

VACC Submission

# Victorian Government Small Business Retail Regulation Review

28 October 2016



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## About VACC

The Victorian Automobile Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,000 members in over 20 retail automotive sectors that employ over 50,000 Victorians. VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialist, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers. In addition to VACC, its sister organisations – the Motor Trade Associations, represent the automotive industry for their respective states.

## Background of the automotive industry

The automotive industry contains approximately 65,000 businesses nationally, the vast majority of which (95%) are small and family owned and operated businesses.

For the year ended June 2015, aggregate employment for the industry was recorded at 362,000 persons. In gross domestic product (GDP), the automotive industry as a whole accounted for approximately \$38.3 billion or 2.5% of Australia's annual GDP in current prices in 2014-15.

The industry is very competitive with small profit margins, consumer behaviour limits capacity of industry to raise prices, large multi-nationals (insurance companies, the oil industry, supermarkets, vehicle manufacturers) heavily influence consumer behaviour and/or price. The cost of doing business is high due to the ongoing regulatory creep and the rapid vehicle technology advances requiring high-level skills and expensive technology in the repair service process.

## Executive Summary

VACC supports the Victorian Government's Red Tape reduction initiatives and has been unwavering in its support and promotion of the Small Business Regulation Review announced by the Honorable Philip Dalidakis, Minister for Small Business, Innovation and Trade on 28 July 2016.

There is significant transactional regulatory red tape within the automotive industry and as such, VACC believes there is scope for reform to various State-based regulations that would be of benefit to both businesses and consumers. In this heavily regulated business environment, many VACC members have expressed dissatisfaction and a lack of confidence in the information and level of service provided by some government agencies. For the purposes of this review, this applies to both state and local government agencies.

VACC has been an active participant at all the Industry Roundtables conducted by the Department of Economic Development, Jobs, Transport and Resources (DEDJTR) held across Victoria. Among retail industry participants to the industry roundtables, there were common grievances around how the State Government administers and delivers various regulatory obligations relating to small business and more specifically, businesses in the automotive industry. Furthermore, the DEDJTR industry roundtables identified a lack of a 'solutions-based approach' from regulators.

Furthermore, the ongoing red tape issues caused by the lack of harmonisation in regulatory obligations across jurisdictions has resulted in considerable lost income and jobs growth potential for businesses. In the automotive industry, this has been further fueled by the growth of online and other digital disruptive tools (e.g. carsales.com.au), making the Victorian marketplace a national, and in some cases, a global marketplace.

As the current industry environment becomes more subject to competitors and new business models the drag associated with poorly designed or poorly administered regulatory imposts has the capacity to adversely affect those businesses who strive to meet these requirements.

Whether real or perceived, there are growing concerns in the industry that some businesses appear to be able to operate with little oversight from government, even when they are operating in regulated occupations. VACC has been vocal on this issue for some time and has been frustrated, not by a lack of red tape, but a lack of enforcement of the red tape that already exists amongst businesses that flout the current laws.

# Regulatory Issues in the Retail Motor Vehicle Industry

## Licensing Red Tape Issues

VACC supports, in principle, the retention and improvement to the current licensing regime as administered under the Motor Car Traders Act and funded from Licensed Motor Car Trader (LMCT) annual fees.

Processes for new licence applicants can be difficult and time consuming. Many new applicants who may or may not be members of VACC, turn to VACC in the hope of successful intervention when attempting to interpret regulation. These newly appointed LMCTs are at times forced to guess their way through new or confusing regulations or consumer facing incidents if they are not members of VACC.

Current licensed businesses who seek to alter some of the original licence details, such as a change of location, are faced with incredible amounts of red tape by local councils. In one instance, a move by a business to premises immediately across the road in the same municipality (City of Moreland) took several months to be approved. This largely forced the said LMCT to trade unlicensed to sustain their livelihood and employment. It was disappointing that the State Government department in this instance would not or could not intervene to expedite the process.

## Measures to ensure more timely business transaction processes by government departments would be welcomed, or the capacity for the State Government to intervene where time lines for administrative processes are unreasonable

LMCTs strive for a level playing field and remain perplexed at the number of unlicensed persons/businesses that currently operate without intervention from government regulators with prescribed enforcement actions. For reasons unbeknown to VACC, regulators do not use data provided by industry or other sources (e.g. Task Force Discover) to intervene, or interrupt the unlicensed market where it is blatant by unscrupulous operators.

In addition, licensed business regulation should be enforced with the full force of the law, not only should regulators be required to investigate and take action, but Courts need to make decisions that reflect expectations from the community. In the rare cases where a prosecution has been brought by regulators, the resultant penalties awarded by the courts has been so miniscule, that the act of operating in an unregulated way has proven to be more profitable than having the impost of meeting regulatory requirements.

## VACC Recommendation

***That the Victorian Government promote and protect the licensed motor vehicle industry and immediately ensure resources allocated to identifying and interrupting the unlicensed industry are active and accountable. VACC welcomes the increase of penalties for businesses operating outside of the required regulatory requirements.***

## Statutory Warranties Motor Car Traders Act -v- Australian Consumer Law

As stated in the 2013 VACC submission to the *Red Tape Review Motor Car Traders Act 1986*, VACC continues to support the existing *Motor Car Traders Act 1986* (MCTA) provisions. The provisions make good sense and lead to a more effective and timely resolution of issues. Importantly, the existence of the Act will eradicate the requirement for both parties to attend VCAT to resolve a dispute. This process is quite an onerous and costly process for all parties when an issue is referred to VCAT without any warning.

There is also concern regarding the regulatory overlap between the industry specific Motor Car Traders Act and the general consumer protection provisions of the Australian Consumer Law (ACL). LMCTs still maintain that the consumer measures and definitions in the MCTA provided clarity and a more definitive position on second hand vehicles which, it is argued, created an improved position for consumers in their understanding of their rights and obligations when buying a used vehicle.

The provisions contained in Section 54 of the *Motor Car Traders Act* are concise and prescribe a 3-month or 5,000 kilometer warranty to retailed vehicles up to the age of ten years that have travelled less than 160,000 kilometers. A legislated MCTA warranty has been in place since the commencement of the Motor Car Traders Act in 1973, and over time has been refined, and has worked exceedingly well. The MCTA clearly differentiates between new and used vehicles, therefore providing clarity for consumer and ease of interpretation.

The advantage of the MCTA is that it is clear and easily comprehensible in its operation, and provides certainty to both the trader and the consumer. Red tape is created when government agency operatives do not take a mediatory approach and rely solely on providing consumers with VCAT application papers.

Consumers buying from a Licensed Motor Car Trader under the current arrangements are also protected by the safety provisions of Section 76(a) of the MCTA. S.76 contains a right for consumers to make a claim on the Motor Car Traders Guarantee Fund, if a trader fails to meet the warranty obligations. Therefore, the consumer is doubly protected. Even if a trader has gone out of business, the Fund will consider a claim. Such a claim would not be easily processed under the Australian Consumer Law, as it must be determined by a VCAT hearing or in a Victorian court.

### VACC Recommendation

***That the Victorian Government recognises the burden being placed upon VCAT when dealing with minor automotive industry issues and encourages consumer protection agencies to settle LMCT – Consumer disputes pursuant to Motor Car Traders Act.***

## Registered Cars Sold at Public Auction

Section 42A of the Motor Car Traders Act mandates that all registered vehicles in Victoria must be sold with a roadworthy certificate. Currently in Victoria an exemption is granted to public auction houses under Section 42A (3) of the Motor Car Traders Act from providing a roadworthy certificate for a car sold at public auction.

LMCT members fail to understand how public auction houses have an exemption from providing a roadworthy certificate for the sale of a registered vehicle, when sold under the fall of a hammer. This provides public auction houses with an unfair market advantage and presents a detriment to consumers.

The issue is exacerbated when unregistered vehicles are retailed at public auction (or privately) with number plates still attached/affixed. It is the view of VACC that this process of sale has the capacity to encourage the infiltration of crime in the motor vehicle sales industry and may also be associated with illegal rebirthing of vehicles.

### **VACC Recommendation**

***VACC calls for a review of the Motor Car Traders Act Section 42A(3) and the Road Safety Act (Vehicles) Regulations 2009, Regulation 72(2) and 73(2) to investigate and address the issue of vehicles sold at auction without a roadworthy certificate, and the issue of unregistered vehicles being sold at auction with the number plates attached.***

## Farm Machinery

Further opportunities for red tape reduction are identified within Regulation 48 (1)(f) of the *Road Safety Act (Vehicles) Regulations 2009* as it applies to slow moving, rural farm machinery.

The requirement for the installation of front number plates on tractors is red tape that hinders industry and the community. It is strongly argued by VACC, and in particular its regional members that rear number plate should be sufficient for the identification of slow moving agricultural machinery. It is also worth noting that tractors do not speed through red light cameras, hence front plates are not needed for such identification. Furthermore, many attachments fitted to the front of tractors make fitment and maintenance of plates difficult due to their design and purpose for use on the land. Where a number plate can be fitted it is highly likely to be dislodged or damaged due to the operation of the vehicles in the environment in which they operate. Replacement of number plates is costly, as are unreasonable punitive measures imposed on drivers for not displaying a front number plate while relocating tractors from farms on the public road. In some instances, there is no place for a front number plate to be fitted on agricultural machinery and, as such, a pragmatic solution must be determined.

### **VACC Recommendation**

***Change the Road Safety Act (Vehicles) Regulations 2009, in particular Section 48(1)(f) by granting an exemption for farm machinery from having a front number plate affixed.***



## Harmonisation Between States

### Duties Act 2000

When a consumer buys a roadworthy, registered vehicle from an LMCT, the consumer pays the LMCT the Motor Vehicle Duty (the duty). The LMCT then lodges this payment and the registration application with VicRoads. Until payment is received, both the consumer and the LMCT are liable for duty.

Victoria remains the only state where the duty is obligated to be paid by the LMCT when a vehicle is acquired by a consumer from a LMCT. In all other States, it is usually negotiated between the vehicle purchaser and the trader who pays the duty at the point of registration application. From an online retailing perspective, under 'Drive Away' pricing criteria as currently mandated under ACL provisions, cars advertised by Victorian LMCTs will always appear to be more expensive as they must include the Motor Vehicle Duty component. This situation is a major impediment to the marketing of vehicles by Victorian based traders and consequently places them at a pricing disadvantage to their interstate counterparts.

Examples of these pricing differentials are illustrated in Attachment A, the illustrations show for the same model of motor vehicle extracted from a **NSW Dealer** via carsales.com.au and a **Victorian based** dealer via carsales.com.au.

The differentiation in pricing is not due to a different value in the vehicle but solely due to the requirements of one state to advertise with the duty included while another state (in this case, NSW) does not have to allow for this. Thus, it appears that the same vehicle is cheaper if purchased from NSW, when in fact this is not the case. VACC argues that notwithstanding countless government attempts to harmonise simple administrative processes such as this Victorian dealers and consumers are left disadvantaged and still perplexed at the intransigent interstate policies on this matter.

### VACC Recommendation

***VACC calls on the Victorian State Government to amend Section 216 of the Duties Act 2000, to allow for harmonised legislation where the obligation to pay duty on the transfer of a registered motor car can be negotiated between the LMCT and consumer.***



## Towing Rules and Regulations

Towing operators that operate across state borders impacted by towing regulations with regards to cross state towing fees. Victorian VACC members deal with multiple fee regimes, and are doubly disadvantaged by having dual state operating licenses.

### Towing Operator points of concern with the Accident Towing Services Regulations 2008

#### 1. Enforcement

Fundamentally, the towing industry is of the view that matters of difficult enforcement are not being addressed and minor infractions are pursued with vigor.

This is highlighted in the example of a towing business, in the heavy towing industry, regularly attending accidents in the Victorian Accident Allocation Area with a truck to tow, although unlicensed for the area. VicRoads' Officers have had first-hand knowledge of this activity, yet no action has been forthcoming to clarify the status of allowable or not allowable activity in restricted areas subject to licensed accident allocation. While VACC understands that some debate over legal or resource issues is inevitable, this does little to address the problem, nor does it demonstrate to the industry that laws will be upheld by the authority.

#### 2. Salvage

The issue of vehicle salvage at accident scenes was raised earlier this year when VicRoads provided a definition of 'salvage' that was open to interpretation. VicRoads did not provide any clarity when pressed on improved definition or interpretations. The VicRoads definition is at odds with the towing industry's view of what constitutes salvage, therefore creating a consequential problem of clarifying what and when charges can be made for salvage.

Salvage rates for towing (and its subsequent retraction) has only served to exacerbate an already volatile position within the towing industry.

#### 3. Legislative and Regulatory Amendments

VACC argues that VicRoads should address several issues which have been either omitted from legislation or misinterpreted by VicRoads. These include the application for a tow truck driver training permit, licenses transfer legislation and the proper recording of motorist's details by the Towing Accident Allocation Centre. Rather than addressing these relatively simple issues in the past, VicRoads proposed that a major review of the industry be conducted by the Essential Services Commission (ESC) which was undertaken in 2016. VACC argues the ESC Review was not necessary nor appropriate. VicRoads is yet to provide direction on which aspects of the ESC's final recommendations are to be implemented and what impact they may have on towing operators. There is still a high potential that the wrong business rules developed by VicRoads, as a result of following through on the ESC recommendations, may undermine industry confidence, and thus destroy license values and good will for existing businesses.

#### 4. Cross Border Issues

VACC seeks advice from the Victorian Government as to whether a Victorian licensed tow truck operator can perform towing activities in the State of New South Wales and without penalty from either VicRoads or RTA NSW. VACC also seeks to understand whether regulation 55 of the Tow Truck Industry Regulations 2008 (NSW) is the relevant statutory provision on this matter. In summary, the regulations provide as follows:

- a) Regulation 55: This permits a person who holds a tow truck licence or permit in a State other than NSW as being exempt from the requirements under the *Tow Truck Industry Act 1998* from holding a licence or driver's certificate in the State of NSW.
- b) Sub regulation 2 would appear to contradict sub regulation 1 by stating that the exemption contained in sub regulation 1 does not apply if the towing work commences in NSW.
- c) Sub regulation 3 further complicates an interpretation of the provisions by stating that regulation 55 does not affect any entitlement or rights of a person who holds a tow truck licence or driver's certificate in another state.
- d) The note which forms the conclusion to regulation 55 indicates that a holder of a tow truck licence in another state must register their licence with the RTA in NSW, which can impose conditions on the registration and use of the licence, consistent with the conditions imposed upon the licence in the home state. In other words, if the licence in Victoria is a trade towing licence, then the operator will be restricted to using the vehicle for trade towing purposes only. Similarly, if the licence permits the attendance at an accident scene, then it follows that such a licence holder would be permitted to attend an accident scene in NSW.
- e) On reading of the legislation, sub regulations 1 and 3 are consistent. However, sub regulation 2 contradicts 1 and 3. In these circumstances, if a charge were to be laid against any members, there would be a strong defence available due to conflict of laws which should lead to a dismissal of any charge.
- f) VACC supports the view that a Victorian licenced tow truck operator and/or driver with the appropriate certificate can attend an accident scene in NSW provided the licence holder is permitted to do so in their home state and provided the licence holder registers their licence with the RTA in NSW.
- g) This view is based upon a literal translation of regulation 55. VACC has conducted a search of the NSW Supreme Court database and has found no reported decisions in relation to this point.
- h) VACC has also conducted a search of the NSW Statutory database for any legislative amendment to regulation 55. Regrettably, there are no further amendments and the Regulations of 2008 remains the most current and prevailing law in relation to this issue.

## Miscellaneous Issues/Concerns

- The definition of salvage does not consider the extra work when a car is still on a road related area, but is difficult to extract or load.
- There is no provision for non-accident tow customers to ride in the truck when their car is being towed or they have engaged in a tow truck service and need to be picked up prior to the vehicle being towed (a real concern having to leave vulnerable road users stranded by the road often at night and in remote areas). Earlier legislation only prohibited unauthorised persons from being in a tow truck while attending an accident, and had a trade tow customer provision.
- Further clarification of the storage calculation formula down to hourly rate or number per day or part thereof is required.
- Being unable to charge for administration such as sending subsequent letters for towing and storage costs to customers, re-sending photos, dockets etc. is impacting on micro business sustainability.
- Being unable to hold vehicles for unpaid salvage.

## Franchising Issues in the Retail Motor Vehicle Industry

The Franchise Code of Conduct does not address the imbalance in the relationship between franchisees and the franchisors. While the Code seeks to provide conditions and protections across a range of industries its generic approach overlooks many issues that are more pertinent to the automotive industry. For example, long term dealership agreements that require significant investment by franchisees still appear to fail the franchise operator in their dealings with multi-national organisations that may erode or remove franchise boundaries of over populate marketing areas. It is the view of VACC that while the Franchise Code is administered by the ACCC, there is scope for the Victorian Government to become more engaged in understanding the difficulties in the automotive franchise sector, and to assist in achieving a more balanced outcome for franchisees and those consumers who purchase vehicles from them.

VACC is looking for support for a specific automotive franchise code given that even the smallest automotive dealer will invest over \$500,000 in the dealership but operates at the mercy of the decisions made by the franchisor and has little protection in law.

### How does it Affect Business in the Industry?

The current Franchise Code has led to a dictatorial attitude by manufacturers to retailers. In many cases, unviable requests are made on retailers. Franchise terms can act as a disincentive to attracting new entrants to the industry. It has been reported to VACC that since the introduction of the Code, many franchisors have shifted the more onerous parts of their franchise contracts out of reach of the Code, and into other operational requirements foisted onto franchisees.

### How can the Problems be Fixed?

VACC supports the development of a specific franchise code for the retail motor vehicle industry on the basis that it is believed it would deliver fairness and a balanced relationship between manufacturers and retailers.

### Our Experience

The unfair termination and non-renewal of retailer franchise agreements in an unreasonable manner, significantly impacts on the reputation, cash-flow and viability of a business operator. Franchise agreements under the existing Franchise Code are often structured in such a manner that retailers effectively have no business they can sell.

## Attachment A – Pricing Differentials Between NSW and Victoria

### 2016 Ford Focus ST LZ Manual - NEW SOUTH WALES DEALER



**\$39,888**

**Drive Away**

### 2016 Ford Focus ST LZ Manual - VICTORIAN DEALER



### 2016 Ford Focus ST LZ Manual

**\$43,953**



**Drive Away from \$43,953**

**\$39,440\* Excl. Govt. Charges**