

Motor vehicle industry newsletter



Motor Vehicle Industry Board message

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Chairperson - Motor Vehicle Industry Board

Dealer trust accounts – don't risk criminal prosecution

It is the annual audit time for dealers' consignment trust accounts. The recent failure of Pat Murphy Motors brings into stark relief the need for the Board's annual audit program.

Regrettably the Board has received an increased number of reports from auditors identifying problems with the manner in which some dealers operate their trust accounts.

It is clearly not well understood that errors in operating trust accounts can have very serious consequences for dealers. Trust accounts are not just ordinary bank accounts. The law requires that everything a dealer does with a trust account is accurate, professional and in the language of the industry, 'squeaky clean'. A failure to comply with the legal requirements can lead not only to action for breaches of the *Motor Vehicle Dealers Act 1973*, but in some circumstances, criminal prosecution. Unauthorised use of trust money (including borrowing it) is a criminal offence. The courts view breaches of trust very seriously as they involve the management of third parties' money.

Unfortunately, this year a number of dealers have failed to comply with their legal obligations, leaving them exposed to prosecution or action before the State Administrative Tribunal.

Others have not taken their obligations to have the audit done on time seriously enough and the Board will now consider taking action against them.

Consequently, it seems timely to remind dealers of the requirements of the Motor Vehicle Dealers Act when taking vehicles on consignment for sale on behalf of members of the public.

Consignment trust accounts

- Before taking any vehicle under a consignment agreement, the dealer must have a 'Consignment Trust Account' to deposit the funds into.
- The dealer must ensure the name of the trust account includes:
 - a) the full name of the dealer;
 - b) the dealer's licence number;
 - c) the trading name (if any); and
 - d) the words 'consignment trust account'
- When a dealer opens or closes a trust account, the Motor Vehicle

Industry Board must be informed as soon as practicable in writing, specifying:

- a) the name and number of the trust account; and
- b) the name and address of the financial institution with which the trust account is or was maintained.

- All funds from the sale of a consignment vehicle must be paid into the trust account.

Trust accounts should not incur fees or be credited with interest. Dealers should resolve that issue with their financial institution so that any fees are charged to their general account.

Payments to and from the account

Trusts accounts should be used only for transactions in consignment sales and the following rules must be observed.

- Payments for consignment sales must be deposited immediately into the trust account and not later than the day after receipt.
- A receipt must be issued and retained for auditing purposes.

Motor vehicle industry board message. Continued on page 2

Trader Enquiry Service for motor vehicle traders

The Trader Enquiry Service is an inspection service offered to automotive dealers and repairers who need advice to avoid or settle a dispute with a consumer. A fee is payable for this service.

The Automotive Technical Officers of the Motor Vehicles Branch who inspect the motor vehicle or automotive component will be able to provide advice about the standard or quality of work completed, and whether a defect in a vehicle is covered by a warranty.

The inspection will determine the cause of damage or failure and provides you and the customer with advice to help resolve any concerns.

The service allows dealers and repairers to deal with issues before they escalate into a dispute and avoids the need for consumers to lodge a formal complaint with the department. It saves time and money for all parties.

If possible, the inspection should be conducted in the presence of both your staff and the customer.

In all cases the technical officer will provide a written report to you and your customer.

You will also be given advice about your obligations to repair the vehicle under warranty, for example whether there is a statutory requirement, or if there is no obligation to repair because the fault is the result of customer misuse.

Note: The Trader Enquiry Service will only be provided to licensed motor vehicle dealers and repairers.

Cost

The minimum fee for a Trader Enquiry Service inspection is \$70. Any inspection taking more than one hour will be charged at \$35 per half-hour (including GST).

How to make an appointment

To arrange for a Consumer Protection Automotive Technical Officer to visit your premises and inspect a vehicle, ring (08) 9282 4361 Monday to Friday between 8.30am and 5.00pm. Country callers can ring 1300 30 40 54 for the cost of a local call.

More information

Contact the Consumer Protection Advice Line on 1300 30 40 54 for free advice about your rights and obligations under the *Motor Vehicle Dealers Act* and consumer legislation.



Motor vehicle industry board message. Continued from front page

Dealer trust accounts – don't risk criminal prosecution

- Payments from the trust account can only be made for:
 - a) the agreed amount to the consignor of the vehicle;
 - b) an amount payable to a financier who holds a security interest in the vehicle;
 - c) an amount payable for repairs made prior to sale by the dealer but only with the prior agreement of the seller; and
 - d) payments of the agreed commission to the dealer, but only after the funds have been cleared.
- Payments to the consignor must be made within two days of the dealer receiving the funds.
- Consignment funds cannot be used to pay for warranty repairs.

Annual auditing and reporting on trust accounts

All consignment trust accounts are to be audited annually and those audits must be conducted by a registered company auditor.

The annual audit period is from 1 January to 31 December each year and audit reports must be submitted within 3 months (by 31 March).

If there are no transactions through the trust account in the audit period, a statutory declaration to this effect can be submitted as an alternative to an audit.

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Fitting non-compliant exhaust systems. What is your responsibility?

From time to time the WA Police, the Department of Transport and Consumer Protection receive complaints about vehicles fitted with extra loud exhausts.

Many of those exhausts are fitted by exhaust retailers and local mechanical workshops and quite often the systems will be non-compliant (illegal) because they are excessively loud, or have modified catalytic converters which will affect the vehicles' emissions. Therefore they will not comply with Australian Design Rules (ADR).

ADRs apply to the construction of vehicles which are to be licensed for road use. They apply to manufacturers of vehicles and under state law vehicles must remain compliant with those rules if used on public roads.

Police can take action against vehicle owners for non-compliant exhaust systems by 'sticking' the vehicles.

What are your rights and obligations as a trader when fitting these non-compliant systems?

The government does not interfere with your right to supply or fit the non-compliant, after-market exhaust systems. However, as you are the expert **you are**

required to tell the owner when a new exhaust system is non-compliant.

Under the *Fair Trading Act 1987* goods supplied in the course of business must be of merchantable quality, which means that they must be fit for the purpose for which they are supplied.

Retailers fitting a non-compliant system to a licensed road vehicle have an obligation to disclose that it is non-compliant. We strongly recommend that you confirm in writing on your invoice that the system is non-compliant.

If a consumer has paid you to fit the system and you do not warn them that it is non-compliant, you may be liable for the cost of returning the vehicle to a legal condition.

Car dealer fined for not keeping records up-to-date

A North Perth car yard, which has now closed down, was fined \$5,000 in the Perth Magistrates Court in February after being convicted of 36 offences under the *Motor Vehicle Dealers Act 1973*.

North Perth Wholesale Pty Ltd was charged by Consumer Protection for failing to record the details of vehicles bought and sold, not displaying required particulars of second-hand cars for sale and not complying with laws governing consignment sales.

Officers visited the car yard in January last year and discovered that its register of transactions did

not reflect Department of Transport records. It was found that 15 vehicles had been bought or sold without the transactions being recorded.

During the same inspection of the car yard, it was also found that 18 second-hand vehicles did not display the mandatory notice of required particulars containing the vehicles' make, model and other registration details as well as the cash price and the dealers' details.

Three other charges related to vehicles being sold on consignment, where the dealer failed to have proper written consignment contracts containing specific terms

and conditions, or did not provide the consignor with a copy of the agreement.

Commissioner for Consumer Protection Anne Driscoll said the offences in this case were serious.

"The car yard showed a blatant disregard for the laws which aim to protect car buyers by providing accurate information on the vehicle being sold and recording the details of transactions," Ms Driscoll said.

The licence of North Perth Wholesale has been suspended and its former dealer principal, Sean De Gois, is not licensed to work in the industry.

Hail storm has ongoing consequences

For many people in Perth and surrounding areas, the hail storm and subsequent flooding in March caused catastrophic damage. It has proven to be a very traumatic time for traders and consumers.

However, the storm did expose some consumer issues with regard to hire car contracts and vehicles damaged on dealers premises.



Hire car contract

Consumer Protection has received a number of written complaints and countless phone calls about hire car companies that are asking the hirers to pay the agreed damage excess which, in some cases, can be more than \$3,000. It would seem unreasonable for a hire car company to hold a hirer responsible for what, in insurance terms, is often called 'an act of God' and clearly no fault of the consumer.

While some contracts may give these companies a basis to charge the hirer for hail damage, it is hoped that those companies take a long-term view and consider customer goodwill under these extraordinary circumstances. The Motor Vehicles Branch is examining the contracts and will negotiate with hire companies to seek a fair outcome, with the hope that reason prevails.



Vehicles sold by dealers

Also hard hit were many vehicles parked at dealers premises. If these were customers vehicles and privately owned (eg in for repairs or valuation) it would be the responsibility of the consumer to claim on their private insurance policy for any damage sustained.

However, if the vehicle was in the process of being sold by a dealer and subject to a 'Contract to Buy a

Motor Vehicle' but had not been paid for, or had not been delivered, then the liability for any damage rests with the selling dealer.

It is a prescribed condition of all standard sales contracts that **'property and risk'** in the vehicle will not pass to the purchaser until the total purchase price is received and the risk and responsibility to insure will pass to the purchaser when the vehicle is delivered.

Standard contract conditions

5. Passing of property and risk in the vehicle

5.1 The Dealer remains the owner of the Vehicle until the Total Purchase Price has been received in full by the Dealer.

5.2 Risk in the Vehicle and the responsibility to insure the Vehicle will pass from the Dealer to the Purchaser when the Vehicle is delivered by the Dealer to the Purchaser, unless the Purchaser and the Dealer agree to some other arrangement and include it as a Special Condition of this Contract. This applies whether delivery occurs at the Dealer's Premises or any other location.

Pat Murphy Motors closes down

A second-hand car dealer in Leederville has closed down, prompting Consumer Protection to appeal to customers to come forward.

Pat Murphy Motors of Oxford Street, Leederville went into liquidation on Monday 8 March 2010. HLB Mann Judd has been appointed as liquidator.

Commissioner for Consumer Protection Anne Driscoll said officers from the department are working with the liquidators to assist consumers who may be affected by the closure of this business.

"Consumers who recently bought cars from this dealer have warranty claims about their vehicles will most likely be covered by the Dealer Warranty Insurance Scheme

operated by the Motor Trade Association of Western Australia," Ms Driscoll said.

"We would like to hear from any customer who may have any outstanding contract issues with this car dealer or may have had their car sold on consignment and have not yet been paid for it."



The Motor Vehicles Branch of the Department of Commerce, Consumer Protection Division is located at the rear of 321 Selby Street, Osborne Park.

Telephone:..... **9282 4361** (Motor Vehicles Branch)

9282 4362 (Licensing)

Facsimile:..... **9282 4363**

Email:..... **motorvehicles@commerce.wa.gov.au**

Website:..... **www.commerce.wa.gov.au**

Postal address: **Locked Bag 14 Cloisters Square
PERTH WA 6850**

The reception desk is open to the public between 8:30am and 5:00pm Monday to Friday (except for Public Holidays).

If you have any questions or feedback about this newsletter, please contact Mr Angelo Barbaro, Principal Customer Services Officer, Motor Vehicles Branch on 9282 4349 or email **angelo.barbaro@commerce.wa.gov.au**