

BULLETIN

Victorian Automobile Dealers Association



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VACC Sale Contracts have been updated

Licensed Motor Car Trader (LMCT) members should note that from June 2017, the terms and conditions of the VACC Contract of Sale of New and Used vehicles (VACC Sale Contracts) have changed.

The updated contracts are identified by 'Version 11 October 2016' and are protected by copyright to VACC.

Why change the VACC contracts?

The changes to the VACC Sale Contracts were implemented after VACC conducted its annual review of all products made available to members.

These adopted changes provide greater protections for dealers while remaining within the parameters dictated by the ACCC Unfair Contracts criteria.

Some important changes to Version 11 October 2016

Unfair terms provisions

Our advice indicates that the unfair contract terms provisions in the Australian Consumer Law (ACL) will soon be extended to small businesses. As vehicles sold by motor dealers are ordinarily for personal, domestic and household use, the VACC Sale Contracts are for use with consumers (assuming that they do not purchase the cars for the purpose of on-selling them) within the meaning of the ACL.

Accordingly, the VACC Sale Contracts were previously prepared with the "unfair terms" provisions in mind. Based on our legal review, Members will have compelling grounds to rely on, in response to any challenges as to the fairness of the terms.

For further clarity, a term will be an "unfair term" under the ACL if:

- it would cause a significant imbalance between the rights and obligations of the parties under the Contract;
- it is not reasonably necessary to protect the legitimate interests of the of the party who would be advantaged by that term; and
- it would cause detriment to a party if it were to be relied on.

Overall, our legal advice states that the previous version of the VACC Sale Contracts did not contain any unfair terms. However, our legal advisors have identified the clauses that they think would be most vulnerable to challenges from consumers, and have explained below why they believe that their inclusion is still justified.

Price increases

The advice notes that clause 2(a) of the New Vehicle Sale Contract enables the Seller to sell a vehicle at a price that is increased from the date of the Contract to the date of the delivery. In some circumstances, such a clause may be considered an unfair term (and one that should be struck out). However, this clause explains that such an increase would be a reflection of an increase in the

recommended retail price published by the manufacturer or distributor (and would not simply enable the Seller to increase the price for any reason whatsoever). Accordingly, the advice considers that this increase would be reasonably necessary to protect the legitimate interest of the Seller and this would serve as a defence to an allegation that the term is unfair.

The advice also notes that clause 2 provides the Purchaser with an option to release itself from the contract within three business days of receiving notice of a price increase – therefore, the Purchaser would also not be "locked-in" to a Contract with any such price increase if they were to act within this period.

Payment

Currently, clause 3 of the Used Motor Vehicle Sale Contract and clause 4 of the New Vehicle Sale Contract enables the Seller to charge penalty interest on any late payments of the Purchaser. Such a clause could amount to an unfair term under the ACL if the amount of interest charged did not reflect a genuine pre-estimate of the loss that the Seller would incur as a result of the late payment. However, as currently drafted, the penalty interest to be charged is a rate calculated based on the *Penalty Interest Rates Act 1983* (VIC), and the amount of interest charged must not exceed 5% of the purchase price of the vehicle. Therefore, it is the view of our legal advisors that this clause is not unfair because it makes a genuine pre-estimate of the loss that the Seller would suffer if the Purchaser failed to make payment by any due date.

Limitations of liability

There are some limitations of liability in place in clause 11 of the Sale Contracts. However, this limitation only operates to the extent permitted by law. Our advice considers this to be a strong ground on which a Member would be able to rely in the event of any challenge of the fairness of the term.

Updates to New and Used Sale Contracts

Additionally, during the review process, our legal advisors noticed that the version of the Used Contract of Sale was not as robust in regards to the prescribed wording used regarding the non-exclusion of statutory warranties and other rights. The updated version of the Used Contract of Sale has been amended to reflect this inclusion.

VACC can confirm that the contracts have included additional wording in the "Limitation of Liability" section of the Sale Contracts to address the liability of the traders under the ACL. Again there is a possibility the fairness of this additional wording may be challenged. However, these limitations reflect the extent to which such liability may be limited at law. Our legal advice considers this to be a fair basis for their inclusion.

Privacy Statement

There have been some minor updates to the Privacy Statement to reflect that the Australian Privacy Principles are set out in Schedule 1 of the *Privacy Act 1988* and to state that the Trader's Privacy Policy will set out information about how individuals may gain access to, and seek the correction of, their personal information, and how they may complain about any breach of the APP's. Our legal advice confirms that the Privacy Statement is still compliant.

Deal Management Systems Generated Contracts

LMCT's who obtain their vehicle contracts through their dealer management system (DMS) should contact their DMS provider and ask to have their contracts of sale updated to reflect the changes in the VACC Contracts.

For those who have an annual licensing arrangement with VACC, please feel free to contact Luke Kearney on 03 9829 1156 to arrange for the new version contracts.

Please note that the VACC Contracts and terms and conditions are copyrighted and that they cannot be reproduced or replicated without the express authority of VACC. This is an area where VACC has been vigilant as it appears that some providers are reproducing the information provided by VACC,

sourced by using member finances and then charging members for the adaptation to their system to reflect these changes. This is not fair on members. VACC encourages members who are aware of misuse of member contracts to contact VACC.

Availability

LMCT members can purchase updated VACC Sale Contracts from VACC stationary department by calling (03) 9829 1191 or by visiting www.autoistore.com.au

To acquire an annual licensing agreement for the electronic use of VACC New and Used Car Contracts of Sale, please call Luke Kearney 03 9829 1156.

Old stock

Any old stock identified by Version 10 July 2015, can still be used. However, they will not afford the increased level of protection covered in the current release.

Regards



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