



Government of Western Australia
Department of Mines, Industry Regulation and Safety



Consultation Regulatory Impact Statement

Proposals for motor vehicle
consignment sales reform

October 2020



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MESSAGE FROM THE COMMISSIONER

Proposals for motor vehicle consignment sales reform

I am pleased to release this Consultation Regulatory Impact Statement (C-RIS) outlining proposals for the regulation of consignment sales of motor vehicles under the *Motor Vehicle Dealers Act 1973* (WA) (MVDA).

For some vehicle owners, selling a vehicle on consignment through a motor vehicle dealer is a viable alternative to being exposed to the risks and uncertainties of having to negotiate a private sale. Consequently, laws around consignment selling provided in the MVDA are designed to protect vehicle owners and ensure processes are totally transparent.

The recently completed review of the MVDA identified sale by consignment as an area of significant risk to consumers and that consumer safeguards provided for within the MVDA, standard contracts and moneys being held in trust, should be retained.

Following completion of the review, Consumer Protection encountered several cases of motor vehicle dealers engaging in consignment selling who failed to comply with the requirements of the MVDA and as a result caused serious consumer detriment and financial losses.

The purpose of this C-RIS is to consider options for reform – either to ban consignment selling or significantly strengthen consumer safeguards. The options have been developed through analysis of the recent failures, current business practices, industry compliance issues and the operation of existing provisions regulating consignment agreements between motor vehicle dealers and consumers.

I therefore encourage everyone with an interest in the sale of vehicles on consignment to take the time to consider this paper and provide feedback. This is your opportunity to have your say in assisting to guide future decisions involving the regulation of consignment sales.

Lanie Chopping

COMMISSIONER FOR CONSUMER PROTECTION

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1 ABOUT THIS PAPER

1.1 Purpose of this consultation regulatory impact statement

The Department of Mines, Industry Regulation and Safety – Consumer Protection Division (Consumer Protection) recently completed a combined review of legislation regulating motor vehicle dealers and repairers (the Review). The Review concluded that current consumer safeguards provided for within the MVDA in relation to consignment sales should be retained given the higher level of consumer risk. These safeguards include the stringent assessment of financial viability of motor vehicle dealers and specific requirements for operating trust accounts.

Following completion of the Review, several cases of consignment selling resulted in considerable detriment for consumers through financial losses. The Review report therefore noted that further consideration is being given to whether these risks warrant the banning of consignment sales under the MVDA (excluding sale by auction) as is the case in Victoria. Cabinet endorsed the Review recommendations and the final review report was released in August 2019.¹

Selling a vehicle on consignment is favoured by many consumers who consider they lack the time, skills or confidence needed to complete a private sale. Recent cases involving consignment sales have shown that the risk of detriment exists where consumers are unaware of the available consumer safeguards and they place their trust in a motor vehicle dealer to comply with their responsibilities and obligations under the MVDA.²

The purpose of this C-RIS is to consider the need for changes to the regulation of consignment sales. The paper considers marketplace factors, industry compliance issues and the efficacy of existing provisions regulating consignment agreements entered into between dealers and consumers. The paper presents possible options for reform and seeks feedback from stakeholders in relation to the viability of those options.

A copy of the MVDA is available from:

www.legislation.wa.gov.au/legislation/statutes.nsf/law_a525.html.

1.2 How to have your say

Consumer Protection is seeking feedback on proposed options for regulation of consignment sales under the MVDA.

¹ Department of Mines, Industry Regulation and Safety (DMIRS) 2019, Decision Regulatory Impact Statement: Review of the Motor Vehicle Dealers Act 1973 and the Motor Vehicle Repairers Act 2003 (final report) (Perth). July 2019.

<https://www.commerce.wa.gov.au/publications/decision-regulatory-impact-statement-review-motor-vehicle-dealers-act-1973-and-motor>

² A dealer who sells a vehicle on consignment on behalf of a vehicle owner is required to pay any money earned from the sale to the owner, less any agreed costs and commission. The MVDA includes certain requirements in relation to sale by consignment including prescribed consignment agreements, trust funds and payments to the owner.

Making a submission

The closing date for submissions is: **4 December 2020**

You are welcome to:

- write an email or letter outlining your views;
- respond to questions presented in the C-RIS; and/or
- respond to a [short online survey](#).

Please feel free to focus only on those areas that are important and relevant to you. You are also welcome to suggest alternative options for addressing issues. If making a submission, please also indicate the capacity in which you are responding, for example, industry body/association, as an individual, or as a consumer.

Please forward any submissions to:

Consultation on Consignment Sales under the Motor Vehicle Dealers Act
Legislation and Policy Directorate, Consumer Protection Division
Department of Mines, Industry Regulation and Safety
Locked Bag 100
EAST PERTH WA 6892

You can also return your submission by email to: consultations@dmirs.wa.gov.au.

Information provided may become public

After the consultation period concludes, responses may be made publicly available on Consumer Protection's website. Your feedback forms part of a public consultation process and Consumer Protection may quote your submission in future publications. If you would prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or other information that you do not wish to become available to the public.

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Telephone queries may be directed to 1300 30 40 54.

2 ABOUT THE ISSUE

The key policy issue to be resolved in this C-RIS is whether consignment selling of vehicles under the MVDA should continue in its current form.

There are concerns that the conduct and business practices of some dealers selling vehicles on consignment has:

- placed consumers at a significantly increased risk of suffering detriment and financial loss;
- caused significant reputational damage to the motor vehicle industry.

Consignment selling is a method for consumers to be able to sell their vehicle however, in some instances, this can also increase the risk to consumers. The Review found that risks of consignment selling arise when dealers fail to comply with their statutory obligations under the MVDA and when consumer protections are not maintained.

Since the Review concluded, cases involving consignment sales reveal that a significant risk exists where unscrupulous dealers behave in a manner that is designed to avoid transparency and to take advantage of vehicle owners who may not always be aware of their rights. These examples highlight the potential risks for consumers and provide a case for regulatory reform to be considered.

2.1 Consignment selling of vehicles

2.1.1 What is consignment selling?

The consignment sale of a motor vehicle is where a private seller (owner) engages a licensed motor vehicle dealer to sell their vehicle. The dealer undertakes the transaction on behalf of the owner and pays the proceeds of sale to the owner, less any agreed costs and commission.

Consignment selling has been described as:

“a type of sale (that) provides a viable alternative for consumers who, for various reasons are unable or unwilling to go through the process of marketing and negotiating the sale of their vehicle privately.”³

Selling a vehicle on consignment is favoured by many consumers due to various factors. For example, consumers may be time poor, have concerns about the security implications of unknown persons visiting their premises, or consider themselves as lacking the skills or confidence needed to complete a private sale. Owners may also consider they can improve their chances of selling by using a dealer and by exposing their vehicle to potential buyers within both a physical marketplace and online.

³ Parliament of Western Australia, Legislative Assembly, Hansard, Motor Vehicle Dealers Amendment Bill 2001, Second Reading, 7 November 2001, (pp 5167-5170). (Available at: [https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/e6f18623b0f93190c825757000147c1f/\\$FILE/A36+S1+20011107+p5167c-5170a.pdf](https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/e6f18623b0f93190c825757000147c1f/$FILE/A36+S1+20011107+p5167c-5170a.pdf)). Accessed 21 August 2020.

2.1.2 Consignment selling modes

The sale of vehicles on consignment selling primarily occurs in two ways.

Where a person consigns their vehicle for sale to a dealer who displays it for retail sale

A consignment sale undertaken in these circumstances generally involves the dealer holding the vehicle in stock on its premises for sale for an agreed price over a defined period. The sale occurs through a negotiated contract with the purchaser. While the dealer has physical possession of the vehicle, the owner retains ownership. The dealer typically promotes consignment selling as a service which its dealership offers to prospective customers as an alternative to vehicle owners enduring the stress of a private sale.

Where a person consigns their vehicle for sale to a dealer who sells the vehicle by auction

Licensed motor vehicle dealer auctioneers conduct regular auctions at which consumers can consign their vehicle for sale. As with a retail sale, the auctioneer and the seller agree on a reserve price (i.e. the minimum sale price for the vehicle) and provided the auction reaches this price, the vehicle is sold to the highest bidder at the auction on the fall of the hammer.

Auction houses may also provide bidders with an opportunity to negotiate a contract to buy the vehicle, if the vehicle is not sold on the fall of the hammer.

2.2 Key reasons for the current regulation of consignment sales

When a vehicle is provided to a dealer to sell on consignment from a vehicle owner (client), a principal-agent relationship is established and the dealer has a responsibility to act in the best interests of the client. The client also trusts that this will occur.⁴

Key of principles of the principal-agent relationship typically include that an agent has a duty to:

- act in the principal's best interests;
- follow the principal's instructions;
- act in good faith;
- exercise due care, skill and diligence;
- be honest in their dealings with all persons involved in a transaction; and
- disclose in writing to a purchaser any relationship with the vendor.

Under a principal-agent relationship, an agent owes a fiduciary obligation to their principal (the client) based around the principles of trust, good faith and the entitlement of one party to expect that the other will act in their best interests.⁵

Similarly, potential purchasers in a consignment sale are entitled to expect that they will be treated fairly, and that the dealer will act in good faith. In some instances, the nature of these transactions increases the risks to consumers, and as a result, necessitates the need to regulate.

⁴ B Sweeney, J O'Reilly & A Coleman, *Law in Commerce*, 6th ed. LexisNexis, Chatswood, 2016.

⁵ P Latimer, *Australian Business Law*, 31st ed. CCH Australia Ltd., Sydney, 2012.

The following risks to consumers have been identified if these duties are not complied with:

- significant financial loss if the proceeds of sale are not paid to the owner or in the event of no sale, their vehicle is not returned to them by the dealer. This could be due to insolvency of a dealer, dishonesty or poor business practices;
- financial loss if an owner does not receive a fair price or the agreed price for their vehicle due to misrepresentations by the dealer;
- the risk that the purchaser of a consignment vehicle does not have warranty claims addressed that arise from the dealer’s statutory responsibility under the MVDA;
- the risk of misrepresentation or misleading conduct by a dealer failing to communicate all offers received to an owner; and
- a lack of transparency where a dealer fails to keep an owner informed, or if it appears information has been withheld as part of a deliberate strategy, to mislead the owner.

2.3 Complaints in relation to consignment selling

Complaints data received on consignment sales is important in identifying the level of dealer non-compliance and in determining whether this non-compliance influences consumer risk.

Table 1 below shows that for the period 1 January 2014 to 31 December 2019, there were 162 complaints relating to consignment sales.

Table 1 - Complaints by year 2014 - 2019

2014	2015	2016	2017	2018	2019	Total
13	50	12	27	23	37	162

Of the 162 complaints, the majority (111 or 69 per cent of complaints) were internally generated by Consumer Protection as a result of the annual audits of dealer consignment trust accounts. The issues identified through the audit process appear to be largely around poor administrative and account keeping practices by dealers, and include:

- ledgers not being properly maintained or reconciliations of accounts not being done;
- bank fees debited to trust accounts;
- consignment sale proceeds posted to a general account instead of a trust account and vice versa;
- trust account overdrawn and discrepancies between bank statements and the account; and
- funds not being paid into trust accounts within the required time period or proceeds of the sale not paid to the owner within the required time period of two business days of receiving payment.⁶

⁶ Motor Vehicle Dealers (Sales) Regulations 1974 (WA), Schedule 4, CI 3.1.

In the majority of cases, Consumer Protection worked collaboratively with individual dealers to rectify non-compliant behaviours and to clarify obligations under the legislation.

Of the remaining 51 complaints, the issues dealt with included:

- dealers accepting vehicles for sale on consignment without the permission of the Commissioner for Consumer Protection and in contravention of the conditions of their dealer's licence;
- dealers accepting vehicles for sale on consignment without entering into a written agreement with vehicle owners and without holding a consignment trust account;
- dealers failing to record variations made to standard contracts to reflect changes to consignment sale arrangements negotiated with vehicle owners;⁷
- dealers failing in their responsibility to ensure that vehicles have been appropriately maintained and stored while held on consignment (e.g. Consumer Protection received complaints from consumers alleging vehicles were returned from dealers at the end of the consignment period with missing items and with excessive kilometres);
- dealers making false and misleading misrepresentations to vehicle owners about the viability of achieving the agreed minimum sale price of a vehicle, with the dealers going on to sell the vehicle for a higher price;⁸ and
- dealers failing to pay the proceeds of sale to vehicle owners, in contravention of the prescribed terms and conditions of standard consignment contracts.⁹

Consumers involved in some of these transactions suffered significant detriment and financial losses, primarily due to false and misleading conduct by consignment dealers. Losses of approximately \$1.9 million are estimated to have resulted, with two dealers accounting for the majority of this amount.

Issues relating to consignment sales extend beyond motor vehicle sales. In August 2019, a caravan dealer selling caravans on consignment ceased trading resulting in losses to 24 owners of around than \$550,000.¹⁰ In July 2019, Consumer Protection, after receiving complaints from consumers regarding the dealer's alleged failure to pay the proceeds of sale of caravans held under consignment agreements, commenced an investigation into the dealer's activities. Consumer Protection referred the matter to the Western Australia Police Force in August 2019 for investigation.

A lack of dealer transparency and misrepresentations during consignment contract negotiations with vehicle owners, were the main compliance issues in recent cases.

⁷ Ibid., Cl 12.1.

⁸ Ibid., Cl. 2.1.

⁹ Ibid., Cl 3.

¹⁰ Phil Hickey, 'High Wycombe caravan dealer charged with 25 counts of stealing', *The West Australian* (Perth), 27 September 2019.' (Available at: <https://thewest.com.au/news/wa/high-wycombe-caravan-dealer-charged-with-25-counts-of-stealing-ng-b881334074z>). Accessed 21 August 2020.

Other issues include the failure to use written consignment contracts stating the amount the vehicle owner would be paid as the minimum sale price and the amount to be kept by the dealer as commission. The dealers were also found to have made misrepresentations to vehicle owners regarding the price which could be achieved, when in fact the dealerships had already secured higher amounts for the vehicles.

In failing to provide signed consignment contracts to vehicle owners, contrary to the Motor Vehicle Dealers (Sales) Regulations 1974 (WA) (MVDSR) requirements, these dealers denied owners access to important information about consumer protections and exposed them to the consequences of poor dealer business practices and deceptive behaviour.

In each of these cases vehicle owners suffered considerable monetary losses, despite the consumer protections provided in the MVDA and the MVDSR. These cases also highlight the failure to recognise and comply with key requirements of the fiduciary relationship that exists between an agent and their client – that is, the obligation to act in the best interests of their client.

Case 1:

In December 2018, Luxuride Pty Ltd trading as Luxuride, and its director Mr Nicholas Ngo, were fined \$90,000 in the Perth Magistrates Court for having contravened motor vehicle consignment selling provisions in dealing with consumers. The dealer failed to deposit sale proceeds into trust accounts and pay sale proceeds to owners of vehicles within timeframes required by the MVDA.

Luxuride was found to have breached the Australian Consumer Law (ACL) in making false and misleading representations to vehicle owners regarding the sale price of vehicles, enabling the dealerships to achieve a higher profit.

Luxuride was also fined for contravening the MVDA provisions which require a dealer to ensure a vehicle owner is provided with a copy of a consignment agreement immediately after being signed by both parties.

Case 2:

In May 2019, PAG (WA) Pty Ltd trading as Xoticar, and persons concerned with the management of this business, were fined \$31,500 in the Perth Magistrates Court for contravening motor vehicle consignment selling provisions in dealing with consumers. The dealer failed to deposit sale proceeds into trust accounts and pay sale proceeds to owners of vehicles within timeframes required by the MVDA.

PAG (WA) Pty Ltd was found to have breached the ACL in making false and misleading representations to vehicle owners regarding the sale price of vehicles, enabling the dealership to achieve a higher profit.

PAG (WA) Pty Ltd engaged in a *modus operandii* in making these false and misleading representations, contrary to section 41 of the MVDA.

On 20 August 2020, in a decision handed down in the State Administrative Tribunal (SAT), Mr Zeljko Grujin, the Director of PAG (WA) Pty Ltd was disqualified from holding a motor vehicle dealer's licence for eight years after being convicted of deceiving owners about the sale price and failing to comply with laws relating to consignment sales.

PAG (WA) Pty Ltd received an indefinite ban and will be required to apply to the SAT in order to operate again in the future.¹¹

¹¹ DMIRS 2020, Consumer Protection – Announcements – ‘Motor vehicle dealer banned after deceiving owners and business now up for sale (Zeljko Grjun/Xoticar Auction House/PAG (WA) Pty Ltd) (Available at: <https://www.commerce.wa.gov.au/announcements/motor-vehicle-dealer-banned-after-deceiving-owners-and-business-now-sale-zeljko-grujin>) Accessed 27 August 2020.

Consumer Protection prosecuted these dealers for contravening the MVDA and the ACL.¹²

The outcomes of these proceedings are detailed in Table 2 below.

Table 2 - Recent involving cases of consignment sales subject to prosecution proceedings

Trader	Legislation Breached	Breach	Estimated Losses (\$)	Penalty
Bunbury Autos Pty Ltd / Howard Bessant. ¹³	MVDA.	No written consignment agreement. Commissioner's approval to sell vehicles on consignment not obtained. Commissioner not informed of change involving company director.	\$3,500	Fine and compensation order: \$6,700 Dealership and director.
Luxuride Pty Ltd trading as Luxuride/ Nicolas Ngo ¹⁴	MVDA. Australian Consumer Law.	Persons employed without holding authorisations required under the MVDA. Copies of consignment agreements not given to vehicle owners. Non-payment of sale monies into trust within required timeframe. Non-payment of net proceeds of sale within required timeframe. False and misleading misrepresentations made to vehicle owners regarding sale price.	\$1,600,000 ¹⁵	Fine: \$90,000 Dealership and director.
Trader	Legislation Breached	Breach	Estimated Losses (\$)	Penalty

¹² DMIRS 2020, Consumer Protection - Announcements – 'West Perth car dealer charged over consignment selling practices (Luxuride / Nicolas Ngo), 15 February 2018.' (Available at: <https://www.commerce.wa.gov.au/announcements/west-perth-car-dealer-charged-over-consignment-selling-practices-luxuride-nicolas-ngo>). Accessed 21 August 2020.

DMIRS 2020, Consumer Protection – Announcements – 'Perth car dealer prevented from selling on consignment after being charged (Xoticar / PAG (WA) Pty Ltd / Myhung Nguyen / Zeljko Grujin), 20 September 2018.' Available at: <https://www.commerce.wa.gov.au/announcements/perth-car-dealer-prevented-selling-consignment-after-being-charged-xoticar-pag-wa-pty>). Accessed 21 August 2020.

¹³ DMIRS 2020, Consumer Protection – Announcements – 'Fine and compensation order for car dealer over illegal consignment sale (Bunbury Autos Pty Ltd / Howard Bessant), 21 January 2019.' (Available at: <https://www.commerce.wa.gov.au/announcements/fine-and-compensation-order-car-dealer-over-illegal-consignment-sale-bunbury-autos-pty>). Accessed 21 August 2020.

¹⁴ DMIRS 2020, Consumer Protection – Announcements – '\$90,000 fine for consignment car dealer and Director (Luxuride / Nicholas Ngo), 14 December 2018,' (Available at: <https://www.commerce.wa.gov.au/announcements/90000-fine-consignment-car-dealer-and-director-luxuride-nicholas-ngo>). Accessed 21 August 2020.

¹⁵ DMIRS 2020, Consumer Protection – Announcements – 'Large consumer losses after closure of West Perth consignment car dealer (Luxuride / Nicolas Ngo), 2 May 2018,' (Available at: <https://www.commerce.wa.gov.au/announcements/large-consumer-losses-after-closure-west-perth-consignment-car-dealer-luxuride-nicolas>). Accessed 21 August 2020.

<p>PAG (WA) Pty Ltd trading as Xoticar/ and Zeljko Grujin)¹⁶</p>	<p>MVDA. Australian Consumer Law.</p>	<p>Non-payment of sale monies into trust within required timeframe. Non-payment of net proceeds of sale to owner of vehicle within required timeframe. False and misleading misrepresentations to made vehicle owners regarding sale price.</p>	<p>\$62,000</p>	<p>Fine: \$31,500 Dealership and salesperson/ manager. Zeljko Grujin banned from working in the industry for eight years from 19 November 2020.¹⁷ PAG (WA) Pty Ltd banned indefinitely and must apply to the SAT if it intends to trade.</p>
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¹⁶ DMIRS 2020, Consumer Protection – Announcements – ‘\$31,500 in fines for consignment car dealer and Manager - PAG (WA) Pty Ltd trading as Xoticar and Zeljko Grujin, 30 May 2019.’ (Available at: <https://www.commerce.wa.gov.au/announcements/31500-fines-consignment-car-dealer-and-manager-pag-wa-pty-ltd-trading-xoticar-and>). Accessed 21 August 2020.

¹⁷ DMIRS 2020, Consumer Protection – Announcements – ‘Motor vehicle dealer banned after deceiving owners and business now up for sale (Zeljko Grujin/Xocticar Auction House/Pag (WA) Pty Ltd), 27 August 2020 (Available at: <https://www.commerce.wa.gov.au/announcements/motor-vehicle-dealer-banned-after-deceiving-owners-and-business-now-sale-zeljko-grujin>) Accessed 27 August 2020.

3 CURRENT LEGISLATION AND ADMINISTRATION

3.1 The *Motor Vehicle Dealers Act 1973 (WA)* and the *Motor Vehicle Dealers (Sales) Regulations 1974 (WA)*

The MDVA and MVDSR establish a licensing regime which applies to the persons engaged in the business of buying, selling and exchanging motor vehicles in Western Australia. The MVDSR also contain provisions that dealers are required to follow when conducting consignment sales.

A person seeking to sell vehicles on consignment must be a licensed motor vehicle dealer. Before being granted a motor vehicle dealers licence, applicants must satisfy the Commissioner for Consumer Protection (the Commissioner) that:

- they are of ‘good character and repute’ and a ‘fit and proper person’ to be in the business of buying and selling vehicles (i.e. by providing a national police clearance certificate);
- they have completed a motor vehicle dealers licensing course conducted by an accepted training provider¹⁸; and
- they have sufficient resources to meet the obligations for the category of licence applied for (i.e. by providing a statement of assets and liabilities and supporting document/s and providing a declaration to having sufficient financial resources to comply with the requirements of the MVDA).¹⁹

The Commissioner, when granting a motor vehicle dealer’s licence, may attach any condition or restriction to the licence.²⁰ A condition is generally imposed on all dealers’ licences to prohibit consignment selling. A licensed dealer wishing to engage in consignment selling must apply to the Commissioner in order to have this condition removed and licensees intending to sell on consignment are subject to closer scrutiny of the financial information which they provide.

3.2 Consumer protections

Motor vehicle dealers selling on consignment are required to comply with specific consignment sales provisions that are designed to promote transparency and to protect consumers.

The MVDA includes specific provisions to address mismanagement of consignment sales funds, and business failures which may result in consumer detriment and losses associated with consignment selling.²¹

¹⁸ DMIRS 2020, Consumer Protection – Licenses and registrations – Motor vehicle industry – ‘Motor industry training courses.’ (Available at: <https://www.commerce.wa.gov.au/consumer-protection/motor-industry-training-courses>). Accessed 21 August 2020.

¹⁹ MVDA, section 15.

²⁰ Ibid., section 15)18A.

²¹ Ibid., section 32B, sections 32C-32E, section 32G.

These protections deal with the handling of monies received from consignment sales and require that a dealer:

- establish a trust account and inform the Commissioner of the details;
- pay monies received from consignment sales into that trust account;
- keep records in relation to consignment sales; and
- have trust accounts audited.

In addition, a dealer who enters a consignment agreement with a vehicle owner must use a written standard contract containing prescribed terms and conditions (set out in the MVDSR).²²

These prescribed terms and conditions provide that:

- the signing of the contract by the owner and the dealer or a person authorised by the dealer means an agreement has been made between the owner and the dealer for the vehicle to be sold based upon the stated terms and conditions;
- no agreement is made unless the owner is provided with a copy of the contract at the time it is signed by the owner and dealer or a person authorised by the dealer;
- the owner grants the dealer exclusive rights to sell the vehicle for the period stated in the contract;
- any variation of the contract must be in writing and signed by both the owner and dealer or a person authorised by the dealer;
- the dealer may sell the vehicle for more than the amount agreed as the minimum sale price for the vehicle. The dealer will be entitled to retain any amount in excess of the minimum sale price as commission;
- if the dealer sells the vehicle, the dealer will pay the total net proceeds to the owner within two business days of receiving payment;
- the owner will retain ownership and property in the vehicle until such time as the purchase price has been paid in full to the dealer; and
- the dealer is responsible for paying the costs of any statutory warranty claims which may be made by the purchaser of the vehicle.

The use of standard contracts is intended to ensure that consignment transactions are conducted with transparency and to reassure consumers that dealers will act in their best interests.

The MVDA also prohibits any person who engages in buying or selling vehicles from engaging in or allowing any undesirable practice.²³

The ACL applies across Australia and provides a range of general consumer protections. In Western Australia the ACL has been enacted as the Australian Consumer Law (WA) (the ACLWA) as a schedule to the *Fair Trading Act 2010* (WA).

The ACLWA provides general protections for consumers, including an owner who engages the services of a dealer in a consignment sale, and a buyer who purchases a vehicle from a dealer.

²² MVDSR, Sch4.

²³ MVDA, section 41.

The ACL requires that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.²⁴

The Review considered the effectiveness of compensation funds operating in other jurisdictions in meeting claims made by consumers for losses incurred resulting from failures by dealers to meet contractual obligations or breaches of legislative obligations.

The Review identified the administrative costs to be significant, and in some cases, greater than the amounts paid by dealers into these funds.

In Western Australia, the number of dealers permitted to sell vehicles on consignment comprises a small proportion of the number of licensed dealers, a factor which the Review identified as weighing heavily against the establishment of a fund.²⁵ The Review concluded that current arrangements provide adequate protections for consumers whilst maintaining the commercial viability of the motor vehicle dealing industry and recommended that a compensation fund not be introduced under the MVDA.²⁶

3.3 Summary of the consignment sales market in WA

Consignment selling of vehicles has traditionally been conducted by dealers operating in markets selling motorcycles, caravans and high end luxury vehicles. In recent years, a tightening motor vehicle industry and more competitive market has seen consignment selling evolve towards more general vehicle sales. Consumer Protection understands that there is also evidence of large motor vehicle dealers and franchise dealers having entered the consignment selling market. The growth in the consignment selling marketplace potentially increases the exposure of consumers to the risks associated with this type of sale.

3.4 Number of dealers

As at 30 June 2020 there were 985 licensed dealers in Western Australia, of which 138 were approved by the Commissioner to sell vehicles on consignment. This represents approximately 14 per cent of licensed dealers. Of this number, 118 dealers held an open consignment trust account and are required to have their trust account audited and submitted to the Commissioner by 30 September 2020.²⁷

Licensing trend data for the preceding four years indicates that on average, 955 dealers have been licensed annually, with an average of 116 dealers being permitted to sell vehicles on consignment.

Not all dealers holding an open consignment trust account are actively engaged in consignment selling. Dealers who have not held or received any trust funds during the year are required to submit a statutory declaration, stating that during the year no consignment sales occurred, in lieu of an audit of the consignment trust account and submission of an audit report.²⁸

²⁴ ACLWA, section 18.

²⁵ DMIRS, D-RIS 2019, pp84.

²⁶ Ibid., pp77-84.

²⁷ MVDA, section 32I(1), MVDSR, Regulation 10N.

²⁸ MVDA, section 32I(2), MVDSR, Regulation 10F.

Dealer consignment trust account information reported as part of motor vehicle industry audit program indicates that over the past four years, on average, 30 per cent of dealers holding consignment trust accounts lodged statutory declarations indicating that they have not engaged in any consignment selling.

3.5 Role of Consumer Protection

In addition to the Commissioner's licensing function, a number of other functions to regulate motor vehicle dealers are undertaken by Consumer Protection.

Dealers

- Education and advice – as a means of promoting industry compliance, dealers are provided with information on the correct processes required to successfully complete a consignment sale. Common problems experienced by dealers in conducting transactions are also explained.
- Proactive compliance – proactive inspections are undertaken to ensure that the dealer is conducting their business in accordance with the requirements of MVDA.²⁹
- Investigations and enforcement – Consumer Protection undertakes formal investigations and initiates prosecution or other enforcement actions where appropriate.³⁰

Consumers

- Education and advice – information is provided to ensure consumers considering selling vehicles on consignment are aware of the regulations covering this activity.³¹
- Complaints – Consumer Protection will conciliate complaints on the consumer's behalf if attempts by a consumer to resolve the matter are unsuccessful.³²

3.6 Other jurisdictions

Each of the states and territories in Australia applies a different approach to the regulation of consignment sales.

Along with Western Australia, consignment selling by vehicle dealers is permitted in Queensland, New South Wales, the Australian Capital Territory, South Australia, Tasmania and the Northern Territory. Victoria is currently the only jurisdiction in which consignment selling of vehicles in the retail marketplace is banned.

²⁹ DMIRS 2020, Consumer Protection – Industry – 'Consignment selling of vehicles.' (Available at: <https://www.commerce.wa.gov.au/consumer-protection/consignment-selling-vehicles>). Accessed 21 August 2020.

³⁰ DMIRS 2020, Consumer Protection – Consultation, compliance and reports – 'Named traders and compliance reports – Compliance actions.' (Available at: <https://www.commerce.wa.gov.au/consumer-protection/compliance-actions-1>). Accessed 21 August 2020.

³¹ DMIRS 2020, Consumer Protection – 'Announcements.' (Available at: <https://www.commerce.wa.gov.au/announcements>). Accessed 21 August 2020.

³² DMIRS 2020, Consumer Protection – Consumer complaints – 'Making a complaint.' (Available at: <https://www.commerce.wa.gov.au/consumer-protection/making-complaint>). Accessed 21 August 2020.

In 1985, a review of Victoria's motor industry legislation identified concerns about motor vehicle traders experiencing financial difficulties that were engaging in consignment selling in order to continue trading. Consignment selling of motor vehicles by motor vehicle traders and consumers was subsequently banned in Victoria in 1986 under section 36 of the *Motor Car Traders Act 1986* (Vic) (MCTA). However, motor vehicles can be consigned between licensed motor car traders and special traders.³³

The rationale for banning consignment selling was because the activity:

“offers broad opportunities for fraud on vendors by allowing the possibility for traders to misrepresent the sale price of a vehicle to the owner or by allowing the possibility that sales proceeds will not be forwarded to the owner. A major objection to consignment selling is that it allows traders to effectively rely on the public to finance their stock.”³⁴

The ban relating to consignment selling does not apply to motor vehicles sold at public auction, thereby allowing consumers to consign their vehicles for sale by auction.

Licensed motor vehicle traders are prohibited from selling retail, or offering to sell retail a motor vehicle on consignment from a member of the public. However, vehicles are permitted to be consigned between licensed traders and special traders.³⁵

Despite these requirements, breaches by motor vehicle traders of the MCTA provisions banning consignment selling continue to occur resulting in claims by consumers against the Motor Car Traders Guarantee Fund (MCTGF)³⁶ for losses suffered. These reports indicate that actions of particular motor vehicle trader and the associated detriment and monetary losses suffered by consumers have contributed significantly to ongoing claims made against the MCTGF.³⁷

³³ Under section 3 of the MCTA:

special trader means a **financier** or manufacturer or a related company of a financier or manufacturer being a body corporate;

financier means a person whose ordinary business is not that of buying selling or exchanging motor cars, but who carries on that business for one or more of the following purposes—

- (a) selling motor cars on instalment terms;
- (b) letting or hiring motor cars under hire-purchase agreements;
- (c) taking or enforcing securities over motor cars;
- (d) letting or hiring motor cars with or without granting any right to purchase them;
- (e) disposing of motor cars acquired by the person in connection with any of the purposes referred to in paragraph (a), (b), (c) or (d).

³⁴ Department of Justice Victoria, Review of *Motor Car Traders Act 1986* (Vic) and Attendant Regulations, Victoria, January 1998, pp23.(Available at <http://ncp.ncc.gov.au/docs/Victorian%20Review%20of%20the%20Motor%20Car%20Traders%20Act%201986%20and%20Regulations%2C%20January%201998.pdf>). Accessed 21 August 2020.

³⁵ Consumer Affairs Victoria 2020, 'Licensing and registration - Motor car traders – Running your business: 'Motor car auction house guidelines' (Available at: <https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/running-your-business/auction-house-guidelines>). Accessed 21 August 2020.

³⁶ Consumer Affairs Victoria 2017, 'Motor Car Traders Guarantee Fund claims register.' (Available at: <https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/public-register/motor-car-traders-guarantee-fund-claims-register>). Accessed 21 August 2020.

Consumer Affairs Victoria 2020, 'Download Annual Reports' (Available at: <https://www.consumer.vic.gov.au/annual-report/previous-annual-reports>). Accessed 21 August 2020.

³⁷ Consumer Affairs Victoria 2020, 'Latest News', (Available at: <https://www.consumer.vic.gov.au/latest-news>). Accessed 21 August 2020.

In a recent article, Victoria's Automobile Chamber of Commerce (VACC) expressed the view that available information regarding claims made on the MCTGF indicates licensed motor vehicle traders are substantially complying with their legislative obligations.³⁸

The VACC also called for reforms to consignment selling provision to address anomalies and the competitive advantage it states currently occurs as a result of auctioneers being able to consign vehicles from the public instead of traditional dealers.

The VACC suggests these inequities have been compounded recently by the introduction of a super luxury stamp duty (SLSD) on premium vehicles in Victoria, resulting in such vehicles being sold interstate, or instead, by auction in Victoria. In both instances it states that the payment of the SLSD is avoided. The Australian Capital Territory, New South Wales, Queensland, South Australia and Victoria also operate compensation accounts for claims for redress regarding consignment sales.

³⁸ Neil Downing. 'Consignment sales ban hurts Vic dealers: VACC calls for ability to sell via consignment and create a level playing field on stamp duty', *GoAuto News Premium* (Victoria), 28 February 2020 (Available at: <https://premium.goauto.com.au/consignment-sales-ban-hurts-vic-dealers/>). Accessed 21 August 2020.

Table 3 summarises the approaches applied in other jurisdictions.

Table 3 - Consignment sales regulation in Australia

Regulation	QLD	NSW	VIC	SA	TAS	ACT	NT	WA
Consignment selling permitted	√	√	X ³⁹	√	√	√ ⁴⁰	√ ⁴¹	√
Appointment to be writing	√ ⁴²	√	N/A	X	√	√	√	√
Written consignment agreements (prescribed content)	X ⁴³	√	N/A	X	X	√	√	√
Dealer, agent required to have trust account	√ ⁴⁴	√	N/A	X	X	√	X	√
Dealer, agent required to deposit money from sale into trust account within set period	√	√	N/A	X	X	√	X	√
Agreed amount to be paid to owner within set period	√ ⁴⁵	√	N/A	X	X	√	X	√
Compensation funds – allows owner claim for losses incurred from actions of dealers	√ ⁴⁶	√	√	√	X	√	X	X

³⁹ Section 36 MCTA (Vic). Consignment sales between licensed motor car traders and consumers are banned except for sales by auction. Does not apply to transactions between licensed traders and special traders.

⁴⁰ *Sale of Motor Vehicles Act 1977* (SA), section 31. Authority to dealer to sell as agent.

⁴¹ *Consumer Affairs and Fair Trading Act 1990* (NT), subsections 172(1) and (2).

⁴² *Motor Dealers and Chattel Auctioneers Act 2014* (MDCAA) (QLD) section 81(2) Motor dealer appointment may be for the performance of— (a) a particular service within a stated period (a single appointment); or (b) a number of services during which the appointment continues (a continuing appointment).

⁴³ MDCAA, section 235. Appointment of motor dealer or chattel auctioneers – Form 9. A form approved by the Chief Executive.

⁴⁴ *Agents Financial Administration Act 2014* (AFAA), (QLD), section 7 – Definitions, Schedule 1 – Dictionary, section 9, Trust Accounts.

⁴⁵ AFAA, section 23(5) – Permitted drawings from trust accounts.

⁴⁶ *Ibid.*, Parts 6, 7 and 8 regulate a combined claim fund for the property, motor and debt collector industries.

4 OPTIONS FOR REGULATION

Outlined below are three possible options for consideration about the regulation of consignment sales of motor vehicles:

Option A – No change (retain the status quo).

Option B – Strengthen existing licensing eligibility provisions and training.

Option C – Ban consignment selling.

Option A – Retain status quo

Under Option A there would be no change to the current laws. The MVDA provisions permitting consignment sales of motor vehicles by dealers would remain in place and current licensing restrictions and auditing requirements would continue to apply.

Continuing to allow consignment selling of motor vehicles would be consistent with regulatory arrangements that apply to the motor vehicle industry industries in other jurisdictions, with the exception of Victoria. Adopting this option would not generate any additional costs for industry or government.

The advantages and disadvantages of Option A are summarised in Table 4 below.

Table 4: Advantages and disadvantages

	Potential Advantages	Potential disadvantages
Option A Status quo (no change) - maintain the current regulatory requirements.	Industry <ul style="list-style-type: none"> No additional compliance costs for industry. Consumers <ul style="list-style-type: none"> No change. Government <ul style="list-style-type: none"> No additional resourcing or regulation required. 	Industry <ul style="list-style-type: none"> Concern about consignment sales negatively impacting industry not addressed. Consumers <ul style="list-style-type: none"> Continued risk of consumer detriment occurring. Government <ul style="list-style-type: none"> No change.

Option B – Retain consignment selling but strengthen contract arrangements, licensing eligibility requirements and training

Option B would include additional eligibility requirements for dealers seeking to sell by consignment. This option would:

- require a dealer who intends to sell vehicles on consignment to lodge a bank guarantee or a fidelity bond as part of their application for a licence;
- introduce the principal-agent relationship obligations into motor vehicle consignment sales under the MVDA, similar to arrangements that apply in the real estate and settlement industries;

- incorporate into the dealer licensing training course, knowledge and training on the fiduciary responsibilities that are created under a principal-agent relationship; and
- enable the Commissioner to consider the fitness and character of an applicant's close associates in order to prevent a disqualified or unsuitable person from participating in the business.

Bank guarantees and fidelity bonds

In commerce, individuals or entities undertaking a diverse range of activities can be asked to lodge bank guarantees or sureties in providing an undertaking against some future performance obligation.⁴⁷

For example, in Western Australia, an individual or company who applies to the Commissioner under the *Debt Collectors Licensing Act 1964 (WA)* for the grant of a debt collectors licence or a licence renewal must lodge a fidelity bond or approved security (such as a bank guarantee) before the Commissioner will issue any licence or renewal.⁴⁸ The bond amount in the case of an individual is \$6,000 and \$10,000 for a corporation.

Fidelity bonds

A bond is an insurance product and is designed to provide cover in the event of certain specified losses, subject to bond products being available.

Using the licensing of debt collectors as a guide, the costs for licensees regarding fidelity bonds for the above amounts are:

- Individual – approximately six percent per annum calculated on the bond amount, payable for each year of the licence.
- Corporation – approximately five percent per annum calculated on the bond amount, payable for each year of the licence.

Bank guarantees

A bank guarantee is a type of guarantee from a lending institution under which the institution will ensure the liabilities of the dealer will be met. Many of Australia's retail banks offer a range of bank guarantee products for bank customers for a fee. In addition, a person will be subject to the bank's financial risk assessment processes, which generally require that they hold a certain level of assets. A general summary of the range of the fees amounts and interest rates payable by customers on business bank guarantees is as follows:

- establishment costs – range from \$100 to \$2,000.⁴⁹
- ongoing fees – retail banks usually require their customers to pay ongoing fees, which can range between 1.5 per cent per annum and 3.0 per cent per annum of the bank guarantee amount.⁵⁰

⁴⁷ Fidelity bond is a form of surety.

⁴⁸ *Debt Collectors Licensing Act 1964 (WA)*, section 20.

⁴⁹ Establishment fees payable are typically expressed as being a fixed amount or a percentage of the bank guarantee.

⁵⁰ Some banks charge minimum fees on a half-yearly basis. Some banks impose monetary minimums or limits on bank guarantees offered to customers. Otherwise banks may require that lenders meet substantial collateral conditions for bank guarantees above particular monetary amounts.

Estimated costs

With the comparatively low number of motor vehicle dealers authorised to engage in consignment selling who may be potential clients of financial products, determining the ideal value of any fidelity bond or bank guarantee amount is difficult.

Table 5 below provides estimated costs based on various bank guarantee amounts. For example, in the Luxuride matter, losses for 15 vehicles were estimated at around \$960,000 – this equates to an average of \$64,000 per vehicle. In the matter involving a caravan dealer outlined earlier, losses of \$550,000 for 24 owners were estimated – this equates to an average of around \$23,000 per caravan.

Training courses are delivered by the Motor Trade Association of WA and Fusion Business College for applicants for motor vehicle dealer’s licences at costs ranging between \$370 and \$420. There will be a one-off minor administrative cost for training course providers to update the consignment module in the motor vehicle dealer training course manual to include information on fiduciary responsibilities between a principal and agent.

Table 5: Estimated cost of implementing bank guarantee

Bank Guarantee

Amount of guarantee	Establishment cost and annual fee for 3 years ⁵¹
\$100,000	\$18,750
\$250,000	\$45,600
\$500,000	\$91,250
\$1,000,000	\$182,500

⁵¹ Costs are calculated based on an ongoing guarantee rate of 3.0 percent per annum, payable in advance half yearly. Total funding costs include establishment fees. Estimated costs are calculated to apply over the three year period of a motor vehicle dealer’s licence. Note: as a fidelity bond rate of 6 percent per annum is equivalent to the guarantee rate of 3.0 percent being paid twice yearly, a table for fidelity bonds is not included.

The advantages and disadvantages of Option B are summarised in Table 6 below.

Table 6: Advantages and disadvantages

	Potential Advantages	Potential disadvantages
Option B Retain consignment selling but strengthen contract arrangements, licensing eligibility requirements and training.	<p>Industry</p> <ul style="list-style-type: none"> Improved regulatory mechanisms relating to the type of activity undertaken by dealers. Clarifies the responsibilities of dealers to consumers when selling a vehicle on consignment. Reduced competition as fewer dealers may be able to meet additional licensing eligibility requirements. <p>Consumers</p> <ul style="list-style-type: none"> Improved consumer protection and transparency in relation to consignment sales transactions. Reduces risk of consumer detriment occurring. Improved protections through bank guarantees/fidelity bonds. <p>Government</p> <ul style="list-style-type: none"> Improved consumer protections. 	<p>Industry</p> <ul style="list-style-type: none"> Increased compliance costs for dealers to comply with new licensing requirements. <p>Consumers</p> <ul style="list-style-type: none"> Increased regulatory costs to industry may be passed on to consumers. <p>Government</p> <ul style="list-style-type: none"> Increased administrative and compliance costs associated with mandatory industry requirements.

In addition, financial institutions providing bank guarantees or authorised fidelity bond providers will require business customers to satisfy other obligations in order to secure funding.

In both cases, a prospective customer’s fulfilment of institutional eligibility criteria typically involves providing appropriate security-backing (e.g. cash, property, assets) and being subject to comprehensive risk assessment.

Option C – Consignment selling by dealers banned

Under Option C, consignment selling of motor vehicles by dealers in a retail setting would be banned in Western Australia. Consignments between licensed motor vehicle dealers and a trade owner⁵² would be excepted meaning motor vehicle dealers, financiers, hire car companies who currently may dispose of the vehicles they own (e.g. a fleet of vehicles) through a licensed motor vehicle dealer, would be able to continue to do so. Consumers would be able to continue to consign their vehicle for sale by public auction through a licensed motor vehicle dealer.

Under this option, consumers would no longer be able to consign a vehicle for sale in a retail setting through a motor vehicle dealer. Consumers seeking to sell their vehicles including caravans, motorcycles or luxury vehicles would have the following alternatives available to them:

- sale by public auction;
- by trade-in, when purchasing another vehicle;
- by direct sale to a motor vehicle dealer; or
- private sale – where the consumer undertakes the responsibility of selling the vehicle.

Option C, in exempting trade owners, will ensure that there is consistency with the current exclusions provided for under the MVDA⁵³ regarding licensed motor vehicle dealers, finance companies and hire car companies. Option C maintains ways for consumers to sell their vehicle through a licensed dealer, but also addresses the highest risk in the marketplace where consumer detriment currently occurs by prohibiting retail consignment sales. The exposure to misleading and deceptive practices, lack of transparency and risk of significant financial loss would all be minimised.

Option C would generate cost savings (with the exception of auction houses) as auditing of consignment trust accounts by consignment dealers will no longer be required. Estimated annual cost savings are likely to be between \$1200 and \$1700 per dealer.

⁵² MVDA, section 5.

⁵³ MVDA, section 32.

The advantages and disadvantages of Option C are summarised in Table 7 below.

Table 7: Advantages and disadvantages

	Potential Advantages	Potential disadvantages
Option C Consignment selling by dealers banned.	<p>Industry</p> <ul style="list-style-type: none"> Improved reputation and confidence in the industry as cases of consignment sales failings reduce. <p>Consumers</p> <ul style="list-style-type: none"> Avoids detriment and financial loss to consumers caused by consignment sales. Consumers would retain opportunity to sell vehicle by consignment via public auction. <p>Government</p> <ul style="list-style-type: none"> Reduced compliance costs. 	<p>Industry</p> <ul style="list-style-type: none"> Loss of income for dealers selling on consignment. <p>Consumers</p> <ul style="list-style-type: none"> Reduced competition and choice for consumers wishing to sell a vehicle by consignment. Potential for increased costs to consumers associated by only being able to use a single selling marketplace, such as auctions. <p>Government</p> <ul style="list-style-type: none"> No change.

5 QUESTIONS

Where possible, please provide evidence to support your views and answers, for example by including relevant statistics, examples or case studies. Please also provide information about the costs of the proposals where you can.

Questions – options for future regulation

- Question 1** Which option do you support and why?
- Question 2** Are there other options to address this issue? Please identify any additional benefits or disadvantages.
- Question 3** If a ban on consignment selling of motor vehicles by dealers were to be introduced (with the exception of vehicles sold at a public auction), is it feasible to require caravans to be sold at public auction or should the consignment sale of caravans be exempted from the ban?
- Question 4** Are there additional cost implications of the different options which have not been identified? Please include quantifiable information if possible.
- Question 5** In relation to Option B, do you support all elements or only some?
For example:
- (a) more stringent licensing assessment;
 - (b) specifying principal-agent obligations;
 - (c) clearer contracts;
 - (d) bank guarantee / fidelity bond requirements; or
 - (e) additional dealer training or demonstrated proficiency in consignment selling.
- If you do not support an element – please indicate why.
- Question 6** In relation to Option B, and for the purposes of implementing bank guarantee / fidelity bond requirements:
- (a) What do you consider to be appropriate bank guarantee or fidelity bond amount to be provided by a motor vehicle dealer as a requirement for approval to engage in consignment selling?
 - (b) On what basis should this amount be calculated – for example, per vehicle, based on a cap on the maximum number of consignment vehicles that a dealer can have for sale at any one time?
 - (c) Do you consider that an alternative financial product would be better to provide security over a dealer's obligations?

6 IMPLEMENTATION AND EVALUATION

6.1 Implementation

Implementation of Options B or C would require amendments to be made to the existing legislation, principally the MVDA and the MVDSR. There may also be a need for consequential amendments to other legislation, subject to the option adopted.

Transitional provisions will be required to allow industry time to comply with any changes that are implemented, except under Option A. For example, in regard to:

- Option B – upon the renewal of a licence, a motor vehicle dealer who wishes to continue to engage in consignment selling will be required to lodge a bank guarantee or a fidelity bond.
- Option C – sufficient time will need to be allowed to enable motor vehicle dealers to sell and settle existing consignment stock, finalise payment of the agreed proceeds from the sale to the consumer (the vehicle owner) and arrange for the auditing of consignment trust accounts.

6.2 Evaluation

The effectiveness of any amendments made to the MVDA will be reviewed five years after commencement.

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Regulation and Safety

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