



## **REVIEW OF REGULATION OF SEPARATED PARTS MARKETS IN AUSTRALIA**

Report Prepared by DLA Piper Australia for the National Motor Vehicle Theft Reduction Council

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Disclaimer: The purpose of this report is to provide background for the discussion and development of policy. It contains general discussion of legal requirements but is not intended to provide legal advice, and should not be relied on as a source of legal advice in any particular circumstances.

## 1. Executive Summary

This report examines the legislation that applies to the trade in separated motor vehicle parts throughout Australia.

The report is prepared against a background of growing concern that existing regulatory arrangements are not optimally effective for combatting criminal involvement in the vehicle and vehicle parts trades.

The current regulatory arrangements comprise a multiplicity of legislative schemes regulating motor car traders, vehicle repairers and second hand dealers. While other laws apply to the separated parts trades (including laws relating to written-off vehicles, and general consumer protection and criminal laws), the focus of this report is on the schemes that most closely regulate the conduct of persons carrying on business of buying and selling used vehicle parts.

Most of these schemes are licensing schemes. Persons must hold the appropriate licences in order to carry on the business. To do so they must meet various criteria to show they are fit and proper persons. They must continue to meet those criteria, and comply with licence conditions and other requirements or risk having their licence suspended or cancelled. The basic model is similar in all jurisdictions.

However, the legislation is far from being uniform or consistent. Different schemes have different regulatory objectives. The extent to which they apply to the trade in vehicle parts varies considerably. In some jurisdictions, persons dealing in vehicle parts are regulated as motor traders and in others as general second hand dealers. Licensing criteria differ, as do the conditions and requirements that apply to the conduct of the business. In some jurisdictions the trade in separated parts is subject to stringent and extensive regulatory controls while in others it is effectively unregulated.

In summary, the position in each of the jurisdictions appears to be:

- **New South Wales** is the only jurisdiction with legislation specifically targeting both vehicle repairers and motor traders operating as auto dismantlers and motor vehicle reconstructors.
- **Victoria.** The trade in whole vehicles, including dismantled vehicle shells, is regulated under the motor dealer legislation while the trade in vehicle parts and accessories is regulated under the second hand dealers legislation.
- **Queensland.** Persons who break up or re-assemble vehicles are required to be licensed as motor dealers while suppliers of separated parts are regulated as second hand dealers.
- **South Australia.** Traders in complete and working vehicles are regulated under the motor dealers legislation while those involved in the trade in wrecked vehicles, vehicle shells and vehicle spares are regulated as second hand dealers.
- **Western Australia.** Licensing requirements apply to persons who dismantle whole vehicles and to repairers who purchase separated parts for repair work. Persons who trade solely in separated vehicle parts appear to be unregulated.
- **Tasmania.** Second hand motor dealers are required to be licensed as motor dealers and second-hand dealers. Vehicle dismantlers and parts sellers must notify police under the second-hand dealer legislation.

- **Australian Capital Territory.** Vehicle dismantlers and constructors who sell, buy or exchange separated parts are licensed under motor repairer legislation, but intermediaries in the supply of separated vehicle parts appear to be unregulated.
- **Northern Territory.** Persons trading in whole vehicles are required to hold a motor dealers licence, although motor wreckers appear not to be. Persons who buy, sell or exchange second hand parts are required to hold a second hand dealers licence.

In this report we outline the main elements of the State and Territory schemes, based on a review of the relevant legislation. This analysis indicates that New South Wales has, particularly in its *Motor Dealers Act 1974*, the most robust licensing regime.

Nevertheless, it is possible that the current uneven and inconsistent regulatory coverage is providing opportunities for criminal involvement in the separated parts trades. If that is so, there may be a case for nationally consistent regulatory reform. Further research is needed about the impact of the current patchwork approach, to assess whether there would be net benefits in a national regulatory approach.

The report then considers the legislative mechanisms available to regulatory agencies under the present schemes. It looks at how the different legislative frameworks set out controls over the right to carry on second hand parts related businesses, the powers available for monitoring and overseeing those businesses, the penalties and sanctions available for operating outside the scheme and for breaching scheme requirements and the compliance and enforcement powers available to deal with breaches.

Because the legislative schemes are very diverse, this analysis is necessarily high level. It also tends to focus on the provisions which appear to provide the most effective and robust set of regulatory controls, the majority of which are to be found in NSW legislation.

The final part of the report looks at mechanisms in other regulatory environments that may be able to be adopted or adapted to improve the effectiveness of regulation of the separated parts market. This analysis proceeds from consideration of two key concepts which underpin many contemporary regulatory strategies:

- an *enforcement pyramid* of progressively more severe interventions to enable regulators to take action that responds appropriately and cost effectively to non-compliant behaviour; and
- a *chain of responsibility* liability model, which imposes a legal responsibility on all parties with the motive and/or capacity to influence compliance outcomes.

In this context we describe a range of interventions and orders that may be applied to the regulation of the separated parts market, including civil penalties, administrative improvement and prohibition notices, court based directions and interventions, forfeiture and commercial benefits penalties, prohibition and industry exclusion and directors and officers liability for corporate fault.

The focus of this discussion is on legislative compliance and enforcement measures. However, it must be recognised that these are only a part of an overall compliance framework. Co-operative engagement with the regulated entities, clearly articulated and consistently followed intervention policies and sufficient skilled and properly resourced enforcement personnel are also critical for effective regulation of any business activity.

## 2. Background

The dismantling and stripping of stolen vehicles and the targeted theft of vehicles for that purpose is an increasingly common and lucrative form of criminal enterprise.

This appears in part to be due to effective measures put in place over the last decade to combat vehicle theft and vehicle rebirthing. These have driven criminal activity into new areas, including into the trade in separated motor vehicle parts.

A NSW Inter-Agency Task Force (ITF) set up in 2010 to examine criminal involvement in the separated parts trade found that 'the trade in stolen vehicle parts continues to be fostered by persons and organisations within the industry who consistently fail to comply with the various acts of parliament, enabling the wide ranging use and disposal of stolen motor vehicles and parts'.

The Task Force suggested that there are a number of deficiencies in the current regulatory approach, including:

- inadequate information gathering and enforcement powers,
- laws which allow principals to avoid responsibility for breaches committed by their agents,
- sanctions that are an insufficient disincentive to serious or systemic non-compliance; and
- evidentiary impediments to effective prosecution.

The Task Force concluded that these factors mean that breaches of the legislation and other criminal conduct are going unpunished.

The National Motor Vehicle Theft Reduction Council's (NMVTRC) 2012-2015 Strategic Plan seeks to, amongst other things, develop a secure system to disrupt the activities of criminals in separated parts markets. A focus of that work is on the modernisation of regulatory regimes to optimise compliance.

In light of the matters raised in the ITF report, the NMTRC decided to commission this report to further consider the legislative and regulatory framework under which persons involved in the second hand parts trade operate throughout Australia.

The purpose of this Report is therefore to outline the features of current State and Territory legislative schemes which regulate the separated vehicle parts market, to identify strengths and weaknesses in the different schemes and to assess the extent to which they reflect 'best practice' regulatory design, particularly in:

- holding accountable persons responsible for non-compliant conduct;
- allowing regulators, police and courts to respond to breaches in an appropriate and flexible way; and
- ensuring that sanctions promote compliance on an enduring basis.

The remainder of this report is as follows:

- Part 3 outlines the laws that apply to the separated parts trade throughout Australia.

- Part 4 compares and contrasts the laws relating to motor vehicle traders, motor vehicle repairers and second hand dealers in each of the States and Territories.
- Part 5 describes the main regulatory tools that are available under that legislation.
- Part 6 looks at some regulatory tools available in other regulatory settings which might be employed to enhance the effectiveness of schemes under which the separated parts market is regulated.

### 3. Regulatory Framework for Vehicle Dealers and Repairers and Second Hand Dealers

Markets for second hand vehicle parts operate subject to various State and Territory laws that regulate the motor and/second hand goods trades. Some jurisdictions also have regulation that specifically deals with motor vehicle repairers.

The legislation typically requires motor traders and/or second hand dealers to be licensed. Obtaining a licence is subject to some form of character, or 'fit and proper person', test. Police and/or consumer affairs agencies are then given various powers to monitor and investigate the conduct of businesses, and to impose or seek sanctions for improper or unlawful behaviour.

In all schemes, compliance with regulatory requirements, whether imposed as licence conditions or as offences, is maintained through a range of monitoring activities, including audit and inspection of records and business premises. Non-compliance is dealt with mainly through penalties and licence sanctions. In most schemes the ultimate sanction is revocation of the right to operate through licence suspension and cancellation.

However, while the various schemes are all built around a common framework, the legislation is neither uniform nor consistent. Different schemes have different regulatory objectives and the extent to which they apply to the trade in vehicle parts varies considerably. In some jurisdictions the trade in separated parts is subject to stringent and extensive regulatory controls. In others, this trade is effectively unregulated.

#### 3.1 Motor vehicle dealer licensing

All States and Territories have enacted legislation that regulates the trade in second hand motor vehicles ('**motor dealer Acts**'). The motor dealer Acts prohibit a person from carrying on a business of trading in motor vehicles without a licence.<sup>1</sup> Applicants for a licence must meet specified requirements as to fitness and character.

The motor dealer Acts also contain extensive measures to protect purchasers of second hand vehicles. While these vary from jurisdiction to jurisdiction, they include statutory warranties, mandatory cooling-off periods, disclosure requirements and offences directed specifically at sharp practices associated with the second hand vehicles trade, such as odometer tampering. The motor dealer Acts also establish guarantee funds out of which consumers who suffer losses as a result of these sorts of practices can obtain redress.

It therefore appears that the main regulatory purposes of the motor dealer Acts is to protect consumers and to ensure second hand vehicle markets operate efficiently and fairly. This is stated explicitly in some of the legislation. For example:

- The purpose of the Victorian *Motor Car Traders Act 1986* is 'to provide for the regulation of motor car traders and to ensure that licensing is carried out efficiently and equitably and that the rights of those who deal with motor car traders are adequately protected'.<sup>2</sup>
- The main object of the Queensland *Property Agents and Motor Dealers Act 2000* is 'to provide a system for licensing and regulating persons as ... motor dealers, that achieves an

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<sup>1</sup> *Motor Dealers Act 1974* (NSW) s. 9; *Motor Car Traders Act 1986* (Vic) s. 7; *Property Agents and Motor Dealers Act 2000* (Qld) s. 279; *Second Hand Vehicle Dealers Act 1977* (SA) s. 7; *Motor Vehicle dealers Act 1973* (WA) s. 30; *Sale of Motor Vehicles Act 1977* (ACT) s.7.

<sup>2</sup> *Motor Car Traders Act 1986* (Vic) s. 3.

appropriate balance between the need to regulate for the protection of consumers; and the need to promote freedom of enterprise in the market place'.<sup>3</sup>

In most jurisdictions the motor dealer Act is administered by the agency responsible for consumer affairs and fair trading, with the director or chief executive of that agency acting as the licensing authority.

### 3.2 Motor vehicle repairer licensing

Three jurisdictions (NSW, WA and the ACT) have enacted legislation that specifically regulates the motor vehicle repair industry ('**motor repair Acts**')<sup>4</sup>.

These Acts require persons carrying on business as motor repairers to be licensed. The licensing authority is generally the same body that is responsible for motor car trader licensing.

Licensing criteria vary from jurisdiction to jurisdiction, but generally include a fit and proper test, and specifically exclude a person from holding a licence if they have committed a disqualifying act. Disqualifying acts may include previous breaches of a motor repair Act or of licence conditions, breaches of other consumer or fair trading legislation and breaches of other criminal laws.<sup>5</sup>

Licensing criteria in some jurisdictions also require applicants to demonstrate that they have appropriate qualifications, necessary financial resources to carry on the business and the right to use suitable premises for the purpose of carrying out vehicle repairs.<sup>6</sup>

While none of the motor repair Acts contains an explicit statement of purpose, it appears that each is directed towards protection of consumers by preventing persons unqualified or undesirable persons from carrying on business as vehicle repairers.

Many businesses involved in vehicle repairs are also likely to hold a licence or authorisation to carry out vehicle inspections or tests. Such authorisations are typically issued by the relevant vehicle registration authority, for the purpose of ensuring that registered vehicles comply with roadworthiness and/or other vehicle standards.

### 3.3 Second hand dealer regulation

All jurisdictions have legislation that regulates dealers in second hand goods ('**second hand dealers Acts**'). The second hand dealers Acts generally do not apply to persons authorised to trade under a motor traders licence.<sup>7</sup> Therefore, if a person is licensed as a motor trader, they would not have to be licensed as a second hand dealer.

Generally, the second hand dealer Acts require second hand dealers and pawnbrokers to be licensed<sup>8</sup>

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<sup>3</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s. 10

<sup>4</sup> *Motor Vehicle Repairs Act 1980* (NSW); *Motor Vehicle Repairers Act 2003* (WA); *Fair Trading (Motor Vehicle Repair Industry) Act 2010* (ACT)

<sup>5</sup> See *Fair Trading (Motor Vehicle Repair Industry) Act 2010* (ACT) s. 11

<sup>6</sup> See *Motor Vehicle Repairs Act 1980* (NSW) s. 18

<sup>7</sup> *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s. 4; *Second-hand Dealers and Pawnbrokers Act 1989* (Vic) s. 5(2); *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) s. 6(2)(b); *Pawnbrokers and Second-hand Dealers Act 1994* (WA) s. 4; s 6; *Second-hand Dealers Act 1906* (ACT) s. 7; *Consumer Affairs and Fair Trading Act* (NT), s. 245

<sup>8</sup> *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s. 6; *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) s. 6; *Pawnbrokers and Second-hand Dealers Act 1994* (WA) s 6; *Second-hand Dealers Act 1906* (ACT) s. 7; *Consumer Affairs and Fair Trading Act* (NT), ss. 247 and 248.



or registered<sup>9</sup>, or at least to give prior notification to police before carrying on business as a second hand dealer<sup>10</sup>.

Generally applicants for a licence must undergo a criminal history check and not have been convicted of a disqualifying offence, or must otherwise meet a 'fit and proper' test.

Second hand dealers are required to maintain records of goods bought and sold, and meet a range of other specific requirements designed to prevent dealings in stolen goods. These vary between jurisdictions, but may include:

- requirements to keep detailed records about second hand goods purchased and sold and to produce those records to police;
- a duty to report suspicious goods;
- obligations to retain goods for a specified period after they are received before on-selling them; or
- procedures for resolving disputes about ownership of second hand goods.

The regulatory purposes of the second hand dealers Acts therefore reflect both consumer protection and law enforcement objectives. This is made explicit in some jurisdictions. For example:

- The purposes of the Victorian *Second Hand Dealers and Pawnbrokers Act 1989* include 'to facilitate and expedite the recovery of stolen goods from second hand dealers and pawnbrokers', and 'to enhance protection consumers dealing with second hand dealers and pawnbrokers'.<sup>11</sup>
- The main objectives of the Queensland *Second-hand Dealers and Pawnbrokers Act 2003* include 'to deter crime in the second hand property market' and to 'help protect consumers from purchasing stolen property'.<sup>12</sup>

There is a discernible difference in emphasis between the regulatory objectives underlying the motor trader and vehicle repairer legislation (ie. consumer protection and market regulation) and those underlying the second hand dealer Acts (ie. crime prevention as well as consumer protection). That difference is potentially significant given, as is discussed below, that the trade in separated parts is, to different degrees (depending on the jurisdiction), subject to both.

### 3.4 Other relevant laws

There are a number of other legal controls and measures that apply to the trade in vehicle parts. They include:

- General prohibitions on misleading and deceptive conduct and other unlawful practices in the *Competition and Consumer Act 2010* and State and Territory fair trading legislation.

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<sup>9</sup> *Second-hand Dealers and Pawnbrokers Act 1989* (Vic) s. 5.

<sup>10</sup> *Second-hand Dealers and Pawnbrokers Act 1996* (SA) s. 7; *Second-hand Dealers and Pawnbrokers Act 1994* (Tas) s 4.

<sup>11</sup> *Second-hand Dealers and Pawnbrokers Act 1989* (Vic) s. 1

<sup>12</sup> *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) s. 3

- Numerous offences under general criminal law targeted specifically at vehicle theft and receiving or handling stolen goods, and legislation providing for confiscation of the proceeds of crime.
- State and Territory roadworthiness and registration requirements, which generally empower registration authorities to suspend, cancel or refuse to transfer the registration of vehicles where the ownership or description of the vehicle is uncertain.<sup>13</sup>
- State and Territory schemes aimed at vehicle rebirthing, under which accident damaged vehicles must be placed on a written-off vehicles register and, depending on the extent of the damage, not re-registered or only re-registered after an inspection has determined that the vehicle bears the same identifiers as the written off vehicle.<sup>14</sup>
- The ability to notify prospective purchasers that a vehicle may be stolen through recording in a vehicle securities register (now the Personal Property Securities Register).
- Laws regulating accident towing services, which typically require accreditation or licensing of tow truck operators.<sup>15</sup>

### 3.5 Evolution of the regulatory schemes

Most of the regulatory schemes that apply to the trade in separated parts have been in place for some time.

Most jurisdictions' second hand dealer Acts were enacted in the late 1980s and 1990s, and these have not been substantially amended since that time.

The majority of the motor dealer Acts date from the 1970s and 1980s. This period saw extensive reform in consumer protection laws, in which most jurisdictions established separate consumer affairs agencies, enacted general consumer protection statutes and introduced new regulatory schemes for a range of high risk industries. Most of the motor dealer legislation dating from that time has been amended since. The current licensing provisions and the extensive enforcement regime in the New South Wales *Motor Dealers Act 1974* was added in 1985<sup>16</sup>. The enforcement powers of the Victoria *Motor Car Trader's Act 1989* have been progressively strengthened over time, most recently in 2005<sup>17</sup>.

Legislation relating to motor trades and second hand dealers was reviewed in most jurisdictions for the purposes of identifying unnecessary regulation pursuant to requirements imposed under the National Competition Policy. Most of those reviews are now more than 10 years old.<sup>18</sup> In any case, the objective of the NCP review process was to identify and remove unjustifiable impediments to business efficiency.

We have not been able to identify any published review that addresses the effectiveness of the

<sup>13</sup> See eg *Road Safety (Vehicles) Regulations 2009* (Vic) reg. 114

<sup>14</sup> See eg *Road Safety Act 1986* (Vic) Division 3 of Part 2

<sup>15</sup> See eg. *Tow Truck Industry Act 1998* (NSW); *Accident Towing Services Act 2006* (Vic)

<sup>16</sup> See: *Motor Dealers (Amendment) Act 1985*

<sup>17</sup> *Fair Trading (Inspectors Powers and Other Amendments) Act 1999*; *Motor Car Traders and Fair Trading Acts (Amendment) Act 2005*

<sup>18</sup> See eg: NSW Department of Fair Trading, *Motor Trades Review, Summary of Proposed Reforms*, February 2001 and Department of Justice (Vic) *National Competition Policy Review of Motor Car Traders Act 1986 and Attendant Regulations*, January 1988

schemes, and in particular their effectiveness or otherwise in dealing with criminal activity, either in the motor trades generally or the separated parts market in particular.<sup>19</sup>

As noted, information provided by the ITF suggests that aspects of the way the New South Wales motor trades laws are drafted and administered need to be improved to enhance its effectiveness in combating criminal involvement in the separated parts market. As will be seen, the unevenness of the legislative requirements between the different jurisdictions suggest that it might be timely to undertake a broad ranging review of the effectiveness of the legislation on an national basis, and empirical research as to its effectiveness in dealing with the trade in stolen vehicles and vehicle parts.

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<sup>19</sup> *The exception is the Queensland Service Delivery and Performance Commission's 2008 Review of Property Agents and Motor Dealers Act 2000*, which recommended creation of a separate Act for motor dealers and a number of changes to the regulation of used vehicle transactions. It recommended that the suitability of applicants' premises be removed as a criteria for considering a licence application, but otherwise made no recommendations for changes to the scope or application of the motor dealer licensing provisions.

## 4. Regulation of the Separated Parts Market in each Jurisdiction

Despite the multitude of legislative schemes directed at motor traders and second hand dealers, regulation of the trade in second hand parts is uneven and inconsistent.

In most jurisdictions there are separate legislative schemes dealing with second hand vehicles and other second hand goods. Generally, the motor dealer Acts apply to the trade in complete vehicles while separated vehicle parts would fall under general second hand-dealers legislation, but this is not always the case.

This part explains the different ways in which the regulatory controls in place in the States and Territories impact on separated parts markets, and identifies some regulatory gaps and overlaps.

### 4.1 New South Wales

The *Motor Dealers Act 1994* creates various classes of licence for dealers, car market operators, financiers and others involved in the second hand vehicle trades.

The *Motor Dealers Act 1994* is the only legislation in any Australian jurisdiction that expressly targets identifiable participants in the separated parts market. It does this by providing specifically for the licensing of auto dismantlers and motor vehicle parts reconstructors.

'Auto dismantlers' are persons who carry on the business of:

- demolishing or dismantling motor vehicles or parts or accessories of motor vehicles;
- buying motor vehicles and substantially demolished motor vehicles and selling substantially demolished or substantially dismantled motor vehicles (whether or not the person also sells parts or accessories of motor vehicles); or
- buying and selling prescribed kinds of parts or accessories of motor vehicles.<sup>20</sup>

'Motor vehicle parts reconstructors' are persons who carry on business of 'purchasing or otherwise acquiring for the purpose of selling or exchanging, or for the purpose of reconstructing and selling, or for the purpose of reconstructing and exchanging, such parts or accessories of motor vehicles as may be prescribed'.<sup>21</sup>

The parts and accessories prescribed for this purpose are:

- 'major body components (chassis and major body sections, bonnets, boot lids, doors, mudguards, bumper bars and apron panels);
- major car accessories (alloy mag wheels, electronic navigation equipment and audio equipment); and
- major mechanical components (engines and engine blocks, gearboxes and transmissions, instrument clusters and airbags).<sup>22</sup>

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<sup>20</sup> *Motor Dealers Act 1974* s. 4

<sup>21</sup> *Motor Dealers Act 1974* s. 4

<sup>22</sup> *Motor Dealers Regulation 2010* (NSW) reg. 4. These terms are defined in section , and include

The *Motor Dealers Act 1974* (NSW) therefore applies a licensing requirement to persons involved in stripping down vehicles and reconstructing vehicles, and to the trade in parts between such persons.

As noted, the *Motor Vehicle Repairers Act 1980* establishes a separate regulatory regime for the vehicle repair industry. It requires persons carrying on business as a repairer to hold a licence in respect of the relevant class or repair work.

'Repair work' is defined to include examining, detecting faults in, adjusting, carrying out maintenance on, altering or painting vehicles. The classes of repair work regulated under the Act include various types of mechanical repair, auto electrical, body repairs and panel beating and painting, but does not include dismantling and constructing vehicles.<sup>23</sup>

The *Motor Dealers Act 1974* and *Motor Vehicle Repair Act 1980* are both administered by Fair Trading NSW. The Director-General of the Department of Fair Trading has power to investigate applications for licences or to request the Commissioner of Police to do so.

The *Pawnbrokers and Second-hand Dealers Act 1996* requires dealers in second hand goods to be licensed. However, the Act only applies to prescribed classes of goods. Motor vehicles and parts are not prescribed for this purpose mainly, although 'car accessories' are. Therefore, in New South Wales, the trade in separated parts falls under the regulations that apply to businesses engaged in motor vehicle related trading activities.

## 4.2 Victoria

Persons who carry on business of trading in motor cars are required to be licensed under the *Motor Car Traders Act 1986*.

Motor car is defined for this purpose as 'a motor vehicle within the meaning of the *Road Safety Act 1986* (whether or not in working condition or complete)',<sup>24</sup>

Therefore, the *Motor Car Traders Act 1986* regulates persons who trade in wrecked vehicles, but not necessarily those who trade only in separated parts. The Act gives no guidance as to the point of distinction between a complete vehicle and a vehicle that is not complete. It is arguable that trading in vehicle bodies stripped of all parts would be regulated under the Act, but trading in parts, even a complete set of parts that would enable the reassembly of a vehicle if applied to a stripped body, would not be.

Ordinary second hand dealers are required to be registered under the *Second Hand Dealers and Pawnbrokers Act 1989*. However, the application of the Act to persons dealing in second hand vehicle parts is somewhat uncertain.<sup>25</sup>

It appears that a licensed motor car trader is not subject to any of the requirements of the *Second Hand Dealers and Pawnbrokers Act 1989* when buying and selling motor vehicles (including incomplete vehicles and body shells) but would be subject to that Act (except the requirement to be registered) if they were buying or selling parts.

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<sup>23</sup> *Motor Vehicle Repairs Regulations 2011* (NSW) sched. 11

<sup>24</sup> *Motor Car Traders Act 1986* (Vic) s.3

<sup>25</sup> Section 4 provides that nothing in the Act applies to a licensed motor car trader buying, selling, exchanging or otherwise dealing in a motor car in accordance with that Act. Section 5 provides that a person who holds a motor car trader's licence may buy, sell, exchange or otherwise deal in second-hand goods that are motor car parts without being registered but must in all other respects comply with this Act

A person who trades in separated parts but who does not hold a motor car traders licence would need to be registered under the *Second Hand Dealers and Pawnbrokers Act 1989*. Trading in 'scrap metal' is exempt.<sup>26</sup>

The position in Victoria would therefore appear to be that the trade in whole vehicles, including dismantled vehicle shells, is regulated under the *Motor Car Traders Act 1986*, while the trade in vehicle parts and accessories is mainly regulated under the *Second Hand Dealers and Pawnbrokers Act 1989*.

Both Acts are administered by Consumer Affairs Victoria, a division of the Department of Justice.

### 4.3 Queensland

Motor dealers are required to be licensed under the *Property Agents and Motor Dealers Act 2000*. The licensing requirement includes not only persons who carry on business acquiring or selling used motor vehicles but also to those who acquire used motor vehicles, whether or not as complete units, to break up for sale as parts.<sup>27</sup>

However, while the licensing requirement applies to persons who purchase vehicles to break up and sell as parts it appears not to apply to intermediaries or resellers.

Persons who carry on the business of dealing in second hand goods and operators of second hand markets are required to be licensed under the *Second-hand Dealers and Pawnbrokers Act 2003*. However, this requirement does not apply to a motor dealer under the *Property Agents and Motor Dealers Act 2000* 'to the extent that the person may lawfully deal with second-hand property under the person's licence under that Act.'

Therefore, the position in Queensland appears to be that persons engaged in the separated parts market who break up or re-assemble vehicles are required to be licensed under *Property Agents and Motor Dealers Act 2000* while intermediaries in the supply of separated parts are regulated under the *Second-hand Dealers and Pawnbrokers Act 2003*.

Both Acts are administered by the Queensland Office of Fair Trading, a division of the Department of Justice and Attorney-General.

### 4.4 South Australia

Persons carrying on business of buying and selling second hand vehicles are required to be licensed under the *Second-Hand Vehicle Dealers Act 1995*.<sup>28</sup>

The term 'second-hand vehicle' is defined to mean a 'vehicle that is used or is capable of being used for transportation on land'<sup>29</sup>. This would appear to limit the scope of the Act to vehicles that are capable of operating, and would therefore exclude severely damaged vehicles, written-off vehicles, vehicle shells and vehicle parts.

Other second hand dealers are regulated under the *Second Hand Dealers and Pawnbrokers Act 1996*. That Act does not establish a licensing scheme as such, but rather requires a person wishing to carry on business as a second hand dealer to notify the Chief Commissioner of Police before commencing

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<sup>26</sup> *Second Hand Dealers and Pawnbrokers(Exemption) Regulations2008* (Vic) reg. 9(1) schedule

<sup>27</sup> *Property Agents and Motor Dealers Act 2000 (Qld)* s 279

<sup>28</sup> s. 7.

<sup>29</sup> *Second-Hand Vehicle Dealers Act 1995 (SA)* s. 3

to do so. Goods are defined for the purposes of that Act to include ‘any form of personal property except intangible property or live animals’. There is no carve out for motor vehicle related goods. However, the requirements in relation to second hand dealers do not apply to businesses that are licensed or exempt from the requirement to be licensed under the *Second-hand Vehicle Dealers Act 1995*.<sup>30</sup>

Thus, the position in South Australia appears to be that traders in complete, working vehicles are regulated under the *Second-hand Vehicle Dealers Act 1995* while those dealing in wrecked vehicles, vehicle shells and vehicle spares are regulated under the *Second Hand Dealers and Pawnbrokers Act 1996*.

The *Second Hand Dealers and Pawnbrokers Act 1996* is administered by police. The *Second Hand Vehicle Dealers Act 1995* is administered by Consumer and Business Services, a statutory office established under the *Fair Trading Act 1987*.

#### 4.5 Western Australia

Western Australia has established separate licensing regimes for motor vehicle repairers, motor vehicle dealers and second hand dealers.

The *Motor Vehicle Dealers Act 1973* prohibits unlicensed dealing by person carrying on any class or description of business of buying or selling vehicles. ‘Vehicle’ has the same definition in this Act as in the *Road Traffic Act 1974*. That definition clearly refers to whole vehicles. The extent to which it would apply to a wrecked vehicle or vehicle shell is not clear, and it would not include vehicle parts. However, the licensing requirement extends to persons who buy and sell vehicles for the purposes of dismantling and selling off the parts.<sup>31</sup>

The *Motor Vehicle Repairers Act 1973* requires persons carrying on businesses in certain types of vehicle repair work to be licensed. The range of vehicle work covered includes mechanical repairs and servicing, auto electrical, vehicle modification, glazing, panel beating and painting.

The licensing of motor vehicle dealers and repairers is administered by the Department of Commerce.

The *Pawnbrokers and Second-hand Dealers Act 1994* provides for the licensing of second hand dealers. However, the Act does not apply to ‘motor vehicles as defined in the *Road Traffic Act 1974* and their parts (including tyres, but not accessories such as radio equipment, roof racks or lights other than those required relevant vehicle standards).<sup>32</sup>

In Western Australia therefore, licensing requirements apply to persons who dismantle whole vehicles and to repairers who purchase separated parts for repair work. However, persons who trade solely in separated vehicle parts appear to be unregulated.

#### 4.6 Tasmania

The *Motor Vehicle Traders Act 2011* requires persons dealing in motor vehicles to be licensed. The extent to which this applies to partially dismantled vehicles and vehicle shells is unclear. It would not apply to a person who deals solely in vehicle parts. Moreover, a person who buys motor

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<sup>30</sup> *Second-Hand Dealers and Pawnbrokers Regulations 1998* (SA) reg. 4(4b)(c)

<sup>31</sup> *Motor Vehicle Dealers Act 1973* (WA) s. 5A, *Motor Vehicle Dealers Regulations 1974* (WA), sched. 4 item D

<sup>32</sup> *Pawnbrokers and Second Hand Dealers Regulations 1996* (WA) reg. 5

vehicles for the purposes of dismantling them is deemed not to be dealing in motor vehicles and is not required to be licensed.<sup>33</sup>

Second hand dealers generally are regulated under the *Second-hand Dealers and Pawnbrokers Act 1994*. As in South Australia, that Act does not require licensing of dealers, but requires a person who wants to carry on business as a second hand dealer to give notice to police of their intention to do so.<sup>34</sup> However, the Act also applies to dealers in second hand vehicles, with the effect that persons who deal in second hand dealers would appear to be required to be licensed under both this Act and the *Motor Vehicle Traders Act 2011*.<sup>35</sup> There is provision under section 3(3) of the Act for the Minister to exempt certain classes of persons from its operation, but a search of the Gazettes has disclosed no order exempting the holder of a motor vehicle traders licence from the requirement to also hold a second hand dealers licence.

Therefore, it appears that in Tasmania, second hand motor dealers are required to be licensed under both the *Motor Vehicle Traders Act 2011* and the *Second-hand Dealers and Pawnbrokers Act 1994*. Vehicle dismantlers are not regulated under the *Motor Vehicle Traders Act 2011*, but if they sell vehicle parts they must have notified police under the *Second-hand Dealers and Pawnbrokers Act 1994*.

The *Second-hand Dealers and Pawnbrokers Act 1994* is administered by the police and the *Motor Vehicle Traders Act 2011* is administered by Consumer Affairs and Fair Trading, both being entities within the Department of Justice.

#### **4.7 Australian Capital Territory**

The ACT regulates motor car traders under *Sale of Motor Vehicles Act 1977*. That Act applies to persons who buy, sell and exchange motor vehicles as a business but not to businesses consisting exclusively of buying vehicles for the purpose of dismantling or demolishing them.

Vehicle dismantlers are however subject to specific regulation under the *Fair Trading (Motor Vehicle Repair Industry) Act 2010*. That Act requires persons who carry on business as motor vehicle repairers to be licensed. A person carries on business as a motor vehicle repairer if they carry on motor vehicle repair work, which is defined to include a range of work performed on a 'motor vehicle, motor vehicle part or motor vehicle system'. This extends to work that involves 'dismantling or assembling' motor vehicles.<sup>36</sup>

Car parts (other than car radios) are expressly excluded from coverage under the ACT *Second Hand Dealers Act 1906*.<sup>37</sup>

Vehicle dismantlers and constructors who sell, buy or exchange separated parts are licensed under the *Fair Trading (Motor Vehicle Repair Industry) Act 2010*, but intermediaries in the supply of separated vehicle parts are effectively unregulated.

Both Acts are administered by the ACT Department of Regulatory Services.

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<sup>33</sup> *Motor Vehicle Dealers Act 2011* (Tas) s. 4(3)(b)

<sup>34</sup> *Second-hand Dealers and Pawnbrokers Act 1994* (Tas) s. 4

<sup>35</sup> The requirement to hold goods for 7 days before selling them does not apply to vehicles (see s. 11(2)(d)).

<sup>36</sup> *Fair Trading (Motor Vehicle Repair Industry) Act 2010* (ACT) s. 6(2)

<sup>37</sup> *Second-hand Dealers Regulations 2002* (ACT), schedule 2.



## 4.8 Northern Territory

The *Consumer Affairs and Fair Trading Act* establishes licensing schemes for both motor vehicle dealers and other second hand dealers. The Act is administered by the NT Department of Justice.

The motor dealer licensing regime is set out in Part 10 of the Act. It applies to persons who buy, sell or exchange motor vehicles for a business. The scheme applies to motor vehicles ‘whether new or used, and whether or not in working condition or complete’<sup>38</sup>. It does not however apply to a person whose business consists exclusively of buying vehicles for the purposes of demolishing or dismantling them.

The general second hand dealer provisions are set out in Part 14. A person who acts as a second-hand dealer must hold a licence. Second-hand motor vehicles are excluded, although motor vehicle parts are not.<sup>39</sup>

The position in the Northern Territory therefore appears to be that persons trading in whole vehicles are required to hold a motor dealers licence. Persons who buy, sell or exchange second hand parts, which would include motor dismantlers who sell the parts, are required to hold a second hand dealers licence.

## 4.9 Summary

It will be seen that the regulation of the separated parts market is, from a national perspective, uneven and inconsistent. Generally, coverage is split between a jurisdiction's motor dealer Act and its second hand dealer Act. These Acts tend to have different objectives, in some cases use different types of regulatory instruments and in some jurisdictions are administered by different agencies. In summary:

- **New South Wales** is the only jurisdiction with legislation specifically targeting both vehicle repairers and motor traders operating as auto dismantlers and motor vehicle parts reconstructors.
- In **Victoria**, the position appears to be that the trade in whole vehicles, including dismantled vehicle shells, is regulated under the motor dealer legislation while the trade in vehicle parts and accessories is regulated under the second hand dealers legislation.
- In **Queensland**, the position appears to be that persons engaged in the separated parts market who break up or re-assemble vehicles are required to be licensed as motor dealers while suppliers of separated parts are regulated as second hand Dealers.
- In **South Australia**, the position appears to be that traders in complete, working vehicles are regulated under the motor dealers’ legislation while those involved in the trade in wrecked vehicles, vehicle shells and vehicle spares are regulated as second hand dealers.
- In **Western Australia**, licensing requirements apply to persons who dismantle whole vehicles and to repairers who purchase separated parts for repair work. Persons who trade solely in separated vehicle parts appear to be unregulated.
- In **Tasmania**, it appears that at the present time second hand motor dealers must be licensed

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<sup>38</sup> *Consumer Affairs and Fair Trading Act* (NT) s. 125

<sup>39</sup> *Consumer Affairs and Fair Trading Regulations* (NT) reg. 3 and schedule

both as motor dealers and *second-hand dealers*. Parts sellers are only subject to the requirement to notify police under the second-hand dealer Act.

- In the **ACT**, vehicle dismantlers and constructors who sell, buy or exchange separated parts are licensed under the Motor Vehicle Repair Industry Act, but intermediaries in the supply of separated vehicle parts appear to be unregulated.
- In the **Northern Territory** it appears that persons trading in whole vehicles are required to hold a motor dealers licence, although motor dismantlers are not. Persons who buy, sell or exchange second hand parts are required to hold a second hand dealers licence.

This position is summarised in following table.

**Table 1: Summary of regulatory coverage**

	Vehicle trader	Repairer	Dismantlers	Reconstructors	Parts trader
NSW	MD	MR	MD	MD	SHD
Victoria	MD	-	-	-	SHD
Queensland	MD	-	MD	MD	SHD
SA	MD	-	SHD*	SHD*	SHD
WA	MD	MR	MD	MD	-
Tasmania	MD & SHD	-	SHD?	-	SHD
ACT	MD	MR	MR	MR	-
NT	MD	-	SHD	MD	SHD

*MD = Licence under a motor dealers Act*

*MR = Licence under a motor repairers Act*

*SHL = Licence under second hand dealers Act (or police notification in SA and Tas)*

*\* = licence required only where trading in whole vehicles.*

## 5. Regulatory tools under the current schemes

The scope and form of the legislation that regulates separated parts markets varies from jurisdiction to jurisdiction. However, all schemes use a common set of regulatory tools, comprising:

- controls over the right to operate.
- monitoring and oversight tools; and
- powers to intervene and deal with unlawful or unacceptable behaviour.

### 5.1 Controls over the right to operate

All schemes require market participants to be licensed. Trading without a licence is an offence. Penalties are intended to be a financial disincentive to unlicensed traders.

The licensing and notification requirements that apply to persons carrying on business as motor dealers, repairers and second hand dealers all adopt criteria based on the character, qualifications and conduct of applicants and their fitness and capacity to carry on the business.

These criteria are used both as entry controls and as a basis for sanctioning misconduct. A person must satisfy the requirements before being granted a licence to operate, but the licence can be limited or taken away if the person fails to continue to meet those standards.

A number of similar licensing criteria are common to the motor dealer and motor repairer Acts and the second hand dealer Acts. For example, all schemes specify that:

- only individuals over the age of 18 or corporations are eligible to carry hold the licence;
- partnerships may only be carry on a business if all partners hold the required authorisation;
- licence holders must not be bankrupt or insolvent; and
- the licence holder must be a 'fit and proper person' to carry on the business.

The 'fit and proper' person test is a widely used in a range of regulatory contexts. It is a flexible test which enables the regulator to take into account a wide range of circumstances in determining whether the applicant is suitable. The High Court has observed:

"The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question."<sup>40</sup>

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<sup>40</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, per Gaudron and Toohey JJ at 380

Prior criminal offences may sometimes be a basis for determining that person is not fit and proper, but a conviction on its own will not always be enough to satisfy a decision maker that a person is not fit and proper to carry on a particular work activity.<sup>41</sup>

For that reason, the legislation in many jurisdictions clarifies and extends the concept of 'fit and proper person' by specifying other circumstances or offences which disqualify a person from holding the licence.

The New South Wales *Motor Dealers Act 1974* and *Motor Vehicle Repairers Act 1980* are the broadest. Both list a wide range of offences and other conduct which may be the basis for refusing a licence, including where it appears to the licensing authority that the applicant:

- has (as an adult) been found guilty within the preceding 10 years of offences relating to stealing a motor vehicle or receiving or unlawful possession of a vehicle or vehicle part;
- is not a person likely to carry on such a business honestly and fairly; or
- is in any other way not a fit and proper person to hold a licence.<sup>42</sup>

These Acts then specify that in determining whether a person is a fit and proper person the licensing authority may have regard to the fact that the person:

- has, during the preceding 10 years, been convicted of or served a term of imprisonment for an offence involving fraud or dishonesty;
- was, at the time of making the application, bound under a recognisance or facing a charge in relation to such an offence;
- had, at the time of making the application, a charge pending in relation to such an offence; or
- has at any time been convicted of an offence against the Act or regulations or on other Acts administered by the Minister.<sup>43</sup>

Further, these Acts also deem a person not to be fit and proper if the regulator has reasonable grounds to believe, based on information provided by the police, that the person:

- is a member of or regularly associates with one or more members of a declared criminal organisation; and
- the nature and circumstances of that relationship are such 'that it could reasonably be inferred that improper conduct that would further the criminal activities of the declared organisation is likely to occur if the person is granted a licence'.<sup>44</sup>

The New South Wales Acts also allow a licence to be refused on the basis of the applicant's actual or potential criminal associations, including:

- if the applicant would be carrying on business in partnership with another person and the

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<sup>41</sup> *Ziems v The Prothonotary of The Supreme Court of New South Wales* (1957) 97 CLR 279 per Taylor J at 302

<sup>42</sup> *Motor Dealers Act 1974* (NSW) s. 12(2)

<sup>43</sup> *Motor Dealers Act 1974* (NSW) s. 12(3)

<sup>44</sup> *Motor Dealers Act 1974* (NSW) s. 12(3A)

licensing authority would be required to refuse that other person a licence;

- the applicant is a corporation and a 'director or other person concerned in the management of the corporation' meets one of the disqualifying criteria.<sup>45</sup>

By making explicit that a conviction for theft of vehicles or vehicle parts will bar a person from obtaining a licence or be a basis for cancelling a licence, these Acts have broadened what otherwise may have been covered by a fit and proper person test. The NSW Administrative Decisions Tribunal has affirmed a decision to cancel a repairers licence of a person who had been convicted of offences relating to dealing in stolen vehicle parts. The Tribunal found a clear intention in the legislation to restrict the ability of those with specified types of offences to operate within the industry.<sup>46</sup>

The disqualifying criteria in the NSW Acts are the most extensive, and the most clearly focused on crime prevention, of any of the jurisdictions. They set out multiple grounds on which an applicant's criminal conduct or associations would disqualify them from obtaining a licence, and directly target criminal gangs and criminal enterprises.

Most other jurisdictions also treat a conviction for an offence against the Act under which the licence is granted as a disqualifying offence, but there is little consistency as to what other offences will disqualify a person from holding a licence. For example:

- In Victoria, 'disqualifying offence' includes an offence involving 'fraud, dishonesty, drug trafficking or violence punishable by imprisonment for 3 months or more'.<sup>47</sup>
- In Queensland, disqualifying offence includes 'an offence involving fraud or dishonesty, an offence involving drug trafficking, an offence involving use or threatened use of violence, an offence of a sexual nature, extortion, arson or unlawful stalking punishable by imprisonment of 3 years or more'.<sup>48</sup>
- In the ACT, 'disqualifying act' includes an 'offence against the Commonwealth *Competition and Consumer Act 2010* or its State or Territory equivalents or an offence against any Commonwealth, State or Territory law punishable by imprisonment for 1 year or more'.<sup>49</sup>

Moreover, the time within which a disqualifying offence must have been committed for it to be a disqualifying offence varies. In Queensland, commission of a serious offence within 5 years of the application is a basis for refusing the licence. In NSW and Victoria the period is 10 years.

By contrast with the New South Wales *Motor Dealers Act 1974* and *Motor Vehicle Repairers Act 1980*, the basis for refusing a right to operate in the legislation of most other jurisdictions is generally neither as detailed nor as far reaching.

In most jurisdictions where the 'fit and proper person' test is used, there is no statutory definition or expansion of the term. Its meaning in any particular context would need to be determined by application of the flexible common law approach noted above.

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<sup>45</sup> *Motor Dealers Act 1974* (NSW) s. 12(4)

<sup>46</sup> See *Zaineddine v Department of Services Technology & Administration* [2011] NSWADT 14

<sup>47</sup> *Motor Car Traders Act 1986* (Vic) s. 3 definition of 'serious offence'.

<sup>48</sup> *Property Agents and Motor Dealers Act 2000* (Qld) Dictionary definition of 'serious offence'.

<sup>49</sup> *Fair Trading (Motor Vehicle Repair Industry) Act 2010* (ACT) s. 10

The 'fit and proper person' test is also not used in all relevant legislation. For example, the *Second-hand Dealers and Pawnbrokers Act 1996* (SA) provides for disqualification of the right to carry on business as a second hand dealer only where:

- the person has been convicted of a dishonesty offence or an offence against the Act;
- the person is bankrupt or the director of a company that has been or is being wound up;
- a police officer issues a notice of disqualification on the basis that the dealer has been in possession of stolen goods at least 3 times in 12 months without notifying police.<sup>50</sup>

Generally, legislation applicable to the separated parts trade also includes criteria that are concerned with issues of suitability and capacity other than in relation to criminal conduct or criminal association. For example, the NSW motor dealer and motor repairer Acts also provide that, to be eligible to hold a licence, an applicant must:

- have sufficient financial resources to carry on the business ; or
- have the qualifications or sufficient knowledge or expertise needed to carry on the business.

Again, there is a range of criteria used in the other jurisdictions, including that an applicant must:

- have sufficient knowledge of the relevant Act and regulations;<sup>51</sup>
- have suitable premises ;<sup>52</sup>
- not have previously held a licence that has been suspended or cancelled;<sup>53</sup>
- not be subject to an administration or representation order under guardianship or similar legislation;<sup>54</sup>
- not be the subject of an admitted claim against the guarantee fund ;<sup>55</sup>
- demonstrate that they can comply with the Act and any conditions on the licence;<sup>56</sup> and
- demonstrate that there is adequate management, supervision and control of the business<sup>57</sup>.

There is therefore no uniform or consistent set of controls over who may be given the right to carry on a business that would involve supplying, trading in or using separated vehicle parts. A person who does not meet the criteria in New South Wales may well be able to obtain the necessary licence in another jurisdiction.

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<sup>50</sup> *Second Hand Dealers and Pawnbrokers Act 1996* (SA) s. 6

<sup>51</sup> *Motor Car Traders Act 1986* (Vic) s. 13 (4)(f)

<sup>52</sup> *Motor Car Traders Act 1986* (Vic) s. 13(4)(h)

<sup>53</sup> *Property Agents and Motor Dealers Act 2000* (Qld) s. 85

<sup>54</sup> *Motor Car Traders Act 1986* (Vic) s. 13(4)(k) and *Second Hand Dealers and Pawnbrokers Act 1989* (Vic) s.6

<sup>55</sup> *Motor Car Traders Act 1986* (Vic) s. 13(4)(m) and (n); *Property Agents and Motor Dealers Act 2000* (Qld) s. 85

<sup>56</sup> *Consumer Affairs and Fair Trading Act* (NT) s. 259

<sup>57</sup> *Consumer Affairs and Fair Trading Act* (NT) s. 259

It is also clear that a history of criminal behaviour or poor business practice in one jurisdiction cannot always be taken into account if the persona applies for a licence in another jurisdiction. There are likely to be legal and practical reasons for this. In some jurisdictions the ability of the regulator to take prior illegality into account is limited to conduct that contravened the laws of that jurisdiction. It may also be the case (although this has not been the subject of investigation in this review) that a regulator in one jurisdiction has limited access to information about an applicant's prior conduct in another jurisdiction.

## 5.2 Monitoring and oversight

Monitoring and oversight tools include requirements for keeping records and reporting certain matters to the regulator, and powers for regulators and their authorised officers to monitor, inspect and investigate the operation of the business and the conduct of the licence holder.

The motor dealers Acts, motor repairer Acts and the second-hand dealer Acts all impose record keeping obligations on the licence holder. Generally, these include requirements that:

- licence holder must maintain records or registers of vehicles and other second hand goods bought, sold or exchanged in the course of the business;
- certain records must be made available for inspection and produced on demand to authorised officers and police; and
- licence holders must report certain changes to the regulator, including changes to the way the business is conducted, changes of address and changes in control of the business.

Record keeping requirements differ from jurisdiction to jurisdiction. Their clear purpose is to ensure that an audit trail is created so that regulators can trace the origin and destination of traded goods. They are supported by a range of powers given to police and enforcement officers to inspect, copy and take away records, and obligations on licence holders and other persons present to provide assistance in accessing the records.

However, only NSW imposes specific obligations to keep records relating to separated parts. Under the *Motor Dealers Act 1974*:

- Separate licences are required for different types of licensed business, even where they are operated from the same place of business. Thus, the holder of a dealer's licence who also carries on business as an auto-dismantler or a vehicle reconstructor must keep separate registers in respect of those businesses as well as in respect of their business as a dealer.<sup>58</sup>
- Auto-dismantlers and vehicle reconstructors must record particulars of every vehicle and of certain prescribed parts (major body components, major mechanical components and major accessories as defined) acquired in the course of conducting the business, as well as details of their disposal.<sup>59</sup>
- A dealer who demolishes or dismantles a vehicle must ensure that particulars of vehicles and parts recorded in its dealers register are immediately transferred to the register kept in respect of its auto-dismantler's business.<sup>60</sup>

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<sup>58</sup> *Motor Dealers Act 1974 (NSW)* ss. 21(2) and 22EA

<sup>59</sup> *Motor Dealers Act 1974 (NSW)* s. 21(4) and (6)

<sup>60</sup> *Motor Dealers Act 1974 (NSW)* s. 21B

- The licence holder is personally responsible for keeping the register. A register entry can be made by an agent, partner or employee of the licence holder but is presumed to have been made by the licence holder unless the contrary is proved.<sup>61</sup>

Our view is that in New South Wales at least there is a robust legislative framework for whole of life tracing of separated vehicle parts, including dismantling, trading, repair and reconstruction. However, irrespective of how good the framework may appear on paper, in practice it will only be effective if there is a high level of compliance. Given the potential for profit in the separated parts trade, high compliance levels are unlikely to be maintained without intensive and sustained enforcement activity and unless regulators have the capacity and the resources necessary to assess whether complete and up-to-date records are being maintained.

### 5.3 Penalties and sanctions

#### *Unlicensed trading offence*

The effectiveness of any licensing based regulatory regime depends on their being an effective deterrent to persons engaging in the regulated conduct without a licence. Where the regulated conduct has the potential to be highly lucrative, the sanction needs to be both substantial and likely to be applied if it is to be an effective disincentive to operating outside the scheme.

All schemes have offences for unlicensed trading, but the penalties prescribed vary significantly. For example:

- Generally, penalties for unlicensed trading in motor vehicles are much higher than those that apply to ordinary second hand dealers.
- The maximum fines prescribed for unlicensed vehicle trading vary between jurisdictions by up to tenfold.
- Some but not all jurisdictions provide for imprisonment.
- Some legislation prescribes penalties that increase with the number of vehicles sold, or the number of days the offence continues.
- One jurisdiction provides for a penalty that reflects the value of goods traded without a licence.
- Most but not all jurisdictions prescribe higher financial penalties where the offence is committed by a corporation. Generally the maximum penalty for a corporation is five times the maximum penalty for an individual.

The highly inconsistent position can be seen from the following summary.

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<sup>61</sup> *Motor Dealers Act 1974 (NSW) s. 22F*



**Table 2: Maximum penalties for unlicensed etc trading**

	<b>Motor vehicle traders</b>	<b>Second-hand dealers</b>
<b>New South Wales</b>	1000 PUs (1 <sup>st</sup> offence) 500 PUs/12 months imprisonment (2 <sup>nd</sup> and subsequent offence)	100 PUs
<b>Victoria</b>	100 PUs + 15% of the sale price per vehicle	100 PUs
<b>Queensland</b>	400 PUs / 2 years	200 PUs
<b>Western Australia</b>	\$50,000 + \$1,000 per day	\$20,000 (corporations) \$5,000 / 12 months imprisonment (individuals)
<b>South Australia</b>	\$100,000	\$2,500
<b>Tasmania</b>	1000 PUs + 50PUs per vehicle (corporations) 200 PUs + 20 PUs per vehicle (individuals)	50 PU + 2 PU per day
<b>Northern Territory</b>	2500PUs (corporation) 500PUs (individual)	2500PUs (corporation) 500PUs (individual)
<b>ACT</b>	50PUs/6 months imprisonment	50PUs/6 months imprisonment

*NB. PU=penalty unit. The amount of a penalty unit is fixed by legislation. Penalty units presently range between approximately \$110 and \$130.*

Note that penalties specified in legislation are the maximum penalties a court can impose. As a general rule, courts only impose maximum penalties in the most serious circumstances, including where there are similar prior offences.

Note also that a number of jurisdictions set the penalty for unlicensed motor trading by reference to the number of vehicles sold. This suggests that the offence is not intended to apply, or at least that there would be no effective penalty available for, persons trading in parts rather than whole vehicles.

Given the potentially lucrative opportunities available for operating outside the licensing framework, it would seem doubtful that the current range of penalties for unlicensed trading, particularly those at the lower end of the range, would be an effective deterrent.

### *Licensing sanctions*

Under most licensing schemes, the principle sanction for not compliance with legal requirements or conditions of the licence is suspension or cancellation of the licence.

Most of the legislation applicable to the separated parts trade provides for the cancellation, suspension and/or variation of the licence in the following circumstances:

- Where the licence was improperly obtained, that is, the application was accompanied by fraud or false information, or the applicant was ineligible to hold the licence, or there were other grounds for refusing the licence.
- Where the licence holder is found guilty of a disqualifying offence or other specified offences.
- Where the criteria for obtaining the licence are no longer met (for example the licence holder has become insolvent, or has ceased to be a fit and proper person).

As with the criteria for grant of a licence, the grounds for varying, suspending and cancelling a licence vary between schemes and between jurisdictions.

Again, the broadest grounds are set out in the NSW *Motor Dealer Act 1974* and *Motor Vehicle Repairers Act 1980*. These provide for the Director-General to issue a 'show cause notice' where there are reasonable grounds for believing, among other things, that:

- the licence was improperly obtained or there were grounds for refusal;
- the licence holder may have been convicted of an offence under the Act or under specified legislation relating to second hand trading or motor vehicle use;
- the licence holder may have failed to comply with the Act or regulations or a condition or restriction of the licence;
- the licence holder, within 10 years preceding the grant of the licence, was found guilty of motor vehicle theft, receiving or possession of stolen vehicle parts or an offence involving fraud or dishonesty punishable by imprisonment for 3 months or more;
- there is evidence that the licence holder 'is probably receiving or dealing in stolen goods';
- the business to which the licence relates is being carried on in a dishonest or unfair manner,
- if the person were not the holder of a licence, the Director-General would be required to refuse an application by the person for a licence;
- the licence holder has ceased to carry on the business at the place to which the licence relates for more than a month; or
- the licence holder is, for any other reason, not a fit and proper person to continue to hold a licence.<sup>62</sup>

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<sup>62</sup> *Motor Dealers Act 1974* s. 20D

Some form of show cause process is required under all schemes, although this is not always spelt out explicitly. This reflects established principles of procedural fairness,<sup>63</sup> which among other things require that a person should not be subjected to a sanction unless they are first made aware of and have an opportunity to respond to the allegation against them and the factual basis on which it is made.

The process set out in the NSW Acts is that if, having issued a show cause notice and considered any response received, the Director General is satisfied that any of the matters in the show cause notice is established, the Director-General may:

- reprimand the licence holder;
- impose a specified requirement on the licence holder;
- suspend the licence for a period not exceeding 12 months;
- disqualify the licence holder or any person concerned in the direction, management or conduct of the business to which the licence relates from holding a licence or from being concerned in the direction, management or conduct of a business for the carrying on of which a licence is required, either permanently or for such period as the Director-General thinks fit;
- impose a condition or restriction on the licence; and/or
- cancel the licence.<sup>64</sup>

The disciplinary process set out under this and other legislation involves making an administrative decision rather than imposing a criminal sanction. A criminal proceeding takes place in a court and requires proof of the offence 'beyond reasonable doubt'. In making a decision about disciplinary measures, the decision maker must be 'reasonably satisfied' that the relevant criteria are made out, which requires that the matters be proved on the 'balance of probabilities' taking into account the nature and consequences of the facts sought to be proved. Where a decision is likely to have the consequences that a person will be deprived of their ability to conduct a business or earn a livelihood, a very high standard of proof, even one which approaches the 'beyond reasonable doubt' standard, may be applied.<sup>65</sup>

Licensing sanctions are a well-established and potentially effective means of removing criminal elements from a regulated industry. In all jurisdictions, involvement in the stolen parts trade would be a basis for cancelling or suspending a licence on 'fit and proper' or similar grounds. However, the licensing criteria set out in the New South Wales *Motor Dealers Act 1974* provide the broadest basis for applying such sanctions.

### ***Other offences***

All schemes set out a range of lesser offences designed to ensure that those operating within the law comply with the regulatory requirements that attach to the licensing scheme. Generally, legislation includes offences for:

- making false or misleading statements in relation to licence applications;
- failing to comply with licence conditions;

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<sup>63</sup> Also referred to as 'natural justice'

<sup>64</sup> *Motor Dealers Act 1974* s. 20E(1)

<sup>65</sup> *Briginshaw v Briginshaw* (1938) 60 CLR

- failing to maintain the required documents/registers and making false entries in them;
- failing to report suspicious goods;
- breaches of consumer protection obligations (display of notices, honouring of statutory warranties, odometer offences etc);
- failing to produce records or provide information to authorised officers;
- failing to operate the business from approved premises; and
- failing to notify changes to licence particulars, eg, changes in ownership or control of the licence holder.

Again, there is a wide range in the penalties specified for similar offences in different jurisdictions. Generally, the range of penalties for different conduct varies. For example, maximum penalties for breaches of record keeping requirements for motor dealers are:

- NSW: 20 penalty units.
- Victoria: 50 penalty units, or 100 penalty units for making a false or misleading entry.
- Queensland: 200 penalty units.<sup>66</sup>

We would query whether the penalty levels for this type of offence could be considered to be an effective deterrent.

#### **5.4 Compliance and enforcement powers**

Each of the regulatory schemes confers a set of powers on agency officers and/or police to investigate and take action in relation to breaches of licence conditions and other regulatory requirements.

Typically, authorised officers or inspectors are given power to:

- enter business premises without warrant;
- require the production of records, and to inspect, take notes, copies or extracts of records so produced;
- require individuals to provide information, explanations of records and assistance in operating machinery or equipment;
- search for and examine any motor vehicles and parts and accessories of motor vehicles on those premises; and
- to obtain search warrants for entry into private premises or non-licensed premises.

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<sup>66</sup> *Second Hand Dealers and Pawnbrokers Act 2003* (Qld) s. 37; *Property Agents and Motor Dealers Act 2000* (Qld) s. 330

These provisions are usually supported by provisions which make it an offence to:

- wilfully delay or obstruct an officer exercising a power;
- refuse or fail to produce, or conceal or attempt to conceal, records or documents that are required to be produced;
- refuse or fail to answer a question or give an explanation relating to such record or documents;
- provide false or misleading information; and
- concealing or attempting to conceal motor vehicles or parts that may searched.

While we have not undertaken a close comparison of the provisions, it appears again that the range of compliance monitoring powers available to authorised officers and police under the New South Wales *Motor Dealers Act 1974* and *Motor Vehicle Repairers Act 1980* are the most comprehensive and wide ranging powers of any jurisdiction. Moreover, under each of these Acts,

- licence holders and their employees are under a duty to report to authorised officers vehicles or parts they suspect of being stolen or unlawfully obtained; and<sup>67</sup>
- enforcement personnel who have reasonable grounds to suspect that a vehicle or vehicle parts in the possession of a licence holder may be stolen may give a notice to the licence holder prohibiting the alteration, disposal or sale of the thing for a period of 14 days.<sup>68</sup>

Specific obligations in relation to property suspected of being stolen are found in some of the second-hand dealer Acts, but not in the motor dealer or motor repair Acts in other jurisdictions.<sup>69</sup> This appears to be a further reflection of the difference between the market regulatory objectives of the motor dealer schemes and the crime prevention objectives of the second hand dealer Acts.

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<sup>67</sup> *Motor Dealers Act 1974* (NSW) s. 49; *Motor Vehicle Repairers Act 1980* (NSW) s. 77B

<sup>68</sup> *Motor Dealers Act 1974* (NSW) s. 50; *Motor Vehicle Repairers Act 1980* (NSW) s. 77C

<sup>69</sup> See eg *Second Hand Dealers and Pawnbrokers Act 1989* (Vic) s. 26; *Second Hand Dealers and Pawnbrokers Act 1994* (Tas) ss. 15, 16; *Second Hand Dealers and Pawnbrokers Act 2003* (Qld) s. 48

## 6. Options for improving Regulatory Effectiveness

It is clear that the current approach to regulation of the vehicle recycling and separated parts trades is inconsistent and uneven, not only as between the State and Territories, but within each State and Territory as well. Vehicle recyclers and parts traders are subject to a range of different laws. While each is based on a 'licensing' approach, the scope and coverage, objectives, compliance requirements and enforcement frameworks vary significantly from jurisdiction to jurisdiction.

Moreover, the regulatory schemes in some jurisdictions appear to be significantly more robust than in others. The New South Wales legislative scheme, and in particular the *Motor Dealers Act 1974* and *Motor Repairers Act 1980*, provides the broadest coverage of the vehicle recycling and separated parts market of any jurisdiction's legislation, contains arguably the strongest set of entry controls and 'right to operate' sanctions and provides regulators with probably the most extensive set of investigative and compliance powers of any jurisdiction.

It is against this general background that we consider a range of legislative options that might be used to strengthen the various regulatory schemes currently in place.

### 6.1 Enforcement pyramid

Contemporary regulation theory recognises that regulatory agencies have limited resources and so must deploy those resources as effectively as possible. It advocates a mix of co-operative and penal measures, or incentives and sanctions, as the most cost effective means of achieving regulatory objectives, on the basis that 'legal proceedings are expensive, whereas co-operation between the regulator and regulated is cheap'.<sup>70</sup>

It is now widely accepted that the most effective regulatory strategies are those that are underpinned by an 'enforcement pyramid' consisting of a hierarchy of interventions of increasing levels of severity. These should be available to be deployed by regulatory agencies as appropriate to particular circumstances. Typically informal warnings and persuasion would comprise the base level, to be used in the majority of interventions. For more serious conduct, and for situations where warnings and persuasion are demonstrably ineffective, legally enforceable directions and prohibitions, minor penalties or infringements should be available. Serious criminal offences, and sanctions that affect the 'right to operate' such as suspension or cancellation of a licence would be reserved for the most serious circumstances.

The enforcement pyramid approach, as advanced by Ayres and Braithwaite in the early 1990s, is founded on the assumption that 'Regulators will be able to speak softly when it is known that they carry big sticks. The tougher and more various the sanctions, the greater the success regulators are likely to achieve by proceeding softly. The more those sanctions can be kept in the background, the more regulations can be transacted through moral suasion, the more effective regulation will be'.<sup>71</sup>

The enforcement pyramid has become an important design feature in a wide range of regulatory legislation enacted since the mid 1990s, including the Corporations Act and in occupational health

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<sup>70</sup> G Gilligan et al, *Research Report: Regulating Directors Duties - How Effective are the Civil Penalty Sanctions in the Corporations Law?*, Centre for Corporate Law and Securities Regulation, University of Melbourne 1989, in Comino V, *The challenge of corporate law enforcement in Australia* (2009) 23 Australian Journal of Corporate Law 233

<sup>71</sup> J Ayres and J Braithwaite, *Responsive Regulation, Transcending the Deregulation Debate*, OUP 1992.

and safety, environmental and transport safety legislation. Moreover, many regulatory agencies have adopted compliance and enforcement strategies which reflect the enforcement pyramid approach, by direct authorised officers to low level and 'co-operative' interventions in the first instance, with escalation to enforcement using criminal and 'right to operate' sanctions in progressively more defined and limited circumstances.

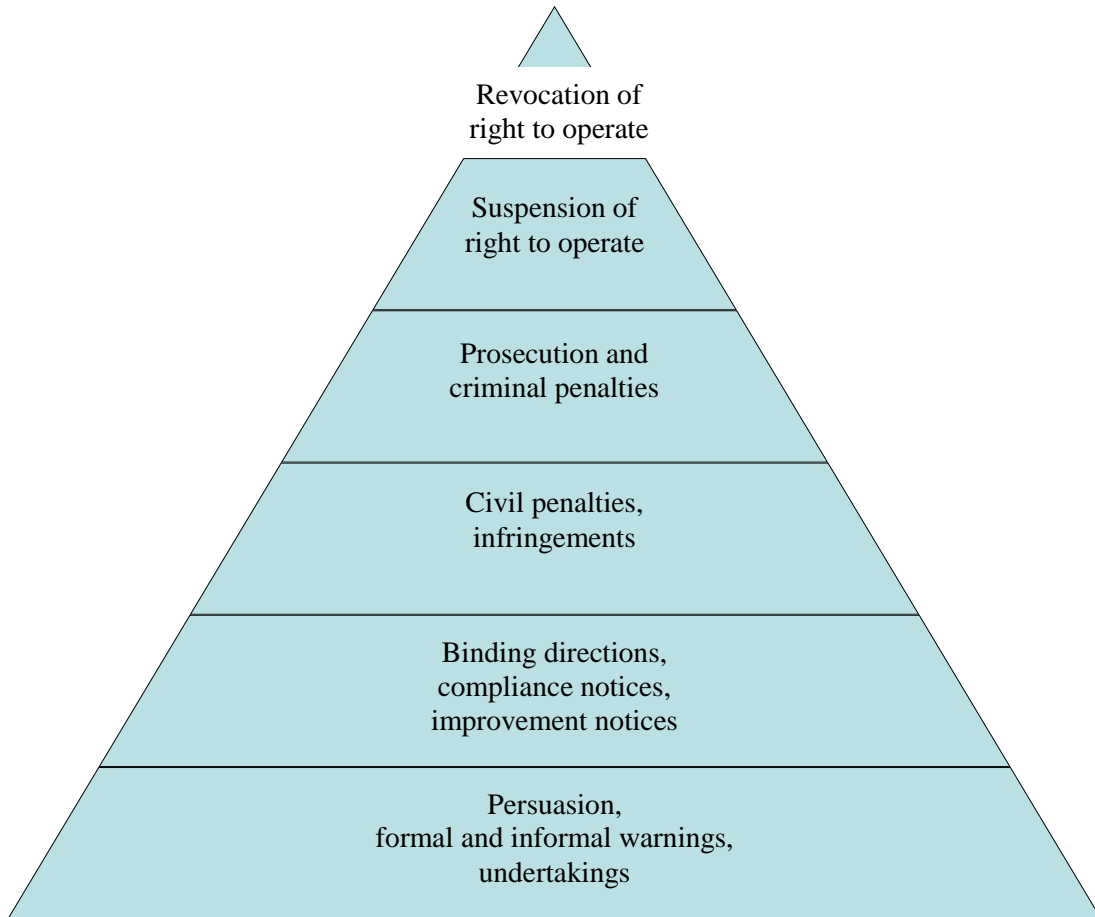


Figure 1: Typical enforcement pyramid<sup>72</sup>

Two comments need to be made in the context of schemes that regulate the separated parts market.

First, the motor dealer Acts and the second hand dealer Acts contain a range of intervention options, from fines and infringements through to sanctions affecting the licence. However, most of the Acts predate the period in which the enforcement pyramid approach started to explicitly influence regulatory design. To the extent to that those Acts make a hierarchy of interventions available, the range is somewhat limited.

<sup>72</sup> Adapted from *Ayres and Braithwaite*, *ibid*, p 35

Second, strategic regulation theory is based on a set of assumptions about the motivations of both individuals and corporations who engage in business activities. These motivations are not limited to profit maximisation, but include countervailing drivers such as a desire to do what is right, to protect and enhance individual and corporate reputation and to minimise the cost and disruption of adversarial regulatory encounters.<sup>73</sup> The major challenge for regulation of the separated parts market is criminal involvement in the vehicle trades. It is unlikely that lower level and co-operative interventions will be effective in that context. The emphasis must therefore be on sanctions at the 'top end' of the scale, which enable regulators to quickly respond to and deal with non-compliant conduct and to deploy sanctions that are of sufficient deterrent effect to offset the potential gains.

There are a number of features of contemporary enforcement pyramids in the safety, health and environmental areas which potentially meet these requirements. The following is an outline of some of the more common mechanisms.

## **6.2 Enforceable undertakings**

Many Australian consumer protection statutes enable a person who has been found to have contravened regulatory requirements to enter into an enforceable undertaking.

Undertakings are voluntary arrangements, and are typically entered into where there is evidence of a contravention which would be a basis for more intensive investigation, and possibly compulsory intervention (through some form of mandatory compliance notice or proceedings for an offence). Thus enforceable undertakings are measures available at the lower end of the enforcement pyramid.

Typically, legislation will provide that the relevant regulator may accept an undertaking from a person in connection with a possible contravention. Because undertakings are voluntary, they can generally be withdrawn at any time, although withdrawal may trigger other regulatory action. Undertakings are generally made publicly available.

If the person who gave the undertaking fails to comply with its terms, the regulator is usually able to apply to a court to enforce its terms. The undertaking provisions contained in the national consumer laws include orders that the person:

- comply with the undertaking
- pay a penalty representing the amount of any financial benefit that the person has obtained that is reasonably attributable to the breach;
- compensate any other person who has suffered loss, injury or damage as a result of the breach.<sup>74</sup>

These provisions also extend liability for breach of the undertaking to any officer of a body corporate who knowingly authorised or permitted the breach.

## **6.3 Criminal and civil penalties**

Conventional criminal activity has traditionally been dealt with by the criminal law, while misconduct in the course of corporate and business activity has been handled through administrative mechanisms such as licensing, usually backed up by regulatory offences. Such offences tend to

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<sup>73</sup> See *Comino V*, *ibid* at 239 ff.

<sup>74</sup> See *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss. 198



attract lower level financial penalties and infringements. This is clearly the case for most (but not all) of the motor traders and second hand dealers schemes.

The distinction between *regulatory offences* and *criminal offences* reflects a policy view that criminal offences should be reserved for conduct which is intrinsically immoral. Criminal sanctions are widely considered to be the most effective form of deterrence because a finding of guilt carries the threat of imprisonment, the shame of public prosecution and the stigma and reputational damage of a criminal conviction. These are considered to be significant disincentives to corporate misconduct. Therefore, prosecution of criminal offences is an important regulatory tool in a range of settings, notwithstanding that it is the measure at the apex of most enforcement, and therefore usually a regulatory strategy of last resort.

Criminal prosecution as a regulatory strategy has a number of difficulties. The criminal 'beyond reasonable doubt' standard of proof requires meticulous investigation and comprehensive briefs of evidence to be prepared. A person who is facing a criminal penalty is generally entitled to refuse to answer questions and provide information on the basis of the privilege against self-incrimination. Where an Act imposes a penalty, the legislation will be read strictly and any ambiguity or uncertainty read against the prosecution.<sup>75</sup> In criminal proceedings it is generally impermissible to negotiate an agreed penalty.

Because of these difficulties, corporate and business regulations often make provision for civil penalties (also called pecuniary penalties). Civil penalties can be imposed after a court or tribunal has found on the balance of probabilities that a person has committed a breach. Criminal sanctions, obviously including imprisonment but also including other sentencing orders and criminal confiscation are not available, although the maximum pecuniary penalty may be relatively high. In some settings it is possible for the regulator and offender to negotiate and agree the amount of pecuniary penalty.

#### **6.4 Compliance directions, improvement notices and prohibition notices**

Compliance and improvement notices allow enforcement personnel to give enforceable directions to cease engaging in conduct that contravenes the legislation. Typically, the power to issue such notices is set out in provisions which provide:

- An inspector or authorised officer may issue the notice against a person believed to be committing or to have committed an offence and the offence is likely to continue or be repeated.
- The person to whom the notice is given must take specified action within a specified period to stop the offence from continuing or occurring again.
- Generally, the person may appeal against the notice. The notice must clearly specify the grounds on which it is issued.
- Failure to comply with a notice without reasonable excuse is an offence.

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<sup>75</sup> See Pearce D and Geddes R, *Statutory Interpretation in Australia* (5th edition) pp 297 ff. Note that this principle of interpretation will not be applied so readily in safety legislation, where legislation is more likely to be read in a way which favours its safety objectives.

Prohibition notices and similar emergency powers allow enforcement personnel to give binding directions to individuals and corporations to prevent or mitigate threats to health and safety or to the environment.

These types of interventions are widely available to health and safety<sup>76</sup>, environmental<sup>77</sup> and transport<sup>78</sup> regulators.

## 6.5 Court based intervention powers

The power of a single officer to give a direction on the basis of their suspicion that illegality may be occurring has the potential to significantly interfere with the operation of a business in circumstances which may not be reasonably justifiable. An alternative approach is to make such powers subject to supervision by the courts.

For example, enforcement powers under Victorian consumer protection legislation, which are available for enforcement of the *Motor Car Traders Act 1986*, enable the Director of Fair Trading or any other person to apply to a court for an injunction to restrain a person from engaging in conduct that constitutes:

- (a) a contravention of any provision of this Act; or
- (b) attempting or conspiring to contravene such a provision; or
- (c) aiding, abetting, counselling or procuring a person to contravene such a provision; or
- (d) inducing or attempting to induce a person, whether by threats, promises or otherwise, to contravene such a provision; or
- (e) being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision.'

An initial application can be made *ex parte* (ie without notice to the offender). In addition to being able to order the person to cease engaging in the proscribed conduct, the court can make various orders requiring the person to take positive action, including:

- to institute training programs in relation to compliance;
- to refund money or transfer property;
- to disclose information about the person's business activities or business associates;
- to honour promises made in the course of misleading or deceptive conduct or in a false representation;
- to destroy or dispose of goods used for the purpose of contravention.<sup>79</sup>

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<sup>76</sup> See eg: *Work Health and Safety Act 2011* (NSW) ss. 191-194

<sup>77</sup> See eg: *Environment Protection Act* (Qld) s. 467

<sup>78</sup> See, eg *Transport (Compliance and Miscellaneous) Act 1983* (Vic) s. 228ZZC-228ZZI

<sup>79</sup> See eg: *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss. 201 and 202

Legislation forming part of the national regulatory schemes developed by the National Transport Commission contains 'supervisory intervention' provisions which allow courts to order persons they consider to be a systematic or persistent offenders, to do specified things to reduce offending, including, for example:

- appointing or removing staff to or from particular activities or positions (including compliance related functions) training and supervising staff;
- obtaining expert advice;
- installing equipment, and implementing systems and procedures for, monitoring, compliance, managerial or operational equipment;
- putting in place monitoring, compliance, managerial or operational systems or procedures under the direction of the regulator;
- to furnish compliance reports to the regulator, and to make them public.<sup>80</sup>

## 6.6 Forfeiture and commercial benefits penalties

Sanctions that are directed towards neutralizing the economic incentives for non-compliant conduct are now widespread. Such measures are based on assumption that persons who engage in any form of commercial activity base decisions about compliance on an assessment of the costs of compliance and the benefits of non-compliance.

All jurisdictions have general proceeds of crime legislation, which enables the confiscation of property and other assets gained as a result of an offence. In addition, a number of regulatory regimes have targeted provisions aimed at neutralizing the economic benefits of offending in particular sectors.

Legislation modeled on the compliance and enforcement framework developed by the National Transport Commission provides for courts to make 'commercial benefits orders' against persons found guilty of transport offences. Typically such orders may require a person to pay a fine of up to three times the *estimated gross commercial* benefit that was *received or receivable* by the person or an associate from the commission of the offence. Such orders may be in addition to, or instead of, any other penalty imposed for the offence.

In estimating the commercial benefit, courts may take into account benefits of any kind, whether monetary or otherwise and any other relevant matters, including (for example, in the transport context, the value of the load). Courts must disregard any costs, expenses or liabilities incurred by the person or by an associate of the person in achieving the benefit.

The New South Wales legislation contains an array of provisions which allows the regulator to trace, seize, restrain and forfeit property of persons convicted of offences under the Act. For example, the *Motor Dealers Act 1974* provides that where a person is convicted of certain offences, a court may, in addition to imposing any other penalty:

- rescind sales made when the person was trading without a licence;
- order the person convicted to pay compensation or to carry out specified work;

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<sup>80</sup> See eg draft *Heavy Vehicle National Law*, clauses 527 -533

- order the forfeiture of vehicles; and
- order the person pay a penalty equal to the proceeds derived from the offence.<sup>81</sup>

In order to preserve property for the purpose of making such orders, the Supreme Court can make orders restraining a person from disposing or dealing with specified property when proceedings are taken against the person.<sup>82</sup>

Legislation in other jurisdictions does not contain similarly broad provisions, although it is possible that general sentencing and proceeds of crime legislation in other jurisdictions would give courts the ability to deal with the proceeds of criminal activity.

### **6.7 Prohibition orders**

Another form of order used in contemporary regulation allows courts to effectively prevent a person from carrying on business in a particular sector or role.

Examples of such provisions include:

- A person who is convicted of an offence under the Corporations Act that is punishable by imprisonment for a period of greater than 12 months is automatically disqualified from acting as a director of a company for the same period of time. There is also provision under the Act for ASIC to disqualify a person from managing a corporation for up to 5 years if the person has been an officer of two or more companies that have entered liquidation within the previous seven years.<sup>83</sup>
- The draft Heavy Vehicle National Law which allows the prosecution to apply to the court for an order prohibiting a person whom the court convicts of an offence under the Law, and whom it considers to be a systematic or persistent offender, from having a specified role or responsibility associated with road transport for a specified period of up to one year.<sup>84</sup>

The purpose of the order is to restrict opportunities for the person to commit, or be involved in the commission of, further relevant offences. However, such provisions are only necessary in regulatory settings where the right to carry on business is not controlled through a licensing requirement or similar entry control. They are therefore unlikely to add anything to the entry control mechanisms currently available under vehicle dealer, vehicle repairer and second hand dealer legislation.

### **6.8 Chain of responsibility**

The term ‘chain of responsibility’ is frequently used to describe an approach to the framing of regulatory laws that involves imposing legal duties on each of the parties in a chain of production or supply who is in a position to influence compliance outcomes.

The term ‘chain of responsibility’ has been used in the road transport context to describe the relationship between a number of different persons involved in a single transport task. While compliance and enforcement activity in the road transport sector traditionally relied heavily on on-road detection and the use of infringements and prosecutions directed against drivers, chain of

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<sup>81</sup> *Motor Dealers Act 1974* (NSW) s. 55B, 55C

<sup>82</sup> *Motor Dealers Act 1974* (NSW) s. 55B

<sup>83</sup> Corporations Act, ss. 206B and 206F.

<sup>84</sup> Clauses 534-538

responsibility based laws sought to impose legal responsibilities on other parties in the chain with the means and incentives to influence on-road compliance.

For example, under the Heavy Vehicle National Law, if the driver of a vehicle commits an overloading offence, the employer of the driver, prime contractor, vehicle operator, consignor of any goods on the vehicle, the packer of the goods and the loader and loading manager of the goods.<sup>85</sup> However each of those parties can avoid liability if they prove that they did not know and could not reasonably have known of the contravention and either they took reasonable steps to prevent the contravention or there were no steps they could reasonably be expected to have taken.<sup>86</sup>

The ‘chain of responsibility’ approach is widely applied in a range of regulatory settings, including in environmental and occupational health and safety legislation. Some examples are:

**Table 3: Chain of responsibility regimes**

<b>Occupational Health and Safety Act 2004 (Vic)</b>	<b>Heavy Vehicles National Law 2010</b>	<b>Marine Safety Act 2010 (Vic)</b>
Employers	Vehicle owners	Port management bodies
Employees	Prime contractors	Commercial vessel operators
Self-employed persons	Drivers	Designers, manufacturers and suppliers of vessels
Persons who control workplaces	Consignors	Designers, manufacturers and suppliers of marine safety equipment
Designers of plant, buildings and structures	Consignees	Marine safety workers
Manufacturers of plant and substances	Packers	Recreational vessel operators
	Loaders and loading managers	

Of all the legislation that applies to the trade in separated vehicle parts, only the NSW *Motor Dealers Act 1974* (NSW) identifies and imposes specific obligations on different parties in the supply chain.<sup>87</sup> It does so by creating separate categories of licence for motor dealers, car market operators, financiers, auto dismantlers vehicle reconstructors and imposing some different obligations on each. For example, auto-dismantlers are subject to specific requirements to surrender number plates of wrecked vehicles to the registration authority, and to mark parts derived from

<sup>85</sup> *Heavy Vehicle National Law* ss. 153-154

<sup>86</sup> *Heavy Vehicle National Law* s. 560

<sup>87</sup> Although it is worth noting that written-off vehicles legislation in some jurisdictions also imposes separate obligations on motor car traders, vehicle wreckers and insurers to report written-off vehicles to the registration authority and to affix notices to written off vehicle in certain circumstances (see eg *Road Safety (Vehicles) Regulations 2009* (Vic), regs. 87-92)

demolished or dismantled vehicles.<sup>88</sup>

These requirements differ from the types of chain of responsibility provisions in contemporary transport safety legislation in that they impose specific but limited obligations on a particular party rather than a general duty to ensure that other parties in the chain comply with their requirements.

## 6.9 Corporate, directors and officers liability

Legislative provisions that extend the chain of responsibility to directors and senior managers of corporations are now common in a wide range of regulatory settings, including in legislation providing for corporate, consumer, environmental, safety and occupational regulation.

Typically, director and officer liability provisions provide that if a corporation commits a relevant offence, each director and each person concerned in the management of the corporation is deemed to have also committed the offence.

It is generally a defence under such provisions if the director or manager charged establishes that he or she:

- had no knowledge of the actual offence or was not in a position to influence the conduct of the person who actually committed the offence; and
- took reasonable precautions and exercised due diligence to prevent the commission of the actual offence.

A variation in some of the legislation provides that directors, senior managers and/or executive officers are deemed to be guilty of an offence committed by the corporation if they “knowingly” permitted the offence to occur.

Typically these provisions enable prosecutors to bring charges against directors or managers irrespective of whether or not the corporation itself has been proceeded against.

Such provisions are found in legislation relating to motor dealers in all jurisdictions except the ACT, and in the legislation of most jurisdictions relating to vehicle repairers and second hand dealers.<sup>89</sup> Section 54 of the *Motor Dealers Act 1974* (NSW) contains provisions that make directors and senior managers criminally liable for offences committed by bodies corporate. Section 54 provides that where a corporation contravenes the Act or regulations, each person who is a director or is concerned in the management of the corporation is deemed to have committed the offence and liable to the same extent as the corporation, unless the person satisfies the court or the tribunal that:

- the corporation contravened the provision without their knowledge;
- they were not in a position to influence the conduct of the corporation in relation to the contravention; or
- they were in a position to influence the conduct of the corporation but used all due diligence to prevent the contravention.

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<sup>88</sup> *Motor Dealers Act 1974* (NSW) s. 26A

<sup>89</sup> See eg: *Motor Dealers Act 1974* (NSW) s. 54; *Pawnbrokers and Second-hand dealers Act 1996* (NSW) s. 40A; *Motor Car Traders Act 1986*, s. 82I and *Australian Consumer Law and Fair Trading Act 2012* (Vic) s. 196; *Second-hand Dealers and Pawnbrokers Act 1989* (Vic); s. 30; *Property Agents and Motor Dealers Act 2000* (Qld) s. 561; *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) s. 112; *Second-hand Vehicle Dealers Act 1995* (SA) s. 47; *Second-hand Dealers and Pawnbrokers Act 1996* (SA) s. 26; *Motor Vehicle Dealers Act 1973* (WA) s. 55; *Motor Vehicle Repairers Act 2003* (WA) s. 110; *Motor Vehicle Traders Act 2011* (Tas) s. 60; *Second-hand Dealers and Pawnbrokers Act 1994* (Tas) s. 22; *Corporate Affairs and Fair Trading Act* (NT) s. 325

The effect of these provisions is to ‘lift the corporate veil’ by allowing individuals who have control over the conduct of the corporation to be made personally liable to criminal sanctions. Directors and managers liability provisions are widely used in a range of regulatory settings. The prospect of senior personnel facing significant penalties (including penalties of imprisonment) has been considered to be an important driver of corporate compliance.

However, such provisions have been subjected to increasing criticism as unfairly imposing responsibilities on directors and senior officers. In response to this concern, Commonwealth, State and Territory governments, through COAG, embarked in 2009 on a project to harmonise the imposition of personal criminal liability for corporate fault across Australian jurisdictions. All jurisdictions have agreed to review and reform derivative liability principles against a set of principles, agreed by COAG, which aim to ensure that, where derivative liability is considered appropriate, it is imposed in accordance with principles of good corporate governance and criminal justice.

The COAG principles are:

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
3. A ‘designated officer’ approach to liability is not suitable for general application.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
  - there are compelling public policy reasons for doing so (e.g. in terms of the potential for significant public harm that might be caused by the particular corporate offending);
  - liability of the corporation is not likely on its own to sufficiently promote compliance; and
  - it is reasonable in all the circumstances for the director to be liable having regard to factors including [that] the obligation on the corporation, and in turn the director, is clear, the director has the capacity to influence the conduct of the corporation in relation to the offending; and there are steps that a reasonable director might take to ensure a corporation’s compliance with the legislative obligation.
5. Where principle 4 is satisfied and directors’ liability is appropriate, directors could be liable where they have encouraged or assisted in the commission of the offence or have been negligent or reckless in relation to the corporation’s offending.
6. In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation’s offending if they are not to be personally liable.’

Any review or extension of the directors and officers liability provisions in the regulatory schemes relating to the separated parts market would need to be assessed against these principles.

It should also be noted that it is relatively rare for directors to be charged under these types of provisions. Nevertheless, they continue to be used in a wide range of regulatory settings because the threat of direct criminal liability is still widely believed to provide a strong incentive for directors and boards to proactively monitor and manage an organisation’s compliance obligations.