

Motor Vehicle Sales

A Proposed Regulatory Regime

January 2001

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Call for Submissions

The Ministry of Economic Development and the Ministry of Consumer Affairs (referred to jointly as the "Ministry") encourage written submissions from interested parties on the content of this document. The purpose of the submissions will be to test the proposals in this document and gather feedback and information. Ultimately, the submissions will inform the Government on any decisions it chooses to take with respect to the reform of motor vehicle sales law.

QUESTIONS FOR SUBMITTERS

The Ministry of Consumer Affairs would like to receive comment on all aspects of this document. Specific questions are also asked in Chapters 4 - 8.

FINAL DATE FOR SUBMISSIONS AND CONTACT DETAILS

Final date for receipt of submissions is 28 March 2001.

Submissions should be addressed to:

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OFFICIAL INFORMATION ACT 1982

In providing your submission, please advise us if you have any objections to the release of your submission. If this is the case, please advise us of the parts of your submission that you would wish withheld, and the grounds for withholding. In preparing and releasing any summary, and in considering any formal Official Information Act requests that might be received, the Ministry will carefully review any representations that you make in this regard.

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Any personal information that you supply to the Ministry in the course of making a submission will be used by the Ministry in conjunction with consideration of matters covered by this discussion paper only.

When preparing any summary of submissions for public circulation, it is the Ministry's normal practice to set out the names of parties making submissions. Your name will be included in any summary unless you inform the Ministry that you do not wish your name to be included. In order to indicate your wishes, or to view personal information held about you in respect of the matters covered by this discussion paper, or to request correction of that information, please contact the Ministry of Economic Development, ph (04) 474 2750.

1. Executive Summary

1.1 BACKGROUND

[1] This paper proposes a new Act to replace both the Motor Vehicle Dealers Act 1975 and the Motor Vehicle Dealers Bill that was introduced to Parliament in late 1998.

[2] The Government has decided to review motor vehicle vendor regulation, and to engage in further consultation, for two reasons. Firstly, decisions on the content of the Motor Vehicle Dealers Bill were made in 1994-95; and, since being introduced into Parliament, the Bill has spent over two years before the Commerce Select Committee. Secondly, submissions to the Select Committee showed varying degrees of support but generally sought further amendments.

1.2 PROPOSALS TO BE INCLUDED IN A NEW MOTOR VEHICLE SALES ACT

[3] The new Motor Vehicle Sales Act would contain the following elements:

- The Act would be focused on the regulation of motor vehicle sales “in trade” rather than just the occupational regulation of motor vehicle vendors. The definition of “in trade” would include car auctions, display-for-sale outlets, car fairs and any person dealing in more than six cars per year (with certain exclusions).
- In order to provide consumers with adequate information before they commit themselves to purchasing a motor vehicle, sellers would be required to disclose certain particulars on a “window card”. This would be achieved through a Consumer Information Standard made under the Fair Trading Act.
- Consumers would continue to receive good title when purchasing a motor vehicle from a registered seller. This is an important protection for consumers. Its continuation, however, would require a mechanism to ensure compensation for financiers whose security interests are extinguished through such a protection. Several options are proposed for achieving this – such as performance bonds, compulsory indemnity insurance, and a modified fidelity fund.
- There would continue to be occupational regulation of those involved in the motor vehicle trade. However, this would not be based on the current licensing regime. Instead, a more simple “registration” system would be established and operated by the Business and Registries Branch of the Ministry of Economic Development. All persons selling motor vehicles “in trade” would be required to register, but with specific exemptions. Registration would be restricted, using “negative” criteria related to previous convictions or loss of registration.
- A new provision would empower the Courts to ban undesirable persons from being involved in motor vehicle sales on evidence of unsatisfactory practice.

- The jurisdiction of the Motor Vehicle Disputes Tribunal would be widened to include claims under the Consumer Guarantees Act 1993, the Fair Trading Act 1986, and Sale of Goods Act 1908. It would cover all sales “in trade”.

[4] The existing Motor Vehicle Dealers Act imposes many costs and restrictions on dealers. As a consequence, there is a strong incentive for dealers to operate outside the Act. The proposed regime would reduce the costs that licensed dealers currently face by removing some of the measures intended to protect consumers. On the other hand, a greater range of sales would be brought within the regime, raising the costs for some vendors who do not operate as licensed dealers. This trade-off is justifiable as increased numbers of consumers are choosing to purchase from outlets where the risk is greater.

1.3 PRINCIPLES

[5] The above proposals are based on key principles for regulation of the motor vehicle sales market. These principles are:

- (a) accurate information on which consumers can base decisions
 - (b) credible and accessible redress
 - (c) coverage of the full range of sales “*in trade*”, without distinction between different types of sale outlet
 - (d) strong incentives for compliance by traders
 - (e) effective enforcement, and penalties where necessary
 - (f) an ability to bar unsuitable people from taking part in the trade
- and, provided that conditions (a-f) are met,
- (g) limited restrictions on the manner in which vehicles are sold.

[6] A summary of the proposals and a comparison with the Motor Vehicle Dealers Act 1975 and the Motor Vehicle Dealers Bill is given in a comparative chart at the end of this document.

2. The Consumer Motor Vehicle Market

2.1 RISKS ASSOCIATED WITH MOTOR VEHICLE SALES

[7] There are a number of risks associated with purchasing motor vehicles. These are:

- (a) A car is a relatively complex mechanical good, which depreciates over time and is subject to breakdowns and deterioration. It is a highly mobile good, and it usually has several owners over its lifetime. At the time of purchase, it can be difficult for the buyer to assess the value of the car and its fitness for purpose.
- (b) Vendors generally have an information advantage over consumers. In some cases they are inclined to use this advantage to overstate the value of the car by, for example, hiding defects, winding back the odometer or otherwise misleading consumers.
- (c) As a relatively high-value consumer good, a vehicle is often used as security for finance; most commonly it secures its own purchase. Therefore, it may later be sold without clear title, and the new purchaser's claim may be subject to prior security interests or even ownership (if the car was stolen).
- (d) Because of insolvency or fraud, the vendor may not provide redress for any loss arising from risks (a), (b) and (c) after sale.

[8] These risks are not unique to motor vehicles. However, the *combination* of risks is uncommon. There is, therefore, a strong case for regulation.

[9] Motor vehicles are relatively more expensive – in terms of initial purchase, depreciation and running costs – than other items purchased by consumers, so a bad deal can have a significant financial impact. However, this argument is not as strong as it was in 1975 when the Motor Vehicle Dealers Act was passed. Up until the 1990s, import licensing, tariffs, and generally lower competition had the effect of inflating motor vehicle prices. The argument that a motor vehicle is likely to be the second most expensive purchase a consumer makes is still true in many cases, but both new and used motor vehicle prices have fallen in real terms and as a percentage of average income.

2.2 CHARACTERISTICS OF MOTOR VEHICLE SALES

[10] Motor vehicle sales have particular characteristics that need to be taken into account when regulation is being considered.

[11] Currently, only around 28% of used motor vehicle sales are transacted by licensed motor vehicle dealers. Other trade outlets include car auctions, car fairs, and sales by finance companies and car-rental businesses etc. It is readily apparent that many used cars are being sold by vendors who simply choose not to be licensed. Private sales are sales conducted by individuals or households on a one-off or occasional basis, through newspaper or "trade and exchange" notices or more informally.

[12] A total of 139,400 imported used motor vehicles were registered in New Zealand during 1999.¹ In its 5 June 2000 issue, *Autofile* estimated that licensed dealers sold approximately 27% or 37,638 of these, and that a further 32% or 44,608 were accounted for by auction houses and other legitimate channels. Assuming that imports for purely private use were 1%, it estimated that approximately 40% or 55,760 used imports were sold on the black market (that is, by unlicensed dealers).

[13] A large number of motor vehicles are sold on credit to consumers (predominantly by hire purchase but occasionally by lease). The dealer will often arrange the credit and various add-ons such as goods insurance, consumer protection insurance, and extended warranties.

2.2.1 Sales by licensed motor vehicle dealers

Definition of motor vehicle dealer in the Motor Vehicle Dealers Act 1975

[14] A motor vehicle dealer is a person who carries on the business of purchasing, selling, exchanging, or leasing motor vehicles. Any person who disposes of more than six vehicles per year is presumed to be a dealer.

[15] Nevertheless, certain types of seller are *excluded* from the dealer category. They are:

- manufacturers who sell to wholesalers and dealers
- licensed second-hand dealers (under the Second Hand Dealers Act 1963) who purchase vehicles for the purpose of wrecking or dismantling them
- finance companies that deal with motor vehicles in the ordinary course of business
- solicitors who act as agents in motor vehicle transactions
- persons who resell a vehicle that has been used for their business
- auctioneers.

Duties of motor vehicle dealers

[16] The consequence of falling under the definition of "motor vehicle dealer" is that the dealer must meet a number of statutory duties. These are:

- Dealers must be licensed. This means they must meet the licensing criteria, contribute to the fidelity fund, belong to the Motor Vehicle Dealers Institute, and fulfil other matters associated with the licensing regime.
- Their salespersons must be registered.

¹ The number of used imports in the New Zealand car market is unusually high, compared with most other countries.

- Dealers must provide good title on vehicles sold.
- Dealers must provide statutory warranties on vehicles sold.
- Dealers must carry on their business at a principal place of business, a branch office, or through a subsidiary. (But a 1999 amendment allows dealers in *new* cars to carry on their business anywhere.)
- Dealers must document all sales agreements in writing.
- Dealers must attach to all vehicles displayed for sale a notice in a prescribed form and with required particulars such as odometer reading, engine capacity, and number of previous owners.

2.2.2 Auctioneers

[17] An auctioneer usually acts as an agent for a vendor, who is using the services of the auctioneer to obtain a favourable price for the good being sold. Payment to the auctioneer is by commission, which is deducted from the sales proceeds.

[18] However, auctioneers are not always acting solely as agents, as the auctioneer may sell its own inventory by auction.

[19] Auctioneers must be licensed under the Auctioneers Act 1928 and meet the various duties that Act imposes. Therefore, licensed auctioneers are not required to be licensed as motor vehicle dealers. However, the existing Motor Vehicle Dealers Act requires that specific records be kept of motor vehicles sold by auction.

[20] Goods sold by auction are not covered by the Consumer Guarantees Act (although the service provided by auctioneers to vendors would be covered). However, the conduct of the auctioneer is governed by the Fair Trading Act.

2.2.3 “Hybrid sellers”

[21] Significant numbers of vehicles are sold in a form that amounts to a hybrid between a private sale and a sale by a dealer. The crucial difference is that the seller is not disposing of its own stock; it is selling on behalf of another person, or assisting them with the sale.

“Display-for-sale” operations (“park and sell”, “lease a lot”)

[22] These terms describe an increasingly common form of motor vehicle sale.

[23] A display-for-sale operator will rent space to motor vehicle owners; the sale of the motor vehicle is negotiated privately between owner and buyer. The return to the operator is the rental paid by the owner for using the space to display the car. As the operator is not a party to the contract for sale between seller and buyer and has no role in its negotiation, they cannot be said to be acting as agent for the seller.

[24] There has been uncertainty whether display-for-sale operators were motor vehicle dealers. The position has now been clarified by recent High Court

decisions that confirm such operators are dealers – so they must be licensed and must fulfil the other requirements of the Act.² This is the case even if the operation is limited to the letting of a space for the car to be exposed for sale and does not extend to services such as grooming the car, providing window cards, or providing change-of-ownership papers. The effect of these decisions significantly limits the attractiveness of these operations under the existing Act.

Car fairs

[25] In both the High Court judgements cited above, it was crucial that the cars remained on the display-for-sale yard in the owner's absence. This distinguishes a display-for-sale operation from a car fair. Car fairs involve owners selling their vehicle themselves, along with other owners, in a space organised by an operator. However, the element of "bailment" by the operator is absent – that is, the operator never assumes responsibility for the possession of the vehicle in the owner's absence. Overall, there is a lesser degree of organisation involved with a car fair.

[26] In *MacGregor*, Anderson J distinguished a display-for-sale operation from a "typical car fair". The result is that car-fair operators do not fall under the definition of motor vehicle dealer.

[27] The effect of an amendment made to the Motor Vehicle Dealers Act in 1979 is that dealers may not dispose of vehicles through car fairs.

2.2.4 Definition of "in trade"

[28] The term "in trade" is a widely understood concept in commercial law. The application of the Commerce Act 1986, the Fair Trading Act 1986, and the Consumer Guarantees Act 1993 are all defined by reference to "in trade".

[29] Each Act uses the following definition of trade (although the Consumer Guarantees Act definition excludes the words in square brackets that refer to interests in land):

"Trade" means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services [or to the disposition or acquisition of any interest in land].

[30] The definition of "in trade" is clear and simple to apply for the vast majority of transactions. Nevertheless, there may still be circumstances where there is uncertainty.

[31] This is because – in the context of motor vehicle sales – "in trade" refers to any motor vehicles sold, purchased, exchanged or leased in the ordinary course of a business. Vehicles sold by finance companies, car rental businesses, or in one-off sales by commercial operations are "in trade". Vehicles sold through auctions will be "in trade". The position is less certain regarding vehicles sold

² *MVDI v MacGregor* (2000) 6 NZBLC 103,006, following *McDonald v MVDI* (1999). Earlier cases went the other way – see *Wilson v Jordan* (High Court Napier, AP 36/98).

through display-for-sale operations and car fairs: it may depend on the identity of the seller. A seller who disposes of a sufficient number of vehicles at a display-for-sale operation or a car fair is acting "in trade". A one-off sale conducted by an individual at such an outlet may be a private sale.

2.2.5 Private sales

[32] A private sale is not "in trade". Typically, a private sale includes the one-off or occasional disposal of a vehicle by an individual or a household. Such vehicles may be advertised in the printed media, on community bulletin boards, or through a sign displayed on the vehicle itself. The price and any other terms of the sale are negotiated informally between the buyer and the seller.

[33] Consumers who buy privately have very limited rights – the situation is one of *caveat emptor*. Consumers generally accept this because they expect to obtain a lower price through a private sale. They appear to accept the greater risk in exchange for the lower price.

3. Problems with the existing situation

3.1 PROBLEMS WITH THE MOTOR VEHICLE DEALERS ACT 1975

[34] After 25 years of operation, the Motor Vehicle Dealers Act 1975 no longer adequately addresses the needs of consumers or the industry. Key problems are discussed below, and include:

- inflexibility
- cost
- non-compliance and low enforcement
- problems with redress
- duplication of provisions in other consumer statutes.

3.1.1 Inflexibility

[35] Even by the standards of other occupational and consumer protection legislation, the existing Motor Vehicle Dealers Act is highly prescriptive. It has had the effect of limiting innovation and restraining new methods of selling, even though these new methods and innovations would meet the needs of consumers. For example, selling new cars on the internet or by 0800 number was technically unlawful until the Act was amended – and used cars still cannot be sold over the internet or by 0800 number. If strictly enforced, the Act limits used-vehicle sales to traditional yards.

[36] Similarly, some of the obligations placed on “display-for-sale” operators may be inappropriate, given that their role in the actual sale of motor vehicles is limited. For instance, as they are not selling their own inventory, they are not in a position to take responsibility for the quality of the vehicle purchased by the consumer. To strictly enforce warranty obligations against display-for-sale operators may remove the viability of that method of selling – and this would not necessarily be desirable, because such outlets offer consumers a means of disposing of a vehicle, or of buying one, at a better price than what would be offered by a dealer (albeit at increased risk).

3.1.2 Cost

[37] The Act imposes significant compliance costs on the industry. Most of the direct costs are associated with the licensing regime:

- initial application to join Motor Vehicle Dealers Institute (\$700)
- annual renewal fees for the Motor Vehicle Dealers Institute (\$140)
- initial contribution to the fidelity fund (\$500); and annual contributions (\$50 plus any additional contribution levied by the Institute – up to \$400)
- public advertisement for the dealer’s initial licence

- annual branch fees (\$200-\$400)
- registration fees for the registration of any salesperson (\$50); and the costs of public advertisement of any application for registration as a salesperson.

3.1.3 Non-compliance and low enforcement

[38] The onerous restrictions on dealer operations and the various costs and procedures associated with being licensed create an incentive to operate outside the Act. This incentive can be manifested by either choosing not to license or by operating a method of sale designed not to fall under the Act. For example, a dealer may disguise its operations by selling its own stock at a car fair or by auction.

[39] Unlicensed dealing is an issue of concern for the industry, which alleges that individuals are importing large numbers of vehicles and selling them unlawfully. It is unclear whether the allegations relate to dealers who are not paying their licence fees, or to dealers who are selling through car fairs. The industry believes that unlicensed dealing creates an uneven playing field where many sellers are at a competitive (cost) advantage through breaching the law. Clearly, dealers would not operate in this way unless they regarded the prospect of detection and penalty as being low.

[40] From a consumer's point of view, there are potential hazards in purchasing from an unlicensed dealer. If the consumer is unaware of the status of the dealer, they may be misled as to the nature of any protections or rights they have.

3.1.4 Problems with redress

[41] An effective and accessible redress system is particularly important for consumers of motor vehicles, for two reasons:³

- The nature of the motor vehicle market – particularly the likelihood of breakdowns and the seller-incentive to hide faults (see para 7) – increases the likelihood of post-sale disputes and the need for adjudication.
- Effective redress increases the seller's incentive to provide good post-sales service, because consumers are in a stronger position if something goes wrong.

[42] Nevertheless, a number of features in the existing regime restrict its ability to provide effective redress:

- Only disputes between licensed motor vehicle dealers and consumers can be heard. Other disputes concerning vehicles sold "in trade" are outside its jurisdiction.

³ It was for these reasons that a Motor Vehicle Disputes Tribunal was set up as part of the 1975 Act.

- Complaints must be referred in writing initially to the Motor Vehicle Dealers Institute, which may then refer it to the Tribunal if agreement is not reached between consumer and dealer. This may help the parties reach a settlement, but can cause delay.
- The monetary jurisdiction is limited to \$12,000. To have disputes over this amount heard by the Tribunal, both parties must agree in writing.
- Claims under the Consumer Guarantees Act (and certain provisions of the Sale of Goods Act 1908 and Hire Purchase Act 1971⁴) can be heard only if both parties agree in writing.

3.1.5 Duplication of provisions in other consumer statutes

[43] The existing Motor Vehicle Dealers Act was passed many years before the Fair Trading Act and the Consumer Guarantees Act. Consequently, there is duplication between the rights (statutory warranties) under the Motor Vehicle Dealers Act and the more general rights under the more recent Acts. This is discussed further in section 5.4.1.

3.2 MOTOR VEHICLE DEALERS BILL

[44] The Motor Vehicle Dealers Bill goes some way towards addressing the Act's inadequacies. It proposes a simpler and less costly licensing regime, with the Registrar of Companies undertaking registration functions. It would also abolish the fidelity fund, remove the statutory functions of the Motor Vehicle Dealers Institute, and simplify access to the Motor Vehicle Disputes Tribunal. But it would retain the Act's statutory warranties.

[45] A comparison of the Bill, the Act, and the current proposals is given in a chart at the end of this document.

3.3 CONCLUSION

[46] The current regime is costly and inflexible and does not necessarily meet the needs of consumers. The licensing of dealers and registration of salespersons does not prevent consumers from receiving bad deals; and very few consumers benefit from the fidelity fund.

[47] Most importantly, it is questionable to what extent consumers value the high level of protection they receive when dealing with a licensed dealer. Increasing numbers of consumers are choosing to buy privately, or from outlets such as auction and car fairs, where they assume a greater risk.

[48] The Motor Vehicle Dealers Bill addresses these concerns but not necessarily in a comprehensive way. It is more appropriate to rethink the approach to regulation of motor vehicle sales.

⁴ These provisions are of limited relevance to consumers, as they are duplicated in the Consumer Guarantees Act.

4. Proposals for occupational regulation

[49] The risks to consumers can be addressed to some extent by occupational regulation – that is, by requiring that undesirable persons do not operate in the motor vehicle trade. Two proposals for this are discussed below. These are:

- a registration regime
- self-regulation.

4.1 REGISTRATION REGIME

[50] The existing Motor Vehicle Dealers Act provides that all dealers must be licensed. Licensing is the responsibility of the Motor Vehicle Dealers Licensing Board, which includes members appointed by the Motor Vehicle Dealers Institute. Before granting a licence, the Board must be satisfied of the “suitability” of the applicant to hold a licence. Suitability is determined by a range of factors including the applicant’s business experience, financial standing, and character.

[51] It is no longer considered appropriate for an industry body to license and discipline its members while promoting their collective interests – it creates a conflict. Occupational regulation is more appropriately undertaken by a third party, usually the government. Specifically, it is proposed that regulation of motor vehicle vendors be undertaken by the Business and Registries Branch of the Ministry of Economic Development, with criteria for registration being based on specific (objective) standards rather than on generalised standards such as “suitability”.

[52] A registration regime for motor vehicle vendors would be simple, and largely based on that proposed for the Motor Vehicle Dealers Bill. Generally, all persons selling cars “in trade” would be required to register, including persons selling more than six cars in a year.⁵ In order to add certainty, it is proposed to expand the definition of “in trade” so that display-for-sale operators and car-fair operators must register. Certain categories of sellers would be exempt; these are discussed later, in section 4.1.3.

[53] The criteria for registration would specify minimum standards. They would in effect be “negative” criteria, because they would prohibit certain persons from being registered as vendors if they have specified criminal convictions or other “status”, and would prohibit a business from being registered if it had such a person as its chief executive or one of its directors or partners. The minimum standards would *exclude*, for example:

- (a) undischarged bankrupts
- (b) persons who have had a motor vehicle dealer licence cancelled
- (c) persons prohibited from directing or managing a company

⁵ The existing Act provides that persons selling more than six cars in a year are presumed to be dealers: section 4(3).

- (d) persons convicted of certain offences of dishonesty (under the Crimes Act 1961 and specified offences under the Fair Trading Act 1986, such as pyramid selling and bait advertising) within the previous five years
- (e) persons convicted of odometer tampering
- (f) persons who have failed to fulfil a Court or Tribunal order relating to their obligations as a motor vehicle seller.

[54] Anyone who is on the register but is later convicted of the offences nominated in (c), (d) and (e) would be named on a “banned persons” list – see section 4.1.5 below.

[55] Registration would meet the following objectives:

- (a) **Consumer protection:** Registration would allow for easy identification of motor vehicle vendors, especially for consumers who wanted redress. In addition, it would help keep unsuitable persons (by reason of their past offending or by virtue of being on the “banned persons” list) out of the motor vehicle trade.
- (b) **Crime prevention and detection:** Registration would provide law-enforcement agencies with details of those involved in motor vehicle dealing.
- (c) **Cost recovery:** Levies paid upon registration would contribute to the costs of operating the Motor Vehicle Disputes Tribunal and the enforcement regime.

4.1.1 How will the regime work?

[56] Every person who carries on the business of a motor vehicle vendor must register. Other details of the registration regime include:

- (a) Unlike the existing Act and Bill, the proposed Act would not require separate registration for each place of business. But vendors would be required to provide a current “address for service” for the register.
- (b) Eligibility would be limited to persons aged 18 and over who do not meet the negative criteria outlined above (plus any additional negative criteria yet to be determined).
- (c) Registration details would include the name and business address of the vendor. If the vendor is a company, the directors and the chief executive must be named; and the business address of the chief executive would be required. (The Companies Office already has the address details of company directors.)
- (d) The Registrar would have no disciplinary powers. The registrar would, however, have the power to cancel registration in certain circumstances (see para [84]).
- (e) There would be appropriate penalties for failure to comply with registration requirements. These would range from low-level penalties for matters

such as failing to file on time, to more serious matters such as unregistered dealing or providing incorrect information for the register.

4.1.2 What sales would be covered?

[57] It is proposed to maintain the distinction between sales “in trade” and private sales. While regulating private sales of motor vehicles to the same standard as trade sales would eliminate occasional uncertainty caused by the application of the “in trade” definition, the cost is much greater. This is for the following reasons:

- The private-sale market for motor vehicles generally works well in meeting the needs of sellers and buyers. Sellers are able to dispose of unwanted vehicles at a price that is likely to be higher than offered by a dealer. Consumers can purchase vehicles at generally lower than dealer prices (although with greater risk).
- Private sales are either one-off or occasional, and often conducted by individuals without business experience. Regulatory requirements would place considerable burden on such individuals,⁶ and the cost of meeting these requirements could not be spread across a volume of sales.
- The Consumer Guarantees Act and the Fair Trading Act do not apply to private sales. Therefore, disputes between private individuals would have to be determined according to common law or the terms of the contract between buyer and seller. Private parties who have disputes may still use the ordinary Disputes Tribunal or the District Court.

4.1.3 What vendors would be registered?

[58] Existing licensed motor vehicle dealers would be required to register. So would display-for-sale operators, car-fair operators, wholesalers, motor vehicle importers who sell more than six cars a year, and auctioneers who deal exclusively or principally in motor vehicles or who sell their own inventory.

[59] Auctioneers, finance companies, insurance companies, car-rental companies, and storage providers who sell motor vehicles as an incidental part of their business would not be required to register.

[60] The new Act, however, would not link registration to responsibility for the quality of the vehicle being sold (see para [94]). It would also remove certain restrictions, such as the requirement for a vendor to personally supervise places of sale.

Display-for-sale operators

[61] Display-for-sale operators would be required to register. The proposed Act would make this requirement explicit in order to avoid the uncertainty that has arisen under the existing Act.

⁶ There are some regulatory requirements that private sellers must meet, such as change of ownership papers, vehicle inspection certificates, and warrants of fitness.

Car-fair operators

[62] A motor vehicle sale that takes place at a car fair is often in substance a private sale. A car fair essentially brings a number of private sellers together in one place. As discussed earlier in para [25], it differs on technical grounds from a display-for-sale operation in that vehicles are never bailed by the operator.

[63] The principal argument for regulating car fairs is that they appear to offer opportunities for dealers to disguise their operations and thereby avoid regulatory requirements. According to industry sources, unlicensed persons and wholesalers are importing numbers of cars and disposing of them at car fairs. Persons doing this are acting "in trade", and are therefore subject to consumer law. According to the proposals outlined in this paper, they would also be required to register if they meet the definition of "vendor" – that is, someone who sells more than six cars a year.

[64] Car-fair operators would also be required to register for reasons given earlier: to keep undesirable persons out of the motor vehicle trade, for crime detection and prevention purposes, and to collect a levy to fund the enforcement of the Act.

Wholesalers and importers

[65] Wholesalers are exempt from licensing under the existing Motor Vehicle Dealers Act as long as they do not also sell directly to the public. This is because the restrictions on dealers (which are designed to protect consumers) are unnecessary for wholesalers who sell exclusively to other businesses. Some wholesalers, however, do sell directly to the public, and are licensed under the existing Act.

[66] Under the proposed regime, the costs of registering would be minimal, compared with those of the status quo. So the case for exempting wholesalers of used motor vehicles is not as strong as it is currently; and it is proposed that all wholesalers would register. Requiring all wholesalers to register would also remove the need to define exemptions – and so remove the incentive for some wholesalers to take undue advantage of potential "loopholes" in the requirements for registration.

[67] Anyone importing and selling more than six vehicles in a year would have to be registered. This raises the issue of whether only registered vendors should be permitted to import motor vehicles. Doing so, however, would prevent individuals from importing vehicles for their own use, and would increase costs for the New Zealand Customs Service in administering the restriction.

Auctioneers

[68] Currently, auctioneers are exempt from the requirement to be licensed as motor vehicle dealers if they are licensed under the Auctioneers Act. This has been to avoid dual licensing, and also because a traditional auctioneer is merely acting as an agent for a vendor – they are not directly responsible for the product being sold.

[69] It is proposed that auctioneers who auction motor vehicles exclusively or as a principal part of their business will be required to register. Auctioneers whose auctioning of vehicles (or selling of vehicles immediately after an auction) is an incidental part of their business will not be required to register.

[70] Auctioneers who carry on the business of selling used motor vehicles (that is, selling their own inventory) would also be required to register.

Finance, insurance and car-rental companies

[71] Finance companies that finance motor vehicle purchases in the ordinary course of business are currently exempt from the requirement to be licensed.

[72] Finance companies could be seen as involved in dealing because a common method of financing the sale of vehicles – known as the “floor plan” method – involves a dealer “selling” a vehicle to a finance company, which then sells or leases the vehicle to the consumer. However, this is excluded from coverage by the existing Motor Vehicle Dealers Act.

[73] Finance, insurance and car-rental companies also sell motor vehicles in the more usual sense of “selling” – for example, car-rental firms may sell vehicles that are no longer wanted as part of their stock, and insurance companies may sell vehicles that have been “written off” in an insurance claim.

[74] It is proposed that these companies be excluded from the requirement to register if the dealing is incidental to the ordinary course of their business (as financiers, insurers, or car renters). If their extent of selling exceeds this, a company would be required to register.

[75] It is important to note that vehicles sold by these companies (excluding hire purchase or lease arrangements described above) are always sold “in trade”. Therefore, the Consumer Guarantees Act, the proposed Consumer Information Standard (see section 5.4.3), and the jurisdiction of the Motor Vehicle Disputes Tribunal would all apply.

Storage providers of impounded vehicles

[76] The Land Transport Act 1998 requires the Police to impound any vehicle being driven by someone who, at the time of driving, is disqualified from holding a driver licence or is suspended from driving. Approximately 14,000 vehicles have been impounded since May 1999.

[77] Many impounded vehicles are not claimed by their owners. To recover the costs of the vehicles’ storage, or simply to dispose of the vehicles, storage providers often sell them. Such sales are clearly incidental to the primary business of storage provision. Further, the operation of storage providers is to some extent regulated under the Land Transport Act. Therefore, it is proposed that storage providers not be required to register.

4.1.4 Registration of salespersons

[78] It is no longer considered necessary to have a separate registration system for salespersons.

[79] The Fair Trading Act allows action to be taken against a business, in cases where an employee of that business breaches the Act.⁷ Breaches of the Act include harassment of purchasers, misleading and deceptive conduct, and unfair trade practices (such as bait advertising). A motor vehicle vendor would also be responsible for the actions of employees who tamper with odometers or otherwise violate the standards set by the proposed Motor Vehicle Sales Act.

4.1.5 “Banned Persons” List

[80] Anyone who is on the register but who is later prohibited from directing or managing a company, convicted of certain offences of dishonesty, or convicted of odometer tampering would be named on a “banned persons” list and prohibited from taking any part in the motor vehicle trade. In effect, they would be de-registered. For some of the offences, it may be appropriate for the ban to last only for a limited period of time, such as five or ten years.

[81] In addition, any person would be able to make an application to the District Court to have a vendor or a salesperson named on the “banned persons” list if that vendor/salesperson could be shown to be “not fit and proper”. It is also possible that industry associations could make such an application against their own members or against fringe dealers.

[82] The criteria for “not fit and proper” would be specified in the proposed Act. Criteria might include: being convicted of serious criminal offences (other than those that result in an automatic ban⁸); serious breaches of the Fair Trading Act; persistent breaches of the proposed Act; and failure to fulfil a Court order.

[83] The proposed Act would also allow the Commerce Commission or the Police to make a “banned persons” application to the Court when they prosecute a vendor in relation to any matter connected with the running of a motor vehicle business (such as fraud or misleading conduct).

4.1.6 Cancellation of a vendor’s registration

[84] It is proposed that the Registrar be given the power to cancel or suspend registration for persistent and continuing breaches of the Act. This power is designed as a compliance tool, particularly for breaches that are not serious enough to warrant the time and expense of prosecution.⁹

4.2 SELF-REGULATION

[85] Self-regulation could be used in conjunction with a registration regime. Specific self-regulation measures already in place include odometer guarantee schemes and extended warranties (provided without additional cost). Additional measures that could be developed include protection through insurance schemes.

⁷ Section 45.

⁸ An automatic ban applies to vendors only.

⁹ A similar power exists for the Registrar of Companies under s.383(1)(c) of the Companies Act 1993.

[86] Self-regulation has proved to be successful in other markets – for example, in residential building, insurance and savings markets, and banking. For industry participants, it can be a helpful marketing tool. The industry has a strong interest in motor vehicle sales reform and in ensuring that regulation is not too onerous. Therefore, industry associations have an incentive to develop credible self-regulatory alternatives with consumer representation.

[87] To be taken seriously, a self-regulation scheme must meet standards for effective self-regulation, such as those proposed by the Ministry of Consumer Affairs.¹⁰ Self-regulation must amount to more than merely a branding or marketing initiative.

[88] Self-regulation cannot be relied on by itself. Schemes are unlikely to cover all industry participants, and consumers risk being harmed by dealings with non-members. Nevertheless, when combined with the basic regulatory framework, self-regulation has potential for reassuring consumers about the integrity of who they are dealing with.

Questions for submitters:

What comments do you have on the proposed registration system and “banned persons list” outlined in this document?

What criteria do you consider should be used to prevent persons from registration?

Which categories of vendor should be required to register?

In what circumstances should auctioneers be required to register?

Should only registered vendors be permitted to import used motor vehicles?

What criteria might be used to “ban” a person from the motor vehicle trade?

¹⁰ Ministry of Consumer Affairs (July 2000) *Guideline for Developing a Code of Practice*.

5. Options for consumer protection

[89] This section discusses different options for providing consumer protection from the risks that arise in motor vehicle sales.

5.1 EXISTING CONSUMER PROTECTION LEGISLATION

[90] Consumer protection is provided in two important Acts that were passed after the existing Motor Vehicle Dealers Act: the Fair Trading Act 1986 and the Consumer Guarantees Act 1993. Both apply to all "in-trade" sales, although the Consumer Guarantees Act does not apply when the good (or service) is:

- *not* of a kind ordinarily acquired for personal, domestic or household use – such as a light truck¹¹
- to be used for business purposes (*and* the parties contract out of the Act)
- sold by auction or by competitive tender.

[91] Where any vehicle is covered by the Act and is not of acceptable quality, the customer has the right to a repair, replacement, or refund (depending on the nature of the problem).

[92] The Fair Trading Act provides that persons selling motor vehicles "in trade" must not engage in any conduct that misleads or deceives consumers. Vendors are required to disclose all information they know about a vehicle, especially when that information will be influential in the purchaser's decision-making.

[93] The Fair Trading Act is enforced by individual consumers, and also by the Commerce Commission. This provides an extra incentive for traders to comply with the Act – it increases the likelihood that breaches will be detected and punished. The motor vehicle industry has been a particular target of the Commission. In the year to 30 June 2000, the Commission prosecuted one dealer, accepted settlements from eight, warned four, and filed a further four Court applications. In the Commission's Annual Plan for 2000/2001, car dealers are named as an investigation target.

[94] It should also be noted that while a car-fair or display-for-sale operator is acting "in trade", they are not a party to the sale of the vehicle and so are not bound by the Consumer Guarantees Act.¹² This would continue to be the case under the proposed Motor Vehicle Sales Act – while these operators would be required to register as motor vehicle "vendors", registration does not imply that they are a party to the sale. The same situation would apply to cars auctioned by registered motor vehicle vendors who are auctioneers and who are acting as agents for the seller.

¹¹ The Court of Appeal has determined the meaning of "ordinarily acquired" in *Nesbitt v Porter* (2000) 6 NZBLC 103,018.

¹² The position for goods sold at auction is straightforward, the Consumer Guarantees Act does not apply.

[95] The actual seller at a car fair, auction, or display-for-sale operation may be a private seller (and so the sale is not subject to consumer law), or they may be a vendor selling "in trade" (in which case consumer law does apply). It is important for consumers to be able to determine the identity of the seller in these situations, in order to assess the level of statutory protection they will get with their purchase. It is therefore proposed that the "window card" required for all motor vehicles sold or auctioned should disclose whether the seller is registered, and therefore, "in trade", or is a private person.

5.2 "SELF-PROTECTION" MEASURES BY CONSUMERS

[96] No matter what statutory framework exists, the nature of a motor vehicle purchase means that consumers will always have to exercise a degree of prudence. Measures that consumers can take to protect themselves include:

- (a) purchasing insurance or a warranty to cover the car for mechanical faults over a period following purchase
- (b) purchasing a car with an odometer reading that is guaranteed by the seller to be accurate (the seller will be in breach of the Fair Trading Act if this guarantee turns out to be false)
- (c) gathering easily accessible information from the Motor Vehicle Securities Register, the Land Transport Safety Authority database, and private-sector "infomediaries" such as Baycorp¹³
- (d) getting mechanical checks done before purchasing a motor vehicle (for example, by the AA or by a private mechanic)
- (e) dealing only with reputable motor vehicle vendors.

[97] Measures (c) and (d) above would help the consumer become well informed before purchase, and would overcome many of the risks in the market. Both measures would involve a cost to the consumer: accessing a registry for information would cost \$10-\$20 while a mechanical check may cost \$80-\$120. These costs – particularly the former – are modest when weighed against the potential financial outlay involved in purchasing a vehicle. It is in the interests of industry and government to make consumers aware of these services and to encourage their use.

5.3 INDUSTRY SELF-REGULATION MEASURES

[98] Dealers may offer additional warranties or mechanical-breakdown insurance policies. A wide range of measures are available. These include:

¹³ Such information includes: the registered owner and previous owners; whether or not the vehicle was stolen; outstanding securities; the identity of the secured party; the vehicle's colour, make, model and country of origin; the odometer reading; and the vehicle-inspection and chassis numbers. Not all this information is available from a single source, but the private-sector agencies can provide most of it.

- (a) dealer guarantees (backed by the “brand”) that offer, for example, a comprehensive certification check, free scheduled services for a specified period of time or number of kilometres driven, a certified odometer reading, and a full mechanical warranty for a (longer) specified time period or kilometres driven
- (b) various guarantees by dealers that the odometer of each vehicle has been checked by an “instrument specialist” and the odometer has not been tampered with
- (c) self-regulatory schemes, such as “AutoSure” – AutoSure New Zealand¹⁴ has recently launched a new certification regime whose main features are:
 - i. AutoSure-approved dealers comply with a code of ethics and standards, including offering a professional service, complying with applicable laws, ensuring all advertising and representations are accurate
 - ii. these dealers are supported by a comprehensive mechanical breakdown insurance policy.

5.4 INDUSTRY-SPECIFIC PROTECTIONS

[99] The Government may make certain additional consumer protection measures mandatory, over and above the protection provided in general consumer law. Three options are possible, for the motor vehicle market:

- (a) statutory warranties in addition to the Consumer Guarantees Act
- (b) mechanical warranty or insurance policy
- (c) a Consumer Information Standard under the Fair Trading Act.

5.4.1 Statutory warranties

[100] Under the existing Motor Vehicle Dealers Act, dealers are required to repair or make good any defect appearing in a used motor vehicle (other than a category D vehicle) within a specified period or before the vehicle has driven a specified distance after sale. The Act classifies vehicles as follows:

- Category A vehicles are vehicles that have travelled no more than 50,000 kilometres or are less than four years old (based on date of first registration). The warranty applies for the first 5000 kilometres or for three months (following the sale).
- Category B vehicles are vehicles that have travelled no more than 75,000 kilometres or are less than six years old (based on date of first registration). The warranty applies for the first 3000 kilometres or for two months (following the sale).

¹⁴ AutoSure began providing finance and insurance packages to the auto industry in 1986. The company serves some 650 approved car dealers around the country.

- Category C vehicles are vehicles that have travelled no more than 100,000 kilometres or are less than eight years old (based on date of first registration). The warranty applies for the first 1500 kilometres or for one month (following the sale).
- Category D refers to all other vehicles. The dealer warrants that the motor vehicle has a current warrant of fitness, that it is of merchantable quality, and that it is fit for the purpose for which vehicles of that type are usually used.

[101] If a warranty is invoked against a dealer, the vehicle must be repaired to a "reasonable condition" (having regard to its age and distance travelled).

[102] These statutory warranties are additional to the dealers' obligations under the Consumer Guarantees Act. This has created confusion about how the two provisions interrelate. The Consumer Guarantees Act requires goods sold to be of "acceptable quality". This is a higher standard than that required under the statutory warranty. The current statutory warranties, therefore, do not offer "extra" protection.

[103] Statutory warranties were retained in the existing Bill, but there was little support for this in submissions presented to the Select Committee.

[104] The arguments in favour of statutory warranties are given below, followed by their rebuttals:

- **Argument:** The guarantees under the Consumer Guarantees Act have less scope than specific statutory warranties under the Motor Vehicle Dealers Act. The Consumer Guarantees Act guarantees apply only to vehicles of a kind ordinarily acquired for personal, domestic or household use. A light truck, for example, would be outside the scope of the Consumer Guarantees Act.
Rebuttal: The statutory warranties in the 1975 Act and the existing Bill would *not* apply to "commercial vehicles" (such as a light truck). They do not have a wider scope than guarantees under the Consumer Guarantees Act.
- **Argument:** The statutory warranties apply to defects that become apparent subsequent to the date of purchase, whereas the guarantees in the Consumer Guarantees Act apply only to defects that exist at the date of purchase.
Rebuttal: The Consumer Guarantees Act guarantees that goods sold will be of "acceptable quality" and the meaning of those words includes "durable" taking into account age, use and price. "Durable" can be interpreted as meaning that goods will continue to be fit for a reasonable time after sale. This provision should catch defects in goods discovered after supply.
- **Argument:** Warranties in the existing Motor Vehicle Dealers Act are specific, whereas the Consumer Guarantees Act guarantees are of a general nature. The consumer's right of redress and extent of redress under the Consumer Guarantees Act are matters of interpretation in the circumstances of the particular case, and are still being tested before the Courts. On the other hand, the Motor Vehicle Dealers Act clearly puts dealers on notice of

their obligations to purchasers: this reduces both the potential for disputes to arise, and the number of claims referred to Motor Vehicle Disputes Tribunal.

Rebuttal: The Consumer Guarantees Act should give reasonable certainty, particularly as more cases are heard by the Courts and reported. Vendors will soon become aware of their obligations under the Consumer Guarantees Act when vehicles fall under its provisions, whether statutory warranties are retained or not.¹⁵

Conclusion on statutory warranties

[105] It is proposed to remove statutory warranties. There is confusion about their interface with the Consumer Guarantees Act and some anomalies have resulted from their interpretation by Tribunals.¹⁶ They have also proved inflexible for dealers who wish to dispose of unwanted stock by auction at a low price. It is considered that industry initiatives to brand different classes of motor vehicles and motor vehicle dealers are preferable to additional layers of statutory protection.

[106] On balance, it is considered that the Consumer Guarantees Act and Fair Trading Act provide a good level of protection to consumers. These protections apply to all sales “in trade”, independent of any occupational regulation regime; they are more flexible than statutory warranties. Protection under these Acts would be enhanced by the adoption of a Consumer Information Standard for used motor vehicles under the Fair Trading Act.

[107] The proposed Act would provide that consumers seeking redress under the Consumer Guarantees Act or the Fair Trading Act can take their case to the Motor Vehicle Disputes Tribunal (which would have functions and powers different from what it currently has).

5.4.2 Mechanical warranty or insurance policy

[108] Motor vehicle vendors could be required to offer buyers an opportunity to purchase a warranty or insurance policy from a reputable independent insurer. This would be in addition to the buyer’s statutory protection, and would provide cover against mechanical defects in cases where a vendor is unable to “make good”.

[109] To consumers who are familiar with the used car market, the offer of such a warranty/policy signals the vendor’s assessment of the risk of mechanical failure – that is, a vendor is likely to charge more for a warranty if it considers the warranty might be invoked. The consumer would then be able to make their own decision about whether the cost of the additional protection was worthwhile.

¹⁵ The Bill provided for statutory warranties in addition to coverage by the Consumer Guarantees Act. Therefore, dealers would have been obliged to become familiar with both sets of obligations.

¹⁶ E.g. category D sometimes provides more protection than category C: see the Tribunal decision at (1984) 4 NZAR 240.

[110] Such a policy or warranty would protect consumers against the motor vehicle vendor becoming insolvent. General insurance providers in New Zealand are required to meet certain minimum standards, including obtaining a rating and paying a bond of \$500,000.

5.4.3 Consumer Information Standard

[111] To assist consumers in their purchasing decisions, specified information would be disclosed in “window cards” that would have to be displayed in *all* motor vehicles sold “in trade”.¹⁷

[112] The information would include the identity of the seller, and a “representation” of the distance travelled by the vehicle. The *seller* would be bound by any representation of distance travelled, even if they were unaware that it was inaccurate. The effect of this would be to increase the ability to take action against odometer tampering because there would be no need to prove any intent to mislead – which has proved a hurdle in prosecutions for fraud.

[113] The form and content of this disclosure would be prescribed in a Consumer Information Standard made under the Fair Trading Act. This proposal was also part of the existing Bill; and the Ministry of Consumer Affairs consulted on two occasions, in 1996 and 1998, about the content of the standard. It intends to conduct another round of consultation once the final details of any reform have been settled.

[114] The setting of a standard under the Fair Trading Act will mean that the standard is monitored and enforced by the Commerce Commission, as well as by individual consumers.

5.5 ADDITIONAL MEASURES

[115] This section discusses other consumer protections found in the 1975 Act or the existing Bill.

5.5.1 Contracts to be in writing and signed

[116] The purpose of this protection is to provide a written and durable record of the transaction. In practice, dealers use standard-form contracts with the particulars of the transaction filled in by the parties concerned. The use of standard forms ensures that this requirement is not particularly onerous, and so it is proposed that it be retained.

5.5.2 Restriction of place of business to principal place of business or branch office

[117] The existing Motor Vehicle Dealers Act prohibits a dealer from carrying on business as a motor vehicle dealer at any place other than its principal place of

¹⁷ This includes at auction, at car fairs, at display-for-sale operations; and all sales by non-registered vendors such as storage providers and finance, insurance and car-rental companies. (On the other hand, a private individual selling their own car from home would not be required to have a window card.)

business, a branch office or a subsidiary place of business – that is, a dealer may only operate from approved premises. The Act also requires that a licensee must personally supervise the conduct of the business. In 1999, the Act was amended to exempt new car sellers from these requirements; but they continued to apply to used car sales.

[118] The objective of the these requirements are:

- (a) to ensure that the consumer could locate the dealer in the event of post-sale problems – for example, to enforce a statutory warranty
- (b) to allow the licensee to enforce acceptable conduct by its employees and agents (through personal supervision).

[119] Both these requirements restrict innovation in the method of selling – for instance, it is not possible to trade used vehicles over the internet or via any other direct-selling method. In addition, many dealers prefer to dispose of vehicles at car fairs rather than operating their own yard. As this activity is unlawful for licensed dealers, it provides a significant incentive for dealers *not* to be licensed.

[120] These requirements were retained in the existing Bill. However, it was recognised at the time of the 1999 amendments to the Act that the requirements would need to be reviewed.

[121] It is now proposed to remove these requirements. The first objective can be met through requiring the seller to register their “address for service”. The second objective is likely to be unnecessary since, under the Fair Trading Act, employers are liable for the conduct of employees that breaches the Act.

5.5.3 Record keeping

[122] The existing Act requires dealers to keep records of transactions, and of the motor vehicles they deal with. This has a crime-prevention function in that it enables the Police to trace the movement of individual vehicles. It may also be of assistance in monitoring compliance with taxation requirements, and in enhancing the odometer trail.

[123] It is proposed to retain this requirement.

5.5.4 Offences for interference with odometers

[124] The existing Bill makes it an offence to alter the reading of an odometer. A dealer is liable to a fine of \$10,000 if they alter the odometer of a vehicle with the intent to misrepresent its value.

[125] The proposed Act would maintain this offence, and extend it to *all sellers*.¹⁸

¹⁸ Including all private individuals who sell their own cars (irrespective of what method or venue they use to sell it).

[126] The new Act would also reverse the burden of proof. The effect of reversing the burden of proof would be that anyone who alters an odometer would have to prove they did not intend to misrepresent the value of the vehicle. It is expected that this would make it easier to prosecute cases of odometer tampering.

Questions for submitters:

What comments do you have on the proposals for consumer protection outlined in this chapter?

Do you support statutory warranties in addition to the Consumer Guarantees Act and the Fair Trading Act? Why?

Should vendors be required to offer consumers purchasing a vehicle the choice of also purchasing a mechanical warranty?

Should vendors be restricted as to their place of business when selling used vehicles?

What comments do you have on the proposed offence of interfering with odometers?

6. Title protection

[127] The Motor Vehicle Securities Act 1989 provides that where a consumer¹⁹ purchases a motor vehicle from a licensed dealer, any security interest outstanding on the vehicle is extinguished and the consumer receives good title (that is, full ownership).²⁰ These provisions will be carried over into Part 6 of the Personal Property Securities Act 1999, when it comes into force.²¹

[128] By contrast, consumers purchasing from someone other than a dealer, such as in a private sale, risk purchasing a vehicle that has an outstanding security attached. This means that the vehicle could be legitimately repossessed by the financier who holds the security interest. To protect themselves, consumers must check the motor vehicle securities register via the internet or use one of the phone services ("Autocheck") prior to purchase, to be sure that the vehicle has not been used as security.

[129] The protection for consumers in buying through a dealer is at the expense of financiers. For example: consumer A may purchase a car on credit secured to the financier. Before repaying the credit, the consumer may trade in the car to a dealer. Up to this point, the security interest of the dealer is still valid, but if the dealer sells the car to consumer B, the security interest is extinguished and the financier loses its security (even though consumer A may not have repaid the credit). The financier may seek redress from the motor vehicle dealer and, as a last resort, from the fidelity fund. If it could not do this, the viability of motor vehicle finance would be jeopardised.

[130] This suggests two options:

- (a) Retain the provisions in the Personal Property Securities Act which ensure that consumers purchasing from registered vendors receive clear title, and provide a mechanism to compensate financiers who lose their security interest.
- (b) Repeal Part 6 of the Personal Property Securities Act so that motor vehicles are treated in the same way as other consumer goods. The effect of this would be that consumers would not be guaranteed clear title when purchasing a motor vehicle from a registered vendor. They would have to check the personal property securities register to see if a vehicle had an

¹⁹ "Consumer" in this context means any person other than a manufacturer, wholesaler, dealer, or a finance company so it is a much wider definition than under the Consumer Guarantees Act.

²⁰ An exception is if the purchaser has written notice of the existence of a security interest.

²¹ Motor vehicles require special protection because they have particular characteristics not shared by other goods: they are of medium to high value (and are thereby more likely to be subject to a security interest); they are highly mobile, being traded frequently during their useful life and being able to be moved considerable distances in a short period of time; and they are an "essential" good whose sudden and unexpected repossession could cause disruption to a consumer's livelihood.

outstanding security on it. If clear title was not provided, consumers would have to seek redress under the Consumer Guarantees Act.

[131] On balance, option (a) is preferred. This implies the continuance of some form of statutory fidelity fund – and so consideration of this option should be linked to the discussion on options to replace the statutory fidelity fund (see section 8.2).

6.1.1 Who should have to give good title?

[132] It is proposed that all registered motor vehicle vendors be required to give good title when selling a vehicle, either as an agent or directly. It would not be too onerous to expect persons “in trade” to check title on all vehicles they deal with before selling those vehicles to consumers.

Questions for submitters:

What comments do you have on the proposal outlined in this chapter to ensure that consumers purchasing a motor vehicle from a registered dealer be assured of good title?

Should there be any exceptions to this proposal?

7. Options for improved enforcement and redress

7.1 WIDER JURISDICTION FOR THE MOTOR VEHICLE DISPUTES TRIBUNAL

[133] There are currently four Motor Vehicle Disputes Tribunals. Each Tribunal may only hear disputes that involve licensed dealers and that have a monetary value of less than \$12,000 (unless both parties agree otherwise).

[134] Under the existing Act, consumers must present their dispute to the Motor Vehicle Dealers Institute; the Institute, after hearing the dispute, may then take it to the Tribunal. This can result in unwanted delays, and so restricts consumers' ability to obtain cost-efficient redress. Under the proposed Act, this would no longer be the case: consumers would be able to take a dispute directly to the Tribunal.

7.1.1 Extending the Tribunal's jurisdiction

[135] It is proposed that the Tribunal be given the role of hearing any consumer disputes arising from the sale of motor vehicles in trade. This means the Tribunal would have the ability to determine and award claims made under the Consumer Guarantees Act, the Sale of Goods Act, and the Fair Trading Act (but not incidental matters under credit or security law).

[136] Private sales could also be included in the Tribunal's jurisdiction, although the case for this is much less compelling. Firstly, most consumer protection law applies to sales "in trade" – so there is little law that the Tribunal can use for disputes between private parties. Disputes resulting from private sales can still be determined in the ordinary Disputes Tribunal.

[137] In addition, the monetary jurisdiction of the Motor Vehicle Disputes Tribunal could be increased to \$50,000.

7.1.2 Membership of the Tribunal

[138] The Chair of the Motor Vehicle Disputes Tribunal would continue to be a barrister or solicitor with 7 years' experience (similar to qualifications required for a District Court judge). This acknowledges that Tribunal hearings are essentially about legal issues.

[139] In order to assist the Chair with technical evidence, the industry representative on the Tribunal would be replaced by a person who has expertise in motor vehicles.

[140] A consumer representative would be retained on the Tribunal. This is because, as traders, motor vehicle vendors are more familiar with the law and with industry practices in general, and so will have an advantage in terms of experience. The purpose of a consumer representative is to counter-balance this advantage.

7.1.3 Funding of the Tribunal

[141] The Tribunal would be partially funded through a registration levy paid by motor vehicle vendors, and also through user charges. The fees paid by applicants would be on a similar scale and operate on a basis similar to that of the ordinary Disputes Tribunal.

7.2 ENFORCEMENT

[142] The proposed regime is simpler, more flexible, and less costly. It is also expected to be easier to comply with. However, the effectiveness of any occupational-regulation and consumer protection regime depends on adequate mechanisms for enforcement.

[143] The enforcement mechanisms under the proposed Act are as follows:

- Registration would be enforced by the Registrar of Companies. The Registrar would be given a variety of powers including the cancellation of licences and the issuing of infringement notices for minor offences. The Registrar would also prosecute for unregistered dealing. The cost of this enforcement would be recovered through the registration levy.
- The Consumer Information Standard would be enforced by the Commerce Commission, as well as by consumers individually.
- The provision for banning persons from any involvement in the motor trade could be enforced by any individual or organisation. For example, the Police or the Commerce Commission could make a “banned persons” application to the Court when they prosecute a vendor in relation to any matter connected with the running of a motor vehicle business (such as fraud or misleading conduct). In addition, any person could make an application to the Court to have a vendor or salesperson named on the “banned persons” list if that vendor/salesperson could be shown to be “not fit and proper”.

Questions for submitters:

What comments do you have on the proposals for improved redress and enforcement outlined in this chapter?

Should parties to private sales be able to take disputes to the Motor Vehicle Disputes Tribunal?

What should be the monetary jurisdiction of the Tribunal?

How can enforcement of the proposed Act be made most effective?

8. The fidelity fund

[144] This section considers the future of the fidelity guarantee fund, whether it should be retained and, if so, in what form.

8.1 HOW THE FUND WORKS

[145] The fund may protect consumers when a dealer:

- is unable to pay a compensation order (ordered by the Motor Vehicle Disputes Tribunal or District Court for breach of the title or statutory warranty protections)
- fails to account for money that it holds as an agent
- fails to meet any other claim arising out of any activity or business of a licensed dealer in its capacity as dealer. For example, the fund compensated a consumer who had suffered a loss due to the dishonest retention of insurance proceeds by a dealer.²²

[146] As well, a financier can claim against the fund when a motor vehicle over which they hold security is sold to a third party who is a "consumer".

[147] The fund also covers legal, investigatory and administrative expenses incurred in connection with the management of the fund.

[148] The fund is the property of the Motor Vehicle Dealers Institute (MVDI) and is administered by a Committee of Management of the MVDI Council together with a barrister or solicitor appointed by the Council.

8.1.1 The operation of the fund

Number of claims and success for consumers

[149] The following table details the number of claims made against the fund in the last six years:

Year	No. of claims	Consumers	Financiers	No. of payouts	Average payment
2000	92	60	32	12	\$4,514
1999	126	85	41	61	\$4,499
1998	215	171	44	87	\$5,761
1997	204	138	66	56	\$6,947
1996	62	59	3	27	\$5,130

²² *Breen v Motor Vehicle Dealers Institute* (1993) 4 NZBLC 103,020.

Year	No. of claims	Consumers	Financiers	No. of payouts	Average payment
1995	51	45	6	25	\$6,619
TOTAL	750	558	192	268	

[150] Over this period, the success rate of claims ranged from 49% (in 1995) to 13% (in 2000). There is no information available on the success rate of consumer claims (as opposed to financiers' claims).²³

²³ Claims by financiers are more straightforward, and so are more likely to be successful.

The cost of running the fund

[151] The fund is costly to run. The MVDI has provided information on the fund's financial performance for 1999 and 1998, which gives some indication of the cost of running it.

		1999		1998	
		\$		\$	
Revenue	Members' contributions	1,000,854		606,411	
	Interest received	19,584		25,321	
	Claims recovered	<u>71,904</u>		<u>55,011</u>	
	Total revenue		1,092,342		686,743
Expenses	Audit fee	1,500		1,500	
	Claims paid	274,451		501,184	
	Other expenses ²⁴	<u>327,840</u>		<u>273,996</u>	
	Total expenditure		<u>603,791</u>		<u>776,680</u>
Surplus/ (Deficit)	Before taxation		488,551		(89,937)
	Taxation		<u>5,841</u>		<u>7,608</u>
	After taxation		482,710		(97,545)

8.1.2 The fund in context

[152] The fund was established before a general framework for consumer protection was in place. Just as significantly, it was put in place at a time when used motor vehicles had a greater real value. As discussed earlier (para [9]), motor vehicle prices have fallen considerably in real terms and as a percentage of average income.

[153] It is estimated that there are 800,000 changes of motor vehicle ownership each year; approximately 27-32% of these are motor vehicles sold through licensed dealers. Access to the fund is available only to those who buy from licensed dealers. Thus the fact that many consumers are choosing to buy motor vehicles from auction, privately, or from a variety of unlicensed outlets suggests that potential access to the fund is not necessarily a significant factor in the decision about where the purchase is made. It is also worth noting that the

²⁴ This largely relates to legal and investigatory expenses.

number of claims as a proportion of motor vehicle sales is extremely small – and the number of successful claims is even smaller.

8.1.3 Arguments in favour of the fund

[154] The arguments in favour of the fund are:

- (a) The fund provides protection to consumers with outstanding claims against insolvent dealers.

[155] Consumers who make purchases from dealers who later become insolvent can potentially lose significant amounts of money if they have claims outstanding against that dealer. The fund therefore protects consumers in this situation by providing an avenue for compensation.

[156] Some consumers benefit in this manner. However, the figures quoted above show that this is a very small number relative to both the total number of motor vehicle sales and the total number of disputes over motor vehicles.

- (b) The fund makes it possible for financiers to recover monies when a security is exhausted, and therefore ensures the viability of motor vehicle financing.

[157] This issue has been covered above, in para [129].

8.1.4 Arguments for removing the fund

- (a) The fund complicates legislation.

[158] A statutory fund makes legislation more complex. Further, the system is cumbersome in that it requires a statutory body and definitions; rules, regulations and procedures; and mechanisms for the collection of contributions and the making of payments. The fund belongs as part of a regime centred around licensing and membership of an industry body.

- (b) There is a limited number of beneficiaries.

[159] The figures detailed above show that only a relatively small number of consumers receive compensation from the fund. This figure is extremely small when considered alongside the number of complaints about vehicles. It is also extremely small in relation to the cost of the fund.

8.2 OTHER OPTIONS FOR LOSS RECOVERY

[160] Although the fund is held up as an important protection, and although it does provide assistance to a few consumers and financiers, the cost of its administration and its limited number of beneficiaries raises questions about its viability.

[161] The existence of a compulsory fidelity fund is also inconsistent with a simplified registration regime administered by a government department.

[162] But there is a need for a fund, or something similar, to compensate financiers who might otherwise be disadvantaged by the title protections given to consumers. The alternatives here are:

- a modified fidelity fund
- performance bonds
- compulsory indemnity insurance for vendors.

[163] Any one of these alternatives could be adopted through industry self-regulation, or be imposed by the Government. These are discussed below.

8.2.1 A modified fidelity fund

[164] If a fund is to be retained, its scope could be restricted so that it only covers title obligations and is used to compensate financiers. Vendors would be required to pay into a fund as a condition of registration. The fund would be used to pay out claims to financiers whose security interests had been extinguished.

[165] Restricting the fund in this way would make it relatively inexpensive and simple to administer, as only a small number of claims are made each year by financiers.

[166] The fund could be administered by a private third party, such as an insurance company, according to criteria set in regulations.

[167] One disadvantage of retaining a fund, even in a modified form, is that all registered vendors would be obliged to pay into the fund – and all would end up paying for the actions incurred by individual vendors who breach the Act. This is an inevitable consequence of a system that pools contributions from many in order to compensate a few. The advantage, however, is that a modified fund would be much less expensive than a bond option; and the amount of contribution required is unlikely to be high, given the restricted function of the fund.

8.2.2 Performance bonds

[168] A further option is to require motor vehicle vendors to have a performance bond. Similar requirements exist under auctioneers legislation²⁵ and existed under the former Motor Vehicle Dealers Act 1958. These schemes would require vendors to maintain a bond at a required level. In practice, the requirement for a bond would not necessarily mean a vendor had to “front up” with cash. Instead, it might involve a third-party guarantee from a bank or an insurance company up to the amount of the bond. The company would pay out any claim against the bond, and would be indemnified by the vendor.

[169] The bond would have to be set at a level that would realistically cover claims that might be made against an individual vendor. Before granting a guarantee, the bank or insurance company would have to carefully assess the

²⁵ Auctioneers Act 1928.

risk of the individual or company applying for the guarantee. Such a system would favour established vendors, and would disadvantage those seeking to enter the market. This could have the effect of reducing competition, and could also provide an incentive for vendors to try to avoid registration.

8.2.3 Vendors' compulsory indemnity insurance

[170] Vendors could be required to purchase their own compulsory indemnity insurance directly from an insurance company. This would cover losses arising from theft or negligence by staff.

[171] However, such a scheme would be relatively limited in its coverage: it would not be available to sole traders (because it is not possible to insure against one's own dishonesty).

Questions for submitters:

What is your view on the effectiveness of the fidelity guarantee fund?

Which option do you support for replacing the fund:

A modified fund?

Performance bonds?

Compulsory fidelity insurance?

9. Comparison of the Motor Vehicle Dealers Act 1975, the existing bill, and the proposed Act

MOTOR VEHICLE DEALERS ACT 1975	MOTOR VEHICLE DEALERS BILL	PROPOSALS IN THIS PAPER
Definition of motor vehicle dealer/vendor		
Anyone selling over six motor vehicles in a calendar year.	Anyone selling over six motor vehicles in a calendar year.	Anyone dealing in six motor vehicles in a calendar year.
Occupational regulation		
Dealers must be licensed. Salesmen must be registered and approved.	Dealers must be licensed. Remove restrictions in relation to salespersons.	Registration will be required for all sellers "in trade" and for organisers of certain other methods of selling motor vehicles. No restrictions in relation to salespersons.
Exceptions		
Auctioneers, finance companies, other classes of seller.	Auctioneers, finance companies, other classes of seller.	Substantial broadening and refinement of classes of sellers who must register.
Eligibility for licence		
<p>The Board must be satisfied that the personal character, fitness, and financial position of the applicant are such that, having regard to the interests of the public, the applicant is a proper person to carry on the business of a motor vehicle dealer.</p> <p>Person must have attained age of majority.</p> <p>A company may not hold a licence if any of its officers are not eligible to hold a licence in their own right. Further, the Board must be satisfied of the business experience and judgement of the officers.</p>	<p>Licensing is automatic, provided specified minimum criteria are met. The applicant:</p> <ul style="list-style-type: none"> • must not be under 18 • must not be an undischarged bankrupt • must not be prohibited from managing a company • must not have received specified convictions within last five years. <p>A company may not hold a licence if any of its officers meets above criteria.</p>	<p>Registration is automatic, provided specified minimum criteria are met. The applicant:</p> <ul style="list-style-type: none"> • must not be under 18 • must not be an undischarged bankrupt • must not be prohibited from managing a company • must not have had a motor vehicle dealer licence cancelled • must not have failed to fulfil a Court/Tribunal order relating to their obligations as a vendor • must not have received specified convictions

MOTOR VEHICLE DEALERS ACT 1975	MOTOR VEHICLE DEALERS BILL	PROPOSALS IN THIS PAPER
		<p>(different from those in the existing Bill) within last five years.</p> <p>A company/partnership may not hold registration if any of its officers/partners fails to meet the above criteria.</p>
Removal of licence/registration		
<p>May be cancelled by the Board of the Motor Vehicle Dealers Institute in prescribed circumstances.</p>	<p>May be cancelled by the Registrar in prescribed circumstances.</p>	<p>Occurs automatically, if a vendor is convicted of specified offences.</p> <p>Can also be achieved through application to the Court (for a Court order that the vendor is a "not fit and proper" person).</p> <p>Registrar can cancel registration in prescribed circumstances (more limited than under MVD Act 1975).</p> <p>"Banned persons" list: those on the list may not take any part in the motor vehicle trade.</p>
Industry bodies		
<p>Act sets up a Motor Vehicle Dealers Institute with a Council, Disciplinary Committee, Motorcycle Division, Motor Vehicle Salesmen Registration Authority etc.</p> <p>Motor Vehicle Dealers Licensing Board.</p>	<p>No statutory industry bodies.</p>	<p>No statutory industry bodies.</p>
Duty of supervision and restriction on premises for trade		
<p>Licensee can only operate from licensed premises and has a duty of personal supervision.</p> <p>Amended in respect of new motor vehicles in 1999.</p>	<p>Licensee can only operate from licensed premises and has a duty of personal supervision.</p> <p>Amended in respect of new motor vehicles in 1999.</p>	<p>These restrictions and duties are removed.</p>

MOTOR VEHICLE DEALERS ACT 1975	MOTOR VEHICLE DEALERS BILL	PROPOSALS IN THIS PAPER
Statutory warranties		
Special statutory warranties that apply to all vehicles sold by dealers.	Special statutory warranties that apply to all vehicles sold by dealers.	No additional warranties. Reliance on Consumer Guarantees Act 1993 and Fair Trading Act 1986.
Title provisions		
Consumers purchase vehicle with clear title.	Title protections removed.	Consumers purchase vehicle with clear title.
Information disclosure		
Particulars relating to vehicle to be displayed on a "window card".	Particulars relating to vehicle to be displayed on a "window card". Card to be a Consumer Information Standard made under the Fair Trading Act.	Particulars relating to vehicle to be displayed on a "window card". Card to be a Consumer Information Standard made under the Fair Trading Act.
Motor Vehicle Disputes Tribunal		
<p>Restricted to cases referred by the MVDI.</p> <p>Limited jurisdiction over the Consumer Guarantees Act.</p> <p>Adjudicators are a consumer representative, an industry representative, and a chair (who must be a lawyer).</p>	<p>Jurisdiction extended to the Sale of Goods Act, Fair Trading Act, and Consumer Guarantees Act.</p> <p>Jurisdiction restricted to disputes involving licensed dealers.</p> <p>Adjudicators are a chair (must be a lawyer) and a person to assist with technical/mechanical evidence.</p>	<p>Jurisdiction extended to the Sale of Goods Act, Fair Trading Act, and Consumer Guarantees Act.</p> <p>Jurisdiction to cover all disputes involving the sale of a motor vehicle "in trade".</p> <p>Adjudicators are a chair (must be a lawyer), one person to assist with technical/mechanical evidence, and a consumer representative.</p>
Fidelity fund		
A fidelity guarantee fund exists to compensate consumers and secured parties in situations where a dealer is unable to fulfil a Court order because of insolvency, or unable to compensate secured parties for loss of title on good.	No fidelity fund.	<p>Modified fidelity fund</p> <p>or</p> <p>performance bonds</p> <p>or</p> <p>compulsory indemnity insurance.</p>