noted that the administrative systems for registration are in place and the Motor Vehicle Trader Register is working well. Registration numbers exceeded 2003 estimates, indicating a relatively high level of compliance, although there continues to be some concern from both industry and consumers that there are traders who are continuing to operate outside the system.

With regard to both registration and information disclosure, the Review identified some general concern about levels of compliance concerning internet trading and through car fair operations.

The Review noted that the new Motor Vehicle Disputes Tribunal (MVDT) under the MVSA has created a sound dispute resolution process and that largely the MVDT is an efficient means of redress for consumers. Some areas of concern such as frequency and geographic location of hearings, delays in hearings, and a lack of consumer awareness of the MVDT and misunderstanding as to the full powers of the MVDT, however, were identified.

Overall, the Review concluded that the removal of the Motor Vehicle Dealers Fidelity Guarantee Fund has not caused any significant loss of protection to consumers but that this area will require further monitoring.

The Review suggested that the level of consumer awareness of their rights needs to be strengthened across all aspects of the motor vehicle industry and commented that the number of agencies involved in administering and enforcing various aspects of the regime may be confusing for consumers and may provide a barrier to consumers seeking remedies that are available to them, or from passing on information about unethical traders.

The Review also noted that between the Registrar, National Enforcement Unit, Commerce Commission and the Motor Vehicle Disputes Tribunal a considerable amount of information is collected about trading activity and behaviour and increased communication between these agencies could assist in identifying priority enforcement targets. A regular

communications strategy between the agencies could also help to build an evidence base for applications to the District Court to ban a person from motor vehicle trading.

Proposed amendments to the MVSA

As noted, a specific requirement of the Review was to make recommendations on whether any amendments to the MVSA were necessary or desirable. The Review of the Operation of the Motor Vehicle Sales Act contained 14 recommendations for relatively minor amendments to the MVSA.

As a result of further consideration of the recommendations made in the Review, this discussion paper now sets out specific proposals to amend the MVSA. Of note is that not all of the recommendations of the Review¹ have led to specific amendment proposals following from their more detailed analysis.

The proposed amendments are discussed under the headings:

- Motor Vehicle Trader Registration
- Motor Vehicle Sales Information Disclosure
- Motor Vehicle Disputes Resolution

A list of the proposed amendments to the MVSA is on the next page.

¹ Other findings in the Review concerned the Consumer Information Standards (Used Motor Vehicles) Regulations 2003. Further analysis of these findings is being undertaken in a separate review. An initial discussion paper on this review was published in May 2006. A second discussion paper is released in conjunction with this discussion paper entitled "Recommended Changes to the Consumer Information Standards (Used Motor Vehicles) Regulations 2003".

2 List of Recommendations

Motor Vehicle Trader Registration

1. Amend section 39 of the MVSA, renewal of registration, to provide for a renewal application to be on a prescribed renewal application form, signed by the applicant, confirming that the trader's name, address, trading name and persons concerned in the management of the company are correct as stated on the Motor Vehicle Register. This amendment removes the requirement for motor vehicle traders to use the application process set out in section 32 for renewals, including making an annual statutory declaration of their trading details.
2. Amend section 39(2) to say sections 33 to 38 apply, with any necessary modifications, to applications for renewal of the registration of a motor vehicle trader under section 39, and to require that the applicants must confirm that they do not meet any of the criteria that disqualify them from being a motor vehicle trader.
3. Also amend section 39 to provide for a renewal application to be accompanied by the prescribed application fee and any levy imposed under section 143.
4. Amend section 40 to provide that a statutory declaration accompany notification of a change where a new director or other person concerned in the management of the company has been appointed.
5. Amend section 40 to provide for notification of changes to be made on the prescribed form.
6. Amend section 68(1)(c) to ensure that persons convicted of breaches of the MVSA that would invoke the banning provisions while registered, may be similarly banned regardless of their registration status at the time of conviction.

Motor Vehicle Sales Information Disclosure

7. Remove section 14(2) to remove the requirement for private sellers to display a SIN at car markets.
8. Amend section 7 of the MVSA to remove reference to car market operators.
9. Amend section 14 and section 16 of the MVSA to exempt from the SIN requirements, transactions that are exclusively between registered motor vehicle traders, and between registered motor vehicle traders and car wreckers as defined in the MVSA

Motor Vehicle Disputes Resolution

10. Amend Schedule 1, clause 14 (1)(b) to allow costs to be awarded against any party to a claim, for non attendance at a hearing for no good cause.
11. Amend section 87 to provide a timeframe within which the adjudicators' annual reports are to be submitted and to deal appropriately with the receipt of multiple reports. Also to replace the phrase "available to the news media" to read "publicly available".
12. Extend section 89 to allow the Motor Vehicle Disputes Tribunal to also consider claims under the Credit Contract and Consumer Finance Act 2003 (CCCFA). This would include allowing creditors to be a party to the claim under the CCCFA.
13. Amend section 90 to increase the total sum of the application or claim from \$50,000 to \$60,000.

14. Amend section 94 to allow the Motor Vehicle Disputes Tribunal to have improved disclosure of MVDT decisions.

Other Matters Considered and No Changes Proposed

1. Not to re-establish the Fidelity Fund and for the Ministry to continue to monitor the impact of the removal of the Motor Vehicle Dealers Fidelity Fund.

3. Motor Vehicle Traders Registration

A large part of the MVSA concerns the registration of motor vehicle traders, requirements of registration and the conduct of those registered. In brief, the aim of the registration regime is to provide protection to consumers purchasing motor vehicles from registered motor vehicle traders through ensuring that –

- all those who carry on the business of motor vehicle trading are subject to the regulatory regime;
- consumers can have confidence that when they are dealing with a registered motor vehicle trader that the person has met the requisite criteria for conducting that business;
- consumers and enforcement agencies can locate the trader in the event of a dispute or breach; and
- unsuitable persons are prevented from participating in motor vehicle trading.

Section 52 of the MVSA provides for a Motor Vehicle Traders Register (MVTR). The MVTR is a register that contains information about whether a motor vehicle trader is registered, and information about the trader's business, including its physical address. The MVTR is a service administered by the Ministry of Economic Development's Business Services Branch.

The MVSA introduced new requirements for registered motor vehicle traders, including widening the definition of a trader. It introduced what is called a "negative licensing" process where an applicant is entitled to become registered provided the person does not fall into a category of person prohibited from being registered. The list includes persons banned from participating in the business of motor vehicle trading, those with a history of bankruptcy, those with certain convictions and past revocation of a motor vehicle dealer's licence or registration.

The Review of the Operation of the Motor Vehicle Sales Act 2003 identified some areas of the registration provisions that could be improved, in particular improvements to the annual renewal of registration, clarity regarding the banning provisions and changes to the definition of motor vehicle (with respect to motor cycles). As a result of further consideration of these recommendations, it is proposed that amendments be made to the MVSA in the following areas:

Renewal of registration of motor vehicle traders

Recommendations:

Amend section 39 of the MVSA, renewal of registration, to provide for a renewal application to be on a prescribed renewal application form, signed by the applicant, confirming that the trader's name, address, trading name and persons concerned in the management of the company are correct as stated on the Motor Vehicle Register. This amendment removes the requirement for motor vehicle traders to use the application process set out in section 32 for renewals, including making an annual statutory declaration of their trading details.

Amend section 39(2) to say sections 33 to 38 apply, with any necessary modifications, to applications for renewal of the registration of a motor vehicle trader under section 39, and to require that the applicants must confirm that they do not meet any of the criteria that disqualify them from being a motor vehicle trader.

Also amend section 39 to provide for a renewal application to be accompanied by the prescribed application fee and any levy imposed under section 143.

To ensure the continuing integrity of the motor vehicle trader registration system and information on the MVTR, motor vehicle traders must renew their registration every 12 months (section 39, MVSA). The same process for renewal of registration is required as for an original application (sections 31 to 38). Currently, this includes a requirement for a statutory declaration from each person concerned in the management of the company to be submitted each year. The review of the MVSA identified this requirement as unnecessarily onerous and, in particular, problematic for those companies that have directors residing outside of New Zealand.

The requirements for a statutory declaration are that it must be signed by the applicants, and witnessed by a solicitor, a Justice of the Peace or other person authorised to take a statutory declaration and must be submitted by the specified date to complete the renewal process. All persons concerned in the management of a company who is registered as a motor vehicle trader must sign and return a statutory declaration.

For companies with directors or other management based overseas, the signing of the statutory declaration can be challenging. The requirements are as follows:

- 1 A declaration made in a Commonwealth country other than New Zealand must be made before a Judge, a Commissioner of Oaths, a notary public, a Justice of the Peace, or any person authorised by the law of that country to administer an oath there for the purpose of a judicial proceeding, or before a Commonwealth representative, or before a solicitor of the High Court of New Zealand.
- 2 A declaration made in a country other than a Commonwealth country must be made before a Commonwealth representative, or before a Judge, or before a notary public, or before a solicitor of the High Court of New Zealand.
- 3 Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal or signature of any person authorised as outlined in (1) and (2) above to take a declaration must be admitted in evidence with proof of the seal or signature being the seal or signature of that person or of the official or other character of that person.

Overseas company directors must be certain that the witness to the statutory declaration is actually authorised to do so – otherwise, the application to register the company as a motor vehicle trader will be rejected.

By way of comparison, under section 214 of the Companies Act 1993, companies are required to complete and file an annual return every year. This annual return contains certain details about a company and is signed by a director or authorised person, but it is not a statutory declaration.

The importance of the statutory declaration for new motor vehicle trader applications is not at question. The Select Committee report and discussion in Parliament with respect to the MVSA identified a strong view held that there should be proof of authenticity of the information provided by those wanting to register as motor vehicle traders.

There is a question about the need for annual statutory declarations, however, when there is no change in circumstances. As noted, this requirement is imposing a considerable compliance burden on some parties, particularly overseas-based directors.

Under section 40 of the MVSA, changes in circumstances are required to be notified within 10 working days of the change. At present, there is no requirement for such advice to be accompanied by a statutory declaration. The need for some of this information to be robust, especially with regard to new directors, is more in alignment with the statutory declaration requirement of an initial application for registration and with the sentiments of Parliament, noted above. This is discussed further below.

It is concluded that the statutory declaration requirement with a registration renewal application is an unnecessary regulatory burden, particularly affecting companies with overseas directors. However, there is a need to confirm that the trader has not in the past 12 months become disqualified from being registered as a motor vehicle trader (e.g. become bankrupt or having criminal convictions). This is to maintain the integrity of the information.

To remove the need for an annual statutory declaration with motor vehicle trader registration renewal, it is proposed that section 39 of the MVSA provides for a specific renewal process, including a prescribed renewal application form and accompanying fee. It is proposed that this form would be signed by either each person concerned in the management of the company, or the company secretary, or a director, or another authorised person to act on behalf of each person concerned in the management of the company. This renewal application will include the required information from sections 33 to 38 of the MVSA² and a new requirement for the applicants to confirm that they have not become disqualified from being a motor vehicle trader in the past 12 months.

Public Policy Objectives Summary

- The proposed changes will result in declarations to the MVTR that improve the integrity of the registration system.
- The proposed change to remove annual statutory declarations will reduce business compliance costs and unnecessary red tape.
- Consumers will benefit from improved annual renewal statements.
- After the initial cost of incorporating changes to the Motor Vehicle Register, there will be reduced on-going costs to government.

² Acceptance or refusal of application by the Registrar and the registration process, including duration.

Amendment to section 40, notification of change in circumstances

Recommendation:

Amend section 40 to provide that a statutory declaration accompany notification of a change where a new director or other person concerned in the management of the company has been appointed.

Amend section 40 to provide for notification of changes to be made on the prescribed form.

As noted above, under section 40 of the MVSA, changes in circumstances are required to be notified within 10 working days of the change. Such changes, however, are not required to be accompanied by a statutory declaration.

The appointment of a new company director or other person concerned in the management of the company is a major change to a company. The way a company behaves will be significantly influenced by its directors and those concerned in the management of the company. Accordingly, the registration process needs to ensure that any new director or other person concerned in the management of the company is not disqualified. Currently, a new director or other person concerned in the management of the company could be appointed who is a disqualified person and this would usually not be identified until the registration is next renewed.

It is proposed to amend section 40 to provide that when a new company director or other person concerned in the management of the company is appointed, a statutory declaration must accompany the written notification to the Registrar. It is noted that providing a statutory declaration within 10 working days would be unreasonable. Therefore it is also proposed that notification of the appointment of a new company director or other person concerned in the management of the company is to be provided within 10 working days with the statutory declaration provided within 20 working days of their appointment. This maintains the integrity and timeliness of the Register without imposing unreasonable timeframes.

To assist with the proposed changes to sections 39 and 40, prescribed forms for the renewal notification and change notification will be developed based on the required information for each application/notification.

The Review of the Operation of the Motor Vehicle Sales Act 2003 noted that some in the industry had advised that there has been some difficulty in meeting the section 40 requirement for directors who reside overseas to provide that written notice be given to the Registrar within 10 working days of any changes. This requirement was seen as too onerous.

The Review concluded that the need for accurate and current director details outweighed the inconvenience to overseas dealers of the 10 working day period. The Ministry of Consumer Affairs still holds this view. With the proposed changes to section 40, the 10 day written notification period will remain, but as any statutory declaration is not required for 20 working days this initial notification time is not considered to be onerous.

Public Policy Objectives Summary

- The proposed changes will result in declarations to the MVTR that improve the integrity of the registration system.
- Consumers will benefit from provisions that reduce the chance of disqualified persons becoming traders.

- Overall, there will be decreased compliance costs for industry as the recommendation replaces the need to provide an annual statutory declaration.

Amendment to banning provisions

Recommendation:

Amend section 68(1)(c) to apply to all persons, not just a person who is registered as a motor vehicle trader.

A person can be banned from trading in motor vehicles if they breach section 68 of the MVSA. A ban is 5 years starting on and from the date of the conviction, failure or other matter that has invoked the ban.

Section 68(1)(a) provides that a person is banned from being a motor vehicle trader if they have 2 or more convictions in a 10 year period for such matters as motor vehicle trading when not registered, and providing false information or declarations in relation to motor vehicle trader registration. Section 68(1)(b) provides that a person is banned from being a motor vehicle trader if in the previous 10 years they have done such things as failed to comply with a Disputes Tribunal order and have been concerned in the management of a motor vehicle trading company that has been banned or gone into liquidation due to unpaid debts. Section 68(1)(d) bans any person from being a motor vehicle trader who is convicted of tampering odometers.

On the other hand, section 68(1)(c) applies only to a person who while a registered motor vehicle trader is convicted of a crime involving dishonesty, or an offence against sections 17 to 22 or 24 to 26 of the Fair Trading Act 1986, is disqualified from registration or managing a company under the Companies Act 1993 or has more than once in a 10 year period been adjudged bankrupt.

The Review of the Motor Vehicle Sales Act 2003 noted the case of Tim Whittle had highlighted a loophole in section 68(1)(c), which provides for the banning of a trader who may have only been convicted of one serious offence but not all persons, including if they have been convicted multiple times of such offences. At the time of Whittle's conviction (he was convicted on 73 counts of fraud in 2005), Whittle's registration had lapsed. This meant the automatic banning provisions under section 68(1)(c) could not be applied as he was no longer a registered motor vehicle trader.

It is not known why the section 68(1)(c) banning provisions are conditional on the *status* of the person convicted (i.e. the person must be a registered motor vehicle trader). The offences in section 68(1)(c) are serious matters and if a person, registered or not, has been disqualified or convicted of these offences then they should be banned from motor vehicle trader registration.

In Whittle's case, a successful application was made to the District Court under section 69 of the MVSA and Whittle was subsequently banned indefinitely. However, taking a claim to court can be a resource consuming process. The policy objective behind the section 68(1)(c) banning provisions was to avoid the need for a Court case for identified wrongdoings.

Accordingly, it is recommended that section 68(1)(c) of the MVSA be amended to apply to any person who has been convicted or disqualified regarding the matters outlined in this clause or adjudged bankrupt.

Public Policy Objectives Summary

- Consumers and industry will benefit from provisions that reduce the chance of a less scrupulous person becoming a motor vehicle trader.

Other Amendments to Registration Provisions Considered

Definition of motor vehicle – cc rating of motor cycles classed as motor vehicles

The MVSA requires every person who carries on the business of motor vehicle trading to be registered as a motor vehicle trader, including those trading in motor cycles 60cc and above. The definition of motor vehicle under section 6 of the MVSA specifically excludes motor cycles which have a cylinder capacity which does not exceed 60 cubic centimetres (60cc). This definition is consistent with the legislation that preceded the MVSA, the Motor Vehicle Dealers Act 1975.

The Review of the Operation of the Motor Vehicle Sales Act 2003 noted that the MVSA reference to 60cc motor cycles does not align with the Land Transport Rules or with the Customs codes in the Tariff of New Zealand. The Land Transport Rules categorise a motor cycle as a two wheeled vehicle exceeding 50ml (equivalent to 50cc) and with a maximum speed exceeding 50km/hour. The tariff categories under which Customs operates identify motor vehicles in bands: under 50cc; from 50cc but not exceeding 250cc; from 250cc but not exceeding 500cc; from 500cc but not exceeding 800cc; and exceeding 800cc.

The Review recommended changing the MVSA to include in the definition of motor vehicles motor cycles 50cc and above to reflect the ratings used in this other legislation. The recommendation noted, in particular, that this would improve the operability of sections 120 to 123 of the MVSA. These sections provide for information sharing arrangements between Customs and the MVTR Registrar, and between the Ministry of Transport and the Registrar. The purpose of these information sharing arrangements are respectively to assist the Registrar in determining any person who imports more than 3 motor vehicles or any person who sells more than 6 motor vehicles in a year who may not be a registered motor vehicle trader. The discrepancy between the MVSA and the definition of motor cycle used in other legislation and with the Customs tariff codes has been identified by the enforcement agencies and industry representatives as unhelpful to information sharing.

Land Transport New Zealand (LTNZ) has advised that there are about 1000 motor cycles registered in the range of 50cc to 60cc which could be affected by a change in the definition of motor vehicle to capture such motorcycles.

Further analysis of this issue has identified that 60cc is used as a “cut-off” line in other legislation. In particular, the Transport (Vehicle Registration and Licensing) Regulations 1994 provide for motorcycle registration and licensing fees based on above and below 60cc bands. Similarly, the Injury Prevention, Rehabilitation and Compensation (Motor Vehicle Levies) Regulations provide for the Accident Compensation Corporation (ACC) levy classifications based on cc bands. Classification 3 is mopeds and motorcycles up to and including 60cc, while Classification 4 is motorcycles from 61cc. The levies for these classes are significantly different; the 2006-2007 levy for Class 3 is \$38.86 and the levy for Class 4 is \$166.50, a four-fold difference.

The reason given for changing the MVSA definition of motor trader to include a lower cc range of motorcycles is to help identify traders dealing in motorcycles between 50 and 60cc. It is unlikely, however, that there would be many traders who exclusively deal with motorcycles between 50 to 60cc. Either traders would also deal in higher cc motorbikes, and therefore be defined as traders regardless of any change, or they would deal with only

mopeds of less than 50cc and therefore would not be classified as a trader of motor vehicles. Given 60cc is a recognised division between motorcycles and mopeds or step-throughs in other transport legislation and no significant advantages can be seen from changing the MVSA, no change is recommended

Definition of motor vehicle – list of vehicle classes

The Review of the Operation of the Motor Vehicle Sales Act 2003 considered whether the definition of motor vehicle in section 6 of the MVSA should be changed to a prescribed list of vehicle classes. Submissions from industry to the Review suggested that the definition of motor vehicle which refers to a road vehicle ordinarily acquired by consumers for personal, domestic, or household use is confusing and that a definite list would help resolve this.

The MVSA definition is closely related to the Consumer Guarantees Act 1993 definition of consumer, with case law being developed from this Act. Customs data is also arranged on domestic/commercial lines. Similar vehicles may be purchased for different purposes (e.g. a four-wheel drive vehicle may be purchased for commercial work and not be covered by the Act or for domestic purposes and be covered by the Act), therefore a list of vehicles may lead to more confusion. Accordingly, no changes to the definition of motor vehicle are recommended.

Definition of a motor vehicle trader – deeming provisions

Under the MVSA, a person who sells more than six motor vehicles or who imports more than 3 vehicles, in a consecutive 12 month period is deemed to be a motor vehicle trader. There is some concern that traders, by various means, are importing more vehicles than this limit allows, and that reducing the number of vehicle sales to three and imports to one, will mitigate this practice. The Review of the Operation of the Motor Vehicle Sales Act 2003 did not support any change, and concluded that this behaviour can be dealt with through the information sharing arrangement with Customs.

Provision of IRD number as part of the details required on registration application

The Review of the Operation of the Motor Vehicle Sales Act 2003 noted that the Motor Vehicle Disputes Tribunal has indicated that some traders will change their name in a small way to evade customers who have raised a claim against them. The Review suggested that requiring applicants for registration as a motor vehicle trader to provide details also of their IRD number might address the problem. Further analysis does not support this suggestion.

Matching company details with an IRD number may help to verify the company's trading status. However, there is limited evidence that this would help to assist enforcement. While it may provide all trading names under which a trader is operating, any new company can gain a new IRD number. Therefore, matching trading names with IRD numbers will not achieve the desired result. Additionally, by including this field in the Register, this will incur some cost to Government. This cost is not justified if there is no evidence of facilitating enforcement.

It is noted that section 32 of the MVSA and the proposed changes to sections 39 and 40 of the MVSA discussed above should be able to address the problem. Section 32(a)(i) and (b)(iii) require that a trader, either as an individual or as a company, must provide a full name on the application for registration. Under the MVSA, full name is defined to also include any aliases or alternative trading name under which the individual or company may operate.

Requirement to define place of business

The MVSA has removed the requirement to operate from a physical car yard, thereby acknowledging that car sales can occur by internet based sales, car fairs and roadside displays. This provides a lower cost approach, but also means traders are less visible. There has been some concern raised by the Motor Trade Association regarding registered traders operating from these alternative premises. Their concern is that by being less visible, this type of trading encourages fly-by-nighters. Additionally, by trading in this manner, such traders are in competition with car yard traders who have made significant investment in their yards.

The Review of the Operation of the Motor Vehicle Sales Act 2003 concluded that since registration still requires a physical address for the trader (but not necessarily the actual place of business), this establishes a point of contact with the trader. Local bodies have the power to restrict places of businesses and therefore have the means to address any physical or local problems that arise with less formal sales approaches. This also reflects the way business is occurring and there is a need for legislation to reflect the market. Therefore, there is no conclusive evidence that a change to this provision is necessary.

Requirement for dual registration

Some second hand dealers have indicated they have to pay fees under both the MVSA and the Secondhand Dealers and Pawnbrokers Act 2004 as a result of quad and farm bikes being classified as motor vehicles under the MVSA. There is widespread anecdotal evidence that quad and farm bikes are targeted for theft from farms and are subsequently illegally traded. The Secondhand Dealers and Pawnbrokers Act aims to hinder such activity.

Quad and farm bikes are not classified as motor vehicles under the MVSA, as they are not road vehicles of a kind ordinarily acquired by consumers for personal, domestic or household use. If a secondhand dealer is also registered as a motor vehicle trader (due to the trading of motor vehicles), the registration fees are separate issues. Based on the information available, the Ministry of Consumer Affairs has concluded that as the Acts provide different consumer and market protection functions and create different obligations it may be necessary for a dealer/trader to pay compliance fees under both Acts. The fees assist with the administration of the Acts and provision of different services such as the Secondhand Dealers and Pawnbrokers Act's requirement of record keeping pre-sale to help recover stolen vehicles.

4. Motor Vehicle Sales Information Disclosure

Section 14 of the MVSA requires motor vehicle traders to display with any used motor vehicle for sale a supplier information notice (SIN). It also requires consumers selling cars through a car market operated by a motor vehicle trader to display a supplier information notice.

Supplier information notices are a form of regulated information disclosure and are referred to as a pre-market consumer protection control. Their objective is to provide consumers with information to assist the purchasing decision.

Pre-market controls are usually applied when there are important safety issues that need to be managed or when the technology involved is complex or when it is considered important to provide consumers with information to allow for better, more informed decision-making and pre-market intervention is the most economically efficient way of achieving the desired policy objective.

The main legislative mechanism for detailing the requirements for the supplier information notice for used motor vehicles being sold by traders is the Consumer Information Standards (Used Motor Vehicles) Regulations 2003. These regulations are made under the Fair Trading Act 1986. They are not discussed in this discussion paper but, as noted, are being separately reviewed alongside the Review of the Operation of the Motor Vehicle Sales Act 2003.

Changes to the requirements for private sellers (consumers) at markets to display SINs and for trader to trader transactions to provide SINs were suggested in the Review of the Operation of the Motor Vehicle Sales Act 2003. As a result of further consideration of these matters it is proposed that amendments to the MVSA be made in the following areas.

Clarification and tightening of requirements on car market operators to provide Supplier Information Notice

Recommendation:

Amend section 14(2) to require car market operators to take reasonable steps to ensure all traders display a SIN when using car markets.

The Review of the Operation of the Motor Vehicle Sales Act 2003 recommended that section 14 of the Act be clarified as to the responsibilities placed on car market operators with regard to providing the SIN, in particular in relation to internet sales, and that consideration be given to removing the section 14(2) provision that requires car market operators only to take reasonable steps to ensure that a private seller provides a SIN.

As noted above, the information disclosure requirements relating to the sale of used motor vehicles are found in two pieces of legislation. The relevant provisions are sections 14 to 18 and sections 101 to 102 of the MVSA and the Consumer Information Standards (Used Motor Vehicles) Regulations 2003 made under the Fair Trading Act 1986, commonly known as the SIN regulations. In brief, the two pieces of legislation say a SIN notice must be displayed with any used motor vehicle offered for sale by a motor vehicle trader which includes through

the facility of a car market operator. Currently car market operators are considered to be motor vehicle traders and therefore have to register as such.

When motor vehicles are physically displayed for sale, the SIN must be attached in a prominent position that makes it clearly visible from outside the vehicle. A SIN is also required for vehicles on display or for sale on the internet (where a contract for sale may be entered into online). The SIN (or access to it, for example, through a hypertext link) must be clearly and prominently displayed on the same web page as the offer, and the contract for sale, relating to that vehicle.

Policy Objectives

As car market operators are classed as motor vehicle traders, all sales at car markets – both by traders and private sellers (consumers) – require the display of a SIN. The policy objectives underlying the need for a SIN for all sales at a car market appear to have been:

- To identify who is a trader and who is selling privately and to stop motor vehicle traders from passing themselves off as private sellers. Despite this side by side trading environment, different rights are still attached to private sales and sales by traders, so it is in the consumer's interest to have the distinction indicated clearly. The SIN was intended to provide a tool for making this distinction by providing a tick box to indicate who was selling.
- An individual selling through a car market is taking advantage of a market-type venue. Requiring all sellers to provide basic information about their motor vehicle, and those who carry on the business of facilitating such sales to make sure this information is provided, is not onerous.
- Private sales should be comparable to a trade with a motor vehicle dealer when using a car market. This was intended to ensure the consumer choosing a vehicle in a venue that offers a mix of private and trade sales has access to the same kind of information on all the vehicles on display.

The Ministry of Consumer Affairs has revisited this situation to see if the policy objectives are justifiable and are being met. The fundamental question has been posed: if a private sale outside a car market does not require a SIN, does the car market environment change the nature of the transaction enough to require private sellers to be subject to SIN display requirements.

Discussion

All motor vehicle traders when selling a used motor vehicle, must, at any venue, display a SIN under section 14(1). Failure to do so contravenes the MVSA. Inspectors can check the status of the vehicle seller on the Motor Vehicle Traders Register as all motor vehicle traders are required to be registered.

Due to a concern that people were avoiding their trader obligations when selling at car markets, the MVSA extended the definition of a motor vehicle trader to include car market operators. Effectively, this made it also the car market operator's responsibility to ensure that motor vehicle traders and private sellers (consumers) who use their services display a SIN. To recognise the difficulties of achieving compliance from private sellers, section 14(2) then requires that the car market operator takes reasonable steps to ensure private sellers display a SIN.

The requirements on car market operators, however, are not proving an effective way of monitoring whether traders do not pose as private sellers (and thus avoid their statutory obligations). It was anticipated that having everyone displaying a SIN in a car market would make enforcement easier in that all transactions would occur with a SIN and the consumer could identify who was privately selling and who was a trader. This can only occur if the SIN is honestly completed and displayed. A trader, however, can simply fill in the SIN and claim to be a private seller. Any set-up is extremely difficult to enforce. To determine if the private seller is indeed a private seller the inspector will need to investigate further than what is provided in the SIN.

With regard to private sellers, when a person enters into a private sale they are not looking for the same kind of deal as that offered by a motor vehicle trader. They are looking for a cheaper price than that offered by a motor vehicle trader and so are accepting that there are possibly risks such as less redress rights with the private sale.

While lack of knowledge of the requirements is no defence for a breach of the law, it is likely given the infrequency with which they participate in the private sale vehicle market that many private sellers are unaware that when they use such a market they are required to produce a SIN. One example is the auction site Trade Me. Even though Trade Me has noted in its terms and conditions of using the site that a SIN must be displayed, the vast majority of private sellers (and detrimentally, motor vehicle traders as well) do not display a SIN.

It also appears that enforcement activity at car markets is being spent on ensuring private sellers understand and complete the SIN as required rather than being directed to identifying traders using car markets and not disclosing they are traders. As well, although a private seller is required to complete and display a SIN, there is no redress or enforcement provisions under the MVSA if the details provided are misleading or incorrect.

Although the SIN notes on its reverse that rights regarding security interests do not apply to private sales, the Ministry has the strong concern that consumers who purchase a vehicle through a car market may be misled as to their redress rights (which go beyond security interests). The Ministry believes people who use a car market, accordingly, may be being led into a sense of false security especially when dealing with generally inexperienced car market sellers and buyers who can reinforce the misconception.

Conclusion

It is concluded that the current situation where all sellers at a car market have to display a SIN and where car market operators have to take reasonable steps to ensure that all participants display a SIN does not meet the policy objectives. It is anomalous and confusing that private sellers at car markets have to complete a SIN and the current requirement is diverting enforcement activity away from the original intention.

An option that was considered during the development of the MVSA was to require all sellers – in all selling situations, private and trader, to be required to display a SIN. This option was considered to be too difficult to enforce and the cost would outweigh the benefits to consumers. It also would increase the chance that information on the SIN would be incorrect if private sellers did not know, or could not access, the required information. Enforcement activity on private sellers would be extremely difficult. It was also felt that it may increase the perception that consumers in private sales have rights they do not have.

The Ministry of Consumer Affairs considers that these arguments are valid for all private sales including those at car markets.

Accordingly, it is concluded that there should not be any obligation for private sellers at car markets to display a SIN. To achieve this outcome will require either that car market operators are exempted from the obligation of needing to ensure SINs are provided for sales at car markets by private sellers (consumers) or that car market operators are no longer classified as motor vehicle traders and thus no longer have the requirement of section 14(1) to ensure a SIN is attached to a used motor vehicle for sale at a car market.

The second option is recommended and this is discussed further below. Complementing this recommendation, it is recommended that section 14(2) of the MVSA be amended to reflect an obligation on the car market operator to take reasonable steps to ensure that a motor vehicle trader displays the SIN when using the car market. This would mean that traders would have to provide a SIN when selling at a car market, but private sellers would not. It should then be clearer to consumers which sellers are traders. As noted, consumers have better protections buying from traders than from private sellers. By amending section 14(2) it would mean that private sellers at car markets are not treated differently from any other private seller of cars or other items. It also would ensure that consumers are not accidentally misled into believing they have greater consumer protection rights. It also meets the policy proposals and concentrates enforcement activity where it is most required.

Public Policy Objectives Summary

- Compliance costs reduced for private sellers and car market operators.
- Improved clarity that there are different requirements regarding car sales that apply to traders and private sellers.
- Reduced enforcement costs to government.
- Motor vehicle traders still have obligation to provide a SIN.

Definition of Motor Vehicle Trader

Recommendation:

Amend section 7 of the MVSA to remove reference to car market operators.

Given that the proposal to change section 14(2) removes the requirement for car market operators to ensure private sellers display a SIN, there is no longer any policy reason for a car market operator to be registered as a motor vehicle trader. This is not a reduction in the obligation of the motor vehicle trader to display the SIN, but a move to a more pragmatic arrangement that reduces business compliance costs to the car market operator.

A car market operator is usually removed from the buyer and seller relationship and is merely the means for initiating the sale. Given the proposals recommend the removal of the sole reason why car market operators be registered as a motor vehicle trader, it is recommended to remove the reference to car market operator from section 7 of the MVSA.

Exemption from requirements to provide a SIN when transactions are exclusively between registered traders

Recommendation:

Amend section 14 and section 16 of the MVSA to exempt from the SIN requirements, transactions that are exclusively between registered motor vehicle traders, and between registered motor vehicle traders and car wreckers as defined in the MVSA.

Currently, section 14(1) of the MVSA requires all used vehicle sales by traders to have a SIN. This requirement applies to sales to consumers and also to sales from one trader to another. In comparison to the MVSA requirement for a SIN for all used vehicle sales by traders, the Consumer Information Standards (Used Motor Vehicles) Regulations 2003 does not require a SIN to be displayed for transaction exclusively between motor vehicle traders.

The MVSA requirement for a SIN for trader to trader transactions is questioned. The SIN is intended to assist consumers to get the information they need to make an informed decision about the vehicle they are considering buying. Sales of used motor vehicles between traders are not consumer sales. Traders purchasing motor vehicles do not face the same information problems as consumers and can be expected to have knowledge of the industry, market values, vehicle type and roadworthiness. Traders also do not receive the same protection as consumers under the Personal Property Securities Act 1999 that provides for consumers purchasing a motor vehicle from a registered trader to receive the vehicle free of any *undisclosed* security interest. Therefore, the information provided in a SIN format does not need to be a requirement for such transactions.

Similarly, a SIN is also not needed for sales between traders and car wreckers, where the vehicle is most likely sold for parts. Concern has been raised regarding the possibility of creating a loophole where car wreckers can repair then on-sell a vehicle without any record of the damage being notified via the SIN. However, the nature of the SIN is not to inform purchasers of previous damage to the vehicle, except for vehicles imported as damaged.

It is recommended that section 14 of the MVSA be amended to exempt from the SIN requirements, transactions exclusively between registered motor vehicle traders, and between registered motor vehicle traders and car wreckers. Consequential to the recommendation to amend section 14 of the MVSA, it is also recommended that section 16, relating to obtaining a written acknowledgment that a SIN has been provided, be amended to not apply to transactions exclusively between registered motor vehicle traders and between registered motor vehicle traders and car wreckers.

Public Policy Objectives Summary

- Reduced compliance costs on industry.
- No increased costs to government or consumer detriments with the proposed change have been identified.

Other Amendments to Motor Vehicle Information Disclosure Considered

Display provisions for motor cycles

Industry has voiced concern that the requirement to display an A4 sized SIN card on motorcycles displayed outdoors is impractical. Whereas the SIN housed inside a car is safe from the weather, a SIN on a motorcycle is not. Some motorcycle dealers have indicated they have been unable to produce a cost effective means of displaying a SIN on the motorcycle which is both water proof and that will not damage the paint finish of the motor cycle in blustery conditions, or blow free of the motorcycle.

The problems raised here may be somewhat overstated. There is not enough evidence to suggest that these problems outweigh the benefit of displaying the SIN and therefore exempting motor cycle dealers from displaying it. There are no constraints about how the SIN is attached to the motor cycle and visits to a selection of dealers have shown that many are adequately securing the SIN to the bike.

5. Motor Vehicle Disputes Resolution

Motor vehicle disputes between traders (registered and unregistered) and consumers can be heard by the Motor Vehicle Disputes Tribunal (MVDT). The purpose of establishing a separate disputes tribunal for motor vehicles lies with the recognition that motor vehicle purchases entail a combination of risks that are uncommon in the purchase of other consumer goods. These risks include traders having an information advantage over the consumer, purchases being of relatively high value, purchases being made often on credit, and vehicles often being used as security for other finance and also often being subject to prior security interests. It is also due to the level of technical knowledge that is required and therefore the MVDT has a level of expertise in motor vehicle disputes.

A claim can be taken to the MVDT:

- Regarding quality issues or faults with the vehicle – covered by the Consumer Guarantees Act 1993 or Sale of Goods Act 1908;
- For alleged misleading and deceptive conduct and false representations – covered by Fair Trading Act 1986; and
- If the trader sold a motor vehicle that was subject to an undisclosed security interest.

Private motor vehicle sale disputes cannot be heard by the Tribunal, but can be heard by the Disputes Tribunal if the claim is under \$7,500 (or \$12,000 on agreement between both parties).

Matters related to the Motor Vehicle Disputes Tribunal are addressed in Part 4, subpart 2 of the MVSA and in Schedule 1. The Review of the Operation of the Motor Vehicle Sales Act 2003 made several suggestions to improve the administration of the MVDT and also suggested its jurisdiction be extended to cover the Credit Contracts and Consumer Finance Act 2003.

Ability to award costs to any party for non attendance at Motor Vehicle Disputes Tribunal hearings

Recommendation:

Amend Schedule 1, clause 14(1)(b) to allow costs to be awarded against any party to a claim, for non attendance at a hearing for no good cause.

Schedule 1 of the MVSA sets out the procedure of the MVDT. Clause 14(1)(b) of Schedule 1 provides that the adjudicator may award costs to or against any party if the applicant to the MVDT, after receiving notice of the hearing, fails to attend a hearing without good cause. Therefore, if a consumer does not attend a hearing without an explanation, costs can be awarded against them. On the other hand, if a trader fails to attend a hearing without any explanation, no costs can be awarded against them.

The MVDT adjudicators have advised that it is more likely that a trader will not turn up to a hearing than the consumer (who is generally the applicant). In the 2006 annual report of adjudicator Mr David Knight, he said “The Tribunal has taken that provision [clause] 14(1)(b) as meaning that it can only award costs against an applicant who does attend a hearing, whereas the practice has been, particularly in the Auckland area, that it is the trader who

fails to attend. This Tribunal recommends that it should be provided with the jurisdiction to award costs against either party, especially if they should fail to attend a hearing without good cause”.

Having considered this matter further, the Ministry of Consumer Affairs concurs with the adjudicators’ suggestion and also notes that there may be a perverse incentive for the trader not to attend a hearing given the current legislative provisions.

To encourage all parties to attend a hearing, it is recommended that it be possible to award costs against either the applicant or motor vehicle trader for failure to attend a hearing. This may provide some additional incentive to adhere to the proper process.

Public Policy Objectives Summary

- Will reduce and could off-set costs a consumer may have incurred in attending a hearing where the trader does not attend.
- Some potential costs to industry if the motor vehicle trader does not attend the hearing without a good cause.
- Reduced costs to government related to MVDT administration.
- Enhances the credibility of and accessibility to redress by consumers.

Submission of Adjudicators’ annual reports

Recommendation:

Amend section 87 to provide a timeframe within which the adjudicators’ annual reports are to be submitted and to deal appropriately with the receipt of multiple reports. Also replace the phrase “available to the news media” to read “publicly available”.

At present adjudicators are required by section 87 of the MVSA to submit annual reports. These reports are required by the Act to contain summaries of claims dealt with, mention any special cases and make any recommendations for amendments to the MVSA. Currently, the MVSA does not specify the timeframe in which the reports are to be submitted.

The first two years reports from adjudicators were received sporadically. As a result there was some difficulty with co-ordinating the release of the reports to the media and in being able to provide any commentary on the findings of the adjudicators.

As the statistical analysis of MVDT cases is compiled each July, it is proposed that annual reports be required to be forwarded to the Minister by 31 October each year.

These dates are acceptable to the Tribunal and this better allows for co-ordinated reports being released.

The phrase “available to the news media” is an unusual one in legislation and it is recommended that it be updated to “publicly available” to allow for a variety of mechanisms to be used to disseminate this information to interested parties in a timely manner.

Public Policy Objectives Summary

- No industry or consumer detriments with the proposed change have been identified.
- No increased costs to government; may be reduced costs.
- Enhances the credibility of redress.

Extension of the jurisdiction of the Motor Vehicle Disputes Tribunal

Recommendation:

Extend section 89 to allow the Motor Vehicle Disputes Tribunal to also consider claims under the Credit Contract and Consumer Finance Act 2003 (CCCFA).

Section 89(1) of the MVSA sets out that the MVDT may inquire into and determine any application or claim in respect of the sale of any motor vehicle under the Fair Trading Act 1986, the Consumer Guarantees Act 1993 and the Sale of Goods Act 1908. However, it cannot hear complaints under the Credit Contract and Consumer Finance Act (CCCFA). At present, any dispute involving the financing of a motor vehicle can be taken to the ordinary Disputes Tribunal. The only constraint on this is the \$7,500 limit (or \$12,000 limit with the agreement of the parties). Disputes above this must be taken to the District Court.

The Review of the Operation of the Motor Vehicle Sales Act 2003 noted that various groups have suggested there is a need for the jurisdiction of the MVDT to be extended in section 89 to include any application or claim under the CCCFA in respect of motor vehicle financing. This is because motor vehicle sales and finance arrangements are often intertwined and in many instances a motor vehicle trader assists or acts as an agent to another in providing finance for the motor vehicle purchase. Moreover, in many instances the likelihood of a sale is dependent on the availability of finance and there is a strong incentive for the motor vehicle trader to facilitate arranging that finance.

Currently the only thing the MVSA has to say about finance arrangements is in section 89(2) under which the adjudicator may pass back to the motor vehicle dealer any repayment commitments that a consumer may have to a creditor where the consumer's right to reject the motor vehicle under the Consumer Guarantees Act has been upheld or the consumer is deemed to have suffered loss due to conduct of the trader under the Fair Trading Act.

For a consumer, if something goes wrong with a motor vehicle purchase, it is not easily understandable that for most matters a dispute can be taken to the MVDT but for financing disputes these must be taken to the ordinary Disputes Tribunal. As noted, a claim submitted to the ordinary Disputes Tribunal may not exceed \$7,500 (or \$12,000 with the agreement of both parties). The MVDT limit, on the other hand, is \$50,000. It is possible that if a claimant has both issues to do with the vehicle purchase under the Consumer Guarantees Act and the CCCFA, they could be pursuing claims in the two tribunals with the same parties at the same time.

Discussion

A vehicle purchase is often referred to as the second largest purchase a consumer makes. In many cases, the purchase is made with borrowed funds. Matters that could be covered by extending the jurisdiction of the MVDT would be in relation to a motor vehicle trader when acting in a role of assisting the financial arrangements. It appears that a motor vehicle trader

who arranges the finance when selling a motor vehicle to a consumer can be considered to be a broker or a paid advisor under the CCCFA. This is because they are paid a commission or fee by the finance company when they refer a motor vehicle purchaser to a finance company. Often this fee is paid by the consumer and is included as a fee on the credit contract. Motor vehicle traders are also usually paid a commission on credit related insurance products they sell with the finance. This is enough to meet the definition of broker and/or paid advisor under the CCCFA. Section 93 of the CCCFA makes it clear that a court can make an order against a broker or a paid advisor if they engage in conduct which amounts to a breach of the Act.

Example of how increasing MVDT's jurisdiction to CCCFA would help consumers purchasing motor vehicles on credit

Random Motors³ is the finance company and car dealer. Random Motors sold "Sally" a car that developed mechanical problems then, instead of replacing under the Consumer Guarantees Act, Random Motors refinanced Sally into a replacement car, including using the faulty car as a trade-in. The value of the original car was valued at \$995 lower than when Sally purchased the car two weeks before. When this car was unacceptable for Sally's purpose, Random Motors refinanced her back into the original car purchased, again using the newer car as a trade-in and resulting in the consumer losing \$495. Random Motors was misleading in their dealings with Sally, not only in regard to the finance, but there were also disclosure issues and oppression issues. Originally the amount in dispute was less than the \$7500 for the Disputes Tribunal but Random Motors had threatened to counter claim for an amount over \$7500 to take it out of the Disputes Tribunal. Sally would have been happy to take the claim to the MVDT with its higher limit but because the misleading behaviour was about the finance part of the transaction rather than the actual sale of the car, Sally was unable to take the claim to the MVDT. If the MVDT was able to hear claims under the CCCFA Sally would have been able to take the claim for oppression and non disclosure to the MVDT. Sally is now in debt for \$26,000 to Random Motors (the original purchase price for the car was \$8995), has a bad credit rating and the car has been repossessed. Sally cannot afford to dispute this amount through the District Court as she is a solo parent on a benefit.

Complaints under the CCCFA can be taken to the Commerce Commission but complaints involving practices that affect only one consumer rather than several consumers are unlikely to meet their enforcement criteria. The Commission does not have the resources to investigate all complaints and is therefore primarily interested in systemic failures, rather than individual ones. However, the Commerce Commission can identify recidivist traders from the publicly available summary of MVDT decisions.

There have been instances reported where certain costs have not been disclosed by the motor vehicle trader when facilitating the finance arrangements, such as brokerage fees. This would be the type of claim that could be taken with an extended jurisdiction.

By extending the jurisdiction of the MVDT to include the CCCFA, consumers who have disputes regarding motor vehicle finance will have a greater opportunity to seek redress.

³ This is a true example. The names of the company and the consumer involved have been changed to protect their privacy.

Public Policy Objectives Summary

- Improves the credibility of and accessibility to redress by consumers.
- Industry may incur some additional costs as disputes which would normally fall outside a Tribunal's jurisdiction may now be taken.

Claim Limit

Recommendation: Amend section 90 to increase the total sum of the application or claim from \$50,000 to \$60,000.

Section 90 states that the MVDT has jurisdiction only if the total sum of the application or claim does not exceed \$50,000. There has been a suggestion that consumers have limited access to justice as a result of this claim limit. Currently, the claim limit means that if a dispute is taken to the MVDT that is in excess of \$50,000, rescission of contract is not a possible remedy because the contract would be worth more than the claim limit and partial rescission is not possible.

In 2001, in the Briefing for the Select Committee during the passage of the Motor Vehicle Sales Bill, officials noted that while the \$50,000 limit is somewhat arbitrary, it had been set at a level that would capture the vast majority of disputes over motor vehicles. Disputes are most likely to arise in respect of lower-value, used vehicles.

The MVDT operates like the ordinary Disputes Tribunal by providing a low cost alternative for consumers with claims below a defined amount. This means the option of an open limit for motor vehicle claims is not possible. If consumers have a claim over the defined amount they can access the District Court to seek redress. This process, however, has a higher cost. The principle behind both the MVDT and Disputes Tribunal is to provide low cost access to the court system for claims that do not justify the expenses that are likely to be incurred in accessing the District or High Courts.

Little evidence is available or collected relating to claims above \$50,000 as the MVDT does not hear claims above this amount. However, the MVDT advises that recently they have had several enquiries from consumers regarding disputes over vehicles with claims greater than \$50,000 and that consideration of increasing the claim limit would enable the majority of motor vehicle disputes to be heard in the MVDT. A survey of the most popular new vehicles indicates that the top selling cars retail for between \$50,000 and \$60,000.

Accordingly, it is recommended that section 90 of the MVSA be amended to allow for claims to the MVDT up to \$60,000. It is considered that an increase to the limit to \$60,000 limit is not unreasonable, preserves the intent of a low cost disputes resolution service, and should cover most disputes over motor vehicles. For higher value claims than \$60,000, it is appropriate that they are filed in the District Court.

Public Policy Objectives Summary

- Improves accessibility to redress by consumers.
- Industry may incur some additional costs as disputes which normally fall outside a Tribunals' jurisdiction may now be taken.

Publication of decisions of the Motor Vehicle Disputes Tribunal

Recommendation: Amend section 94 to allow the Motor Vehicle Disputes Tribunal to have improved disclosure of MVDT decisions.

Under section 94 of the MVSA, the MVDT must, for the purposes of protecting the public, arrange for the publication in the *Gazette* of a notice of any MVDT decision that has been determined against the trader. The MVDT may also provide a copy of such a decision to the news media. In practice, the MVDT provides details of all cases (names of consumers are excluded) to interested media and other groups.

Adjudicators, in their annual reports, have advised that in some instances it would be fair to withhold publication of some decisions that have been found against the trader or, alternately, to publish all decisions⁴. As currently written, section 94 precludes this. The adjudicators' reasoning for recommending this change is that occasionally the trader has made significant efforts to remedy the problem but the consumer's expectations are unrealistic. For example, a trader may offer a consumer \$1000 to remedy the problem, but the consumer rejects the money and takes the case to the MVDT, expecting more money as an outcome. The MVDT then makes a decision against the trader for \$500. This result is published as a decision against the trader, when the trader has more than satisfactorily attempted to remedy the problem. Suggested solutions from the adjudicators include amending section 94 of the MVSA to replace "must" with "may", so that the adjudicators have discretion on publication of decisions or amending section 94 to require publication of all decisions.

For comparison, under the ordinary Disputes Tribunal, decisions can be published by the Registrar as specified by the Minister. At present this means that only the parties involved have access to the decision. Under other legislation, the Employment Court has a default of publishing all decisions unless an order is made by the court not to publish. The Medical Practitioner's Disciplinary Tribunal publishes all cases on their website (suppressing the patient's name) with the option of suppressing all names. In contrast to a *Gazette* notice, the facts of the case and the decision are fully reported. This ensures that details such as degree of fault or mitigating circumstances are reported.

Options

Three possible approaches to publishing the MVDT findings have been identified. *Option 1* is to amend the MVDT to allow the adjudicators to publish decisions at their discretion. The disadvantage of this approach is that the unfairness perceived by the adjudicators will not necessarily be solved by this option, as they will be required to judge whether a case is in the public interest. The preferred public policy position is to have open access to information unless there are compelling reasons to withhold it. This option would not achieve that objective. It also would not reflect current practice of the MVDT where all cases are provided to interested groups. This is not the preferred option.

Option 2 is to amend the MVSA to provide for the publication of all decisions, regardless of who the decision favours. This option is fair and non-discriminatory, ensuring that the degree of fault is clear. This option does not require the adjudicator to make decisions regarding publishing. It opens the way for full publication of decisions on an appropriate website (withholding personal details of the individuals to protect privacy), in a similar way to the Medical Practitioner's Disciplinary Tribunal and addresses the fact that consumers do not

⁴ See in particular 2006 Annual Report of Mr Burnard.

read the *Gazette*. The general approach taken by the Official Information Act 1982 can be applied here: that the information should be accessible unless there are good reasons for withholding it. These reasons would include:

- The possibility of endangering the safety of any person;
- Unreasonably prejudice a commercial position;
- That withholding is necessary to protect the privacy of natural persons; and
- Allowing access would be contrary to an order.

Other reasons for withholding information would be included. However, it is questionable if this option meets the purpose of the Act, which is to promote and protect the interests of consumers in relation to motor vehicle sales. Publishing details of a decision that went against consumers may not promote or protect the consumer interest.

Option 3 is to amend the MVSA to continue to provide for publication of decisions against traders only and not to limit this to the *Gazette*. However, these decisions can be provided in full, indicating the level of mitigation that a trader may have attempted. This option is fair to the trader and also protects the consumer in accordance with the purpose of the Act. As with option 2, this option does not require the adjudicator to make decisions regarding publishing and ensures the degree of fault is clear. In addition, it meets the objective of the Act with respect to the promotion and protection of consumer interests.

The Ministry of Consumer Affairs invites comments on whether there should be publication of all decisions made by the MVDT or if the publication of the decisions should still be restricted to traders only, but these decisions be reported in full. It is considered that any publication should not be limited to the *Gazette*.

Public Policy Objectives Summary

- Information is accessible unless there are compelling reasons to withhold the information.
- The transparency of the MVDT is maintained.
- Information disclosure is an important part of the credibility of the redress system.

Other Amendments to Motor Vehicle Disputes Resolution Considered

Filing fees

Under the MVSA, claims to the MVDT must be accompanied by a \$50 filing fee whereas under the Motor Vehicle Dealers Act 1975, the associated disputes tribunal was free. It has been suggested that the filing fee to the MVDT may be a barrier to redress for some cases and that the requirement to pay a filing fee should either be removed for all applicants to the MVDT or that the MVDT should be able to waive the filing fee at its discretion. For example, if a consumer has a complaint relating to a motor vehicle that has been bought on hire purchase and the consumer is struggling to keep up payments then having to pay a filing fee could cause further financial burden and thus a claim is not taken.

Whilst previously access to the MVDT was free, it was also more difficult for a consumer to take a claim to the disputes tribunal because the claimant first had to get through the Motor Vehicle Dealers Institute complaints process. There is no hard evidence that the filing fee is preventing claims being filed and in most cases the fee is refunded to the consumer if their

claim is successful. The filing fee is within the range (\$30 and \$100) set for access to the ordinary Disputes Tribunal, which considers claims of considerably smaller value. On balance, the filing fee is not considered onerous.

6. Fidelity Fund

Recommendation:

Not to re-establish the Fidelity Fund and for the Ministry of Consumer Affairs to continue to monitor the impact of the removal of the Motor Vehicle Dealers Fidelity Fund.

The Review of the Operation of the Motor Vehicle Sales Act 2003 considered whether or not to re-establish a motor vehicle trader Fidelity Fund. Since this Review, two of the Motor Vehicle Disputes Tribunal adjudicators also have asked for further consideration to be given to this matter.

Under the earlier Motor Vehicle Dealers Act 1975, consumers and security interest holders had access to the Motor Vehicle Dealers Fidelity Guarantee Fund (the Fund) as a protection against default by the licensed dealer. The Fund could be accessed when a licensed dealer was unable to pay a compensation order due to its insolvency or failed to account for money it held as an agent.

In the course of developing the MVSA, the government explored various options for retaining the Fund or a redress equivalent. These included:

- Compulsory third party warranties;
- Compulsory indemnity insurance;
- Government-run fidelity fund;
- Self regulation: group insurance or voluntary fidelity fund.

Each of these options contained significant drawbacks: these included high administrative costs compared to the benefits conferred, inequities in where the burden of risk was placed (mostly on the finance provider rather than the trader), and difficulties in designing a redress fund that appropriately reflected the differing roles of traders in the broader registration regime – car market operators and auctioneers do not have a financial interest in the vehicle under purchase.

It was decided that the maintenance of a compulsory fidelity fund was inconsistent with the simplified registration regime administered by a government department.

The policy decision was made to disestablish the Fund because:

- The number of claims to the Fund was small, and the number of successful claims was even smaller. In 1999 only 13% of claims were successful, and most of the claimants were finance companies with a security interest in the vehicle;
- The administrative and investigative functions were costly, and were extremely expensive when compared with the number of claims. In 2000, the costs of administering the Fund were twice the value of claims paid out;
- All traders were obliged to pay into the scheme and were therefore subsidising the actions of dishonest traders;
- The Fund was established before the Consumer Guarantees Act 1993. This Act has subsequently provided consumers with better remedies;

- Access to the fund was not direct: claims were first screened by the industry-based Motor Vehicle Dealers Institute;
- The new registration structure did not support the fidelity fund in its existing form; and
- Alternatives to the Fidelity Fund were either too costly or not available (i.e. compulsory indemnity insurance is unavailable to sole traders as it is impossible to insure against one's own dishonesty).

Review findings

The Review found that the removal of the Motor Vehicle Dealers Fidelity Guarantee Fund may have denied some consumers a full remedy. However for others, the wider application of the MVDT to enable access to redress under the Consumer Guarantees Act has brought better remedies.

The Fund was available only when a licensed trader could not pay out on an order because the trader had become insolvent. In the two years of operation of the MVSA ten companies had their registration cancelled for reasons of insolvency. None of these companies appear on the record of claims received by the MVDT and the removal of the Fund would not therefore have had any impact in these instances.

A further 33 companies had their registration cancelled. Cancellation is commenced if the Registrar is satisfied that the motor vehicle trader has been registered by reason of any false or fraudulent representation or declaration, if the application fee has been subsequently dishonoured, if the trader is disqualified for registration, or if the trader has ceased to carry on the business of motor vehicle trading.

Anecdotal evidence would suggest that there may be some individuals who have attempted to avoid their obligations to pay compensation by voluntarily ceasing trading and starting up trading under another slightly modified name. This practice is commonly referred to as establishing a phoenix company and is not restricted to the motor sales industry. The Ministry's review noted that the Insolvency Law Reform Bill (which was passed in October 2006) contained provisions to minimise abuse of phoenix company arrangements. It should be noted that the National Enforcement Unit can prosecute a trader who has gone out of business and the trader can be fined. Additionally, enforcement processes mean that some traders may be prohibited from registering as a trader in the future. However, this does not guarantee a consumer will recover any money owed.

Insolvency law exists to protect those people whose businesses are legitimately in trouble, and therefore pursuing such businesses for redress is against the spirit of those laws. This is potentially in conflict with consumer protection, but serves to encourage a confident economy. There will always be those traders who seek to subvert the laws to their own advantage. The aim of the legislation should be to discover and punish these traders who bring the profession into disrepute. No other legislation allows pursuit of debts from insolvent business other than those processes currently available. There has been no reason identified to introduce additional regulation on motor vehicle traders over and above the standard insolvency provisions that apply for all other traders.

Some finance companies are experiencing losses due to traders going out of business, particularly if the trader has responsibility for any security interests. Under the Motor Vehicle Dealers Act 1975, finance companies claimed for such losses under the Fidelity Fund. With the Fund removed, finance companies are in a similar situation to consumers. As commercial operations, finance companies should make a risk assessment as to the character of the motor vehicle trader they choose to deal with. The Select Committee, at the

time of deliberating on the Motor Vehicle Sales Bill, chose that the risk of the trader's insolvency (in the case of 'on-behalf of' sales) should be borne by the financier rather than the consumer who purchased the vehicle. The Committee considered that financiers are better placed to manage and absorb the risk.

The Ministry does not wish to downplay any concerns about the detriment to consumers from such behaviour. It is difficult, however, after three years of operation of the new registration regime, to determine whether the problems of such behaviour are sufficiently widespread to justify reinstating a fidelity fund or its alternative, and the costs of administering such. Consumer groups have not indicated that the lack of a fidelity fund is having a widespread detrimental effect on consumers.

Additional Information

As noted, finance companies, not consumers or purchasers of vehicles, were the majority of claimants in the final few years of the Fund, mainly because there were difficulties accessing information on outstanding debts on vehicles around the Personal Property Securities Register (PPSR) that put transactions at risk. The on-line status of the PPSR has removed such problems as it can be searched for \$1.

Adjudicators have noted that some consumers would have been eligible to claim on the Fund had it still been in existence and have called for its re-establishment. However, it appears that about 1% of the cases considered through the MVDT in 2005/2006 would have met the Fund's eligibility criteria. It is also difficult to quantify the amount of potentially eligible claimants where traders have failed to settle a compensation order, as the MVDT does not follow up the collection of their orders. A consumer can register the failure to pay on a compensation order with the Collections Unit at the District Court. This is similar to any debt from a compensation order from the ordinary Disputes Tribunal.

One of the offences that the Fidelity Fund covered included when a trader did not pass on monies from a sale of a vehicle on behalf of a consumer. Under the MVSA, this offence can be prosecuted and can attract a fine not exceeding \$20,000 for an individual and \$40,000 for a company. This is enforced by the National Enforcement Unit, a Business Unit of the Ministry of Economic Development. Therefore, there would be no need to access a fidelity fund for this type of offence.

Conclusion

The policy reasons for disestablishing the fund are still valid. In addition, a structure within which a fund could efficiently work is not in place, and re-establishment of this is prohibitively expensive.

While there are some examples where consumers may have been eligible for the fidelity fund had it existed, these are rare and there is no evidence that these claimants would have been successful through the fidelity fund system.

Continued monitoring of the impact of the removal of the Motor Vehicle Dealers Fidelity Fund by the Ministry of Consumer Affairs is the recommended way forward in the face of limited information.

7. Making a Submission

This discussion document has been produced to give an opportunity to interested parties to express their views on the recommended changes to the Motor Vehicles Sales Act 2003. You are encouraged to make a submission. Submissions should be sent by **14 May 2007**.

Please indicate clearly if your comments are commercially sensitive or if for some other reason you consider they should not be disclosed. Any request for non-disclosure will be considered in terms of the Official Information Act 1982.

Your submissions should be sent to:

Motor Vehicle Sales Act Discussion Document
Ministry of Consumer Affairs
PO Box 1473
Wellington
Email: motorvehicles@mca.govt.nz
Fax 04-473 9400

8. Next Steps

There will be a summary of submissions produced which will present information in an aggregated form. Please indicate whether you would like to receive a copy of the summary as hard copy or email.

Following the consideration of submissions a paper will be prepared for the Minister of Consumer Affairs and Cabinet setting out specific proposed changes to the Motor Vehicles Sales Act 2003. If these proposals are accepted then a Motor Vehicle Sales Act Amendment Bill will be drafted. A tentative bid has been made for the introduction to Parliament of such a Bill for late 2007. If the Bill is introduced to Parliament it will be referred to a Parliamentary Select Committee. The Committee will seek submissions from the public on the Bill.