

**Report on
questions posed to, and answers provided by, the
Motor Vehicle Industry Board
in relation to the proposed transfer of
the Board's functions to the
Department of Commerce and
Commissioner for Consumer Protection**

29 October 2012

BACKGROUND

In late 2009 the Government decided that the licensing function performed by Boards in the Consumer Protection portfolio, including the Motor Vehicle Industry Board, should be transferred to the Commissioner for Consumer Protection. Legislation implementing this decision was passed by State Parliament in November 2010.

In the lead up to the transfer, the Department of Commerce engaged with each of the Boards to ensure that the views and experience of members in discharging the Board's functions was properly captured and considered in the development of the Department's own administrative processes.

During consultations with the Motor Vehicle Industry Board, the Board requested that the Department provide it with a list of questions to respond to. A list was subsequently provided by Mr Gary Newcombe, Director of Strategic Policy and Development in the Consumer Protection Division of the Department of Commerce. The Board's responses to those questions are referred on page 12 of the Board's 2009/10 Annual Report.

Direct extracts of the original list of questions asked of the Board and the Board's response to each question (in italics) is attached.

Additional commentary from the Department of Commerce is also provided based on the Department's actual experience since the transfer of the licensing function to the Commissioner for Consumer Protection took effect on 1 July 2011.

MVIB response to Gary Newcombe¹

Questions (1) and (2)

How, if the proposed model of a separate Motor Industry Advisory Committee and Consumer Advisory Committee were to be retained, could consumer input into issues in the motor dealer and repairer industries be supported?

- 1. It is not clear to the Board what the functions of the proposed Motor Industry Advisory Committee will be, and it is therefore difficult for the Board to provide input into this. It is not apparent to the Board on what issues the Committee would be asked to provide advice to the Commissioner and the Minister.*
- 2. It is, however, the Board's view that there would be a fundamental inconsistency with the legislative purpose and functions of the Commissioner for Consumer Protection, if the Department were to fund and provide administrative support to an industry-only Advisory Committee with no independent consumer representation among its members. It does not seem compatible with the principles of the legislative framework upon which the Department is based, for it to be providing resources to industry-only bodies, where no continuous or on-going, independent consumer feedback would be provided to the Commissioner or Minister, or to the Motor Industry Advisory Committee.*
- 3. It seems to the Board that the appropriate course would be to include consumer representatives as permanent members of the Motor Industry Advisory Committee, and to arrange for those consumer representatives to also sit on the Consumer Advisory Committee.*
- 4. Apart from this policy concern, the Board's experience has been that it is beneficial, and in fact essential, to have a mix of industry and consumer input in discussing all aspects of Board business. The same would apply in relation to the proposed Motor Industry Advisory Committee.*
- 5. At Board meetings, members frequently enjoy robust exchanges of views, and benefit greatly from being exposed to, and understanding, different points of view. The Board will often arrive at a more balanced and measured decision as a result of the greater breadth and depth of discussion. The Motor Industry Advisory Committee will need to have the same breadth of input to be effective.*

COMMENT (Paragraphs 1-5)

The Motor Vehicle Industry Advisory Committee was established under the *Fair Trading Act 2010* on 1 July 2011.

¹ Mr Newcombe is Director Strategic Policy and Development in the Consumer Protection Division of the Department of Commerce.

The functions of the Committee are set out in the *Fair Trading Act 2010*. The functions include advising the Minister and the Commissioner for Consumer Protection on the regulation of the motor vehicle dealing and repair industry in Western Australia, including the licensing, certification and training of persons or businesses.

It is also a function of the Committee to advise on education, information and advice provided to consumers by the Commissioner, or on any other matter referred to the Committee by the Minister or Commissioner.

The Committee is chaired by the Director General of the Department of Commerce and includes representatives of the Motor Trade Association of WA (Inc), the Institute of Automotive and Mechanical Engineers (Inc) and the Royal Automobile Club WA. The Commissioner for Consumer Protection is also as ex officio member of the Committee.

With a membership of more than 700,000, the Royal Automobile Club WA was included on the Committee to provide a balance to policy issues where the interests of consumers might be affected.

The Consumer Advisory Committee, another statutory committee under the *Fair Trading Act 2010*, has also been established since the abolition of the Boards.

The operation of the Motor Vehicle Industry Advisory Committee represents no inconsistency with the purpose and function of the Commissioner for Consumer Protection. The Committee has been established by legislation and support for the Committee forms part of the Commissioner's purpose and function, as does support for the Consumer Advisory Committee.

Question (3)

How should the Committee operate? How often should it meet and what level of support would the Committee require?

6. *The answers to these questions appear to depend upon the legislative scope of the Committee and the range of issues that the Committee will be required to consider. Without knowing what types of issues the Committee will be asked to consider, it is difficult to provide an answer. For the Committee to be effective it would need to meet regularly, probably monthly, and would need to have its own policy support function to enable it to retain its independence and provide feedback to the Commissioner and the Minister, unfiltered by the Department.*

COMMENT (Paragraph 6)

The *Fair Trading Act 2010* provides for the Motor Vehicle Industry Advisory Committee to determine its own procedures.

The former Board generally met on a monthly basis as part of a meeting cycle to deal with licence applications. Since the Commissioner has become the licensing authority, licence applications are now dealt with on a continuous, daily basis.

The Committee is not a licensing body and there is, therefore, no imperative to maintain the same meeting frequency as that of the Board. Nevertheless, the views of the Board about the frequency of meeting were noted and meetings of the Committee were initially held once a month. However, in March 2012 the Committee agreed to move to bi-monthly meetings on the understanding that the frequency of meeting would be re-considered when a proposed major review of motor vehicle legislation commences later this year.

The Committee members bring their own experiences, and those of their members, to the operations of the Committee.

The Committee was not established to be a separate policy body and, therefore, does not require its own policy support function.

Question (4)

Having regard to the Board's existing role and procedures in administering the licensing regime for motor vehicle dealers and repairers, what are the key areas where the Board believes it and its members add value to the regulatory regime and that the Commissioner would need to replicate or replace to ensure the continued integrity of the licensing systems? How would the Commissioner best go about replicating/replacing this contribution? Provide comment on the range of areas where the Board and its members contribute – ranging from industry input about current practices, Chair and members' input on legal issues/decision-making, and consumer representatives' input to decision-making.

'Fit and proper' character test

7. *In relation to the Board's existing role and procedures in administering the licensing regime, one significant area where the Board makes a vital contribution is in respect of the 'fit and proper' character test for both new applicants and renewing licence-holders. The Board conducts hearings for those applicants with more serious criminal records, in order to determine whether the applicant satisfies the 'fit and proper' character test. The Board gives a very careful and measured consideration to those applicants, and conducts its hearings in a thorough and careful way, having regard to long-established legal requirements.*

COMMENT (Paragraph 7)

Following the abolition of the Boards, the Department of Commerce implemented a new structure which included a new Licensing Directorate to specifically deal with licence applications for all occupational licensing in the Consumer Protection portfolio. Vesting all licensing in one Directorate has enabled the Commissioner for Consumer Protection to apply standard principles to determination of fit and proper vests, rather than different principles being applied by different licensing boards.

In making decisions about whether an applicant or an existing licensee is a fit and proper person, the Commissioner is guided by legal advice from the Consumer Protection Legal Unit and where appropriate, the State Solicitors office and private counsel.

Board membership

8. *Board members have been appointed to the Board through a careful selection process and members bring to their deliberations extensive life experience and maturity, a capacity to ensure equity and fairness, and a very wide range of personal, professional, occupational and educational experience. Each of the different members of the Board makes a valuable contribution to discussions and decisions of the Board, ensuring all perspectives relevant to issues are considered. Board members have also acquired extensive experience and knowledge of the motor industry during their tenure on the Board, which has been invaluable in the Board's decision-making. While the Board operates within the parameters of the legislation, its independence from the Department and the make-up of its members, gives it a credible persona in the eyes of both the motor vehicle industry and consumers.*

COMMENT (Paragraph 8)

The Motor Vehicle Industry Advisory Committee has a different membership to the former Motor Vehicle Industry Board, reflecting its different role and functions.

The membership of the Motor Vehicle Industry Advisory Committee is made up of individuals with extensive experience in various aspects of the motor vehicle industry. In this respect, the Committee's membership has a greater depth of industry experience than was available to the Motor Vehicle Industry Board.

Chairperson and legally-trained members

- 9. The Chairperson and legally-trained members ensure that applicants are accorded procedural fairness both before and during hearings. These members are also experienced at reading and interpreting the legislation, and ensuring that the Board carries out the functions, powers and duties conferred on it by the Act, and that it does not act beyond its powers.*
- 10. An independent Chairperson with legal qualifications is able to facilitate and balance the differing views of members and ensure that discussions and decisions stay within the parameters of the Board's legislative framework.*

COMMENT (Paragraphs 9-10)

Matters relevant to a licensing process involving quasi legal proceedings are not relevant to the Department's current administrative processes. The Commissioner has access to both internal and external legal advice and acts upon that advice to ensure that it operates within the legislative framework.

While the last Chair of the former Motor Vehicle Industry Board was a qualified legal practitioner this was not a statutory requirement and the former Chairs were not legal practitioners. Indeed, the Motor Vehicle Dealers Act 1973 did not require that any members of the Motor Vehicle Industry Board should be legally qualified.

Industry members

- 11. The industry members on the Board have extensive motor sales and motor repair industry knowledge, and are able to ask questions of applicants in hearings which relate to the industry in particular, and in Board deliberations they are able to provide first-hand knowledge of industry practices. Often, this industry input in the course of a hearing has been very revealing and enlightening.*

COMMENT (Paragraph 11)

The Motor Vehicle Industry Advisory Committee has more industry members than that appointed to the former Board. The increased number of industry members provides greater scope for more broad ranging discussion and deeper consideration of issues affecting the motor industry, beyond those just relating to licensing.

Members of the Committee are provided with full briefings at each meeting about matters relevant to licensing, as well as matters of general relevance to the industry. Members are at liberty at all times to raise any matter pertaining to the motor industry.

Consumer representatives

- 12 *Consumer representatives are able to ask questions of applicants in hearings which reflect community values and concerns, and they also raise these concerns during Board deliberations. They give an 'outsider's' perspective to industry members and reflect community expectations and standards, one recent example being in relation to standards of honesty and openness in respect of sales representations made to customers by motor vehicle sales staff. Some have community welfare experience including a Justice of the Peace who sits on interviews for juvenile offenders, and a financial counsellor who assists individuals in Mental Health Act hearings.*

COMMENT (Paragraph 12)

Parliament endorsed the Government's decision to shift the functions of various licensing Board's including the Motor Vehicle Industry Board to the Commissioner for Consumer Protection. The Commissioner does not normally conduct hearings as part of the current licensing processes.

Importantly, the Consumer Advisory Committee has been established under the *Fair Trading Act 2010* and this Committee can be consulted on any policy matter arising in the Consumer Protection portfolio, including any matters relevant to licensing.

Single public servant

13. *It is understood that if the Board's powers were to be transferred to the Commissioner, those powers may in turn be delegated to the Manager of the Motor Vehicles Branch. Whilst it is true that the current Manager has accumulated extensive knowledge and experience of the motor industry, partly as the result of attending Board meetings over many years in his capacity as Board Secretary, and being involved in discussions with industry and consumer representatives, this will not always be the case. When the current Branch Manager is no longer in the position, a new Manager may not have any such knowledge or experience, and therefore may not bring the same attributes to the decision-making. It would not be possible to replicate the wealth of knowledge, and life, legal and industry experience of the nine Board members, in a single public servant.*
14. *The Board has a quorum of five members sitting at each of its hearings, the five being made up of a balance of legal, industry and consumer representatives. The Board does not believe that it would be possible to replicate the balance which the input of five members brings to discussions and decision-making, if a single person is deciding whether an application should be granted.*

- 15. If a single Departmental staff member is charged with granting or refusing applications, Board members are concerned that it will be difficult to ensure that principles of procedural fairness are applied in all cases. It will be very difficult to safeguard against errors being made in the exercise of the discretion, such as ill-informed or capricious decision-making, the taking into account of extraneous or irrelevant considerations, acting upon a wrong principle, mistaking the facts, failing to take account of a material consideration or giving inadequate weight to a relevant consideration.*
- 16. It is hard to envisage how a single staff-member would be able to replicate the Board, when one considers that the Board deals with matters swiftly, with minimal waiting times for hearings, and operates in a cost-efficient and effective way.*

COMMENT (Paragraphs 13-16)

The board model approach to licensing is considered to be inefficient and not strategic.

Decisions relating to licensing and renewals have not been delegated to the Manager of what was the Motor Vehicles Branch. Rather decisions are made by a limited number of senior officers in the Licensing and Registration Directorate of the Department of Commerce, under delegated authority from the Commissioner for Consumer Protection. The Commissioner is directly responsible for making the most significant decisions. This arrangement is actually similar to that which existed under the former Board, where most decisions relating to licensing and renewals were made under delegated authority by the Secretary of the Board, who was also the manager of the Motor Vehicle Branch.

Where difficult licensing decisions arise, particularly where the applicant has a history of offences and judgements need to be made about the relevance of those offences to the applicant's current circumstances, the matter will be considered by a panel of senior Consumer Protection staff. In some instances, applicants are asked to attend an interview to explain their situation.

In exercising their delegated authority, the senior officers currently apply the same criterion and policies that were approved by the former Board. Experience to date shows that this process is working effectively.

The Commissioner and her delegates have access to internal and external legal advice to support the licensing function and to ensure that licence decisions are appropriate and not capricious. All licence decisions are reviewable by the State Administrative Tribunal (SAT). The cost of an application to the SAT is \$306. Since the Commissioner became the licensing authority, only two applications have been made to the SAT for review.

Since the abolition of the Board, the former Board's licensing criterion and policies have been comprehensively reviewed to ensure that they complied with all legislative requirements. A review of the licence renewal process is also currently underway to explore ways of reducing the regulatory burden on business while maintaining levels of consumer protection.

Legal requirements

17. *There is extensive case law governing the manner in which these decisions should be made, including Tavelli v Johnson, unreported; SCT of WA :Library No 960693, and Coulthard v Henneker (2003) WASCA 187. The case law requires that a decision-maker take a wide range of factors into account in determining whether an applicant satisfies the fit and proper test. Each application must be considered on its own merits. Relevant factors include,*

- *whether the convictions occurred in the course of or relate to the carrying out of the occupation to which the application relates,*
- *whether the offences involved dishonesty,*
- *whether they occurred while the person was the holder of a licence, and*
- *whether they are otherwise so serious, either in themselves or as representing a course of disregard for the law, as to reflect particularly adversely on the character of the person.*

18. *Factors which may indicate that a person is of good character and repute and a fit and proper person, notwithstanding previous convictions, may include*

- *demonstrating genuine remorse and contrition, true insight and understanding of the earlier turpitudes, especially if demonstrated by actions as well as words,*
- *whether the offences were committed a substantial time ago, although no set period can be fixed,*
- *any change in the applicant's circumstances from the time of commission of the offences which would indicate that factors giving rise to the offences have been eliminated, including such things as separating themselves from the people they were involved with at the time the offences were committed, overcoming drug or alcohol addictions, undertaking rehabilitation or anger management courses, demonstrating family or social support, and*
- *a lack of further offending, and age, paid and voluntary work and character references.*

COMMENT (Paragraphs 17-18)

The Commissioner is well aware of the case law relevant to the "fit and proper" character test in a licensing context, and the factors decision makers must take into account. Motor vehicle licensing procedures are administered in accordance with those principles. Internal legal advice and expert external advice is available to the Commissioner where required.

Necessity of a hearing

- 19. The Board is very concerned that if the regulatory regime were to be vested in a single public servant making decisions 'on the papers', it would not be possible to consider all of the above factors, and many more applications would be refused. On the papers, many applicants have serious or extensive criminal records, sometimes including dishonesty convictions, which would at first glance, make it difficult for them to satisfy the decision-maker that they are 'of good character and repute and a fit and proper person'.*
- 20. It is the experience of Board members that only through a very careful and thorough process of obtaining sentencing remarks, court transcripts, Statements of Material Facts, considering written references, hearing from and asking questions of the applicant in person, and questioning any witnesses brought by the applicant, that a balanced and fair picture can be obtained of the applicant's merit. It is only through a hearing that all of the factors required by the case law can be considered.*
- 21. Often, Board members have formed a preliminary impression of an applicant after reading the papers which make up the Board Hearing Notice, only to find after conducting a hearing, that they have formed a quite different impression. It is always extremely useful to see an applicant in person and be able to ask questions of the person, and in many cases hear from additional character witnesses. From long experience, it is the firm view of Board members that these decisions should not be made 'on the papers'.*
- 22. Many applicants wishing to enter the motor industry have not attained high levels of education and do not possess sufficient skills in writing to be able to demonstrate in writing that they are fit and proper.*
- 23. It is difficult to see how the hearing process could be replicated if the decision-making is vested in a single staff member.*

COMMENT (Paragraphs 19-23)

See commentary on paragraphs 13-18.

Appeals – delay and cost

24. Applicants who have been refused a licence, and wish to appeal the decision would then need to apply to the State Administrative Tribunal for a review of the decision. The Board has concerns about a potential increase in the number of appeals to the SAT, as, in the Board's experience, the SAT is slow to deal with matters, and there would be a backlog of applicants waiting to commence work in the industry. When matters are currently referred to the SAT there are numerous Directions Hearings and mediations, and a hearing may not be listed for several months. This would result in unfair delays in applicants being able to pursue their desired livelihood, and prospective employment positions with dealerships will not be able to be kept open. In addition to the issue of delay, the additional costs which are incurred by applicants when taking matters to the SAT is a concern to the Board. The decision-maker would presumably be required to attend mediations in each case, as well as attend each hearing. None of the above is desirable.

COMMENT (Paragraph 24)

All licence decisions are reviewable by the State Administrative Tribunal (SAT). The cost of an application to the SAT is \$306. Since the transfer of the licensing function to the Commissioner only two applications have been made to the SAT for review. The Board's concerns in relation to the SAT have not eventuated.

Abolition of some licences

- 25. The Board is aware of recommendations to abolish the 'fit and proper' character test for salespersons, yard managers and individual repair certificates. The Board believes that retaining licensing for only dealers and repair-business owners would have a negative impact on standards in both the motor sales and repair industries, and on the level of consumer confidence in these industries.*
- 26. Furthermore, if scrutiny of applicants entering the motor and repair industries is left to dealers and repair-business owners when employing new staff, there would need to be considerable training of licensed dealers to ensure that they understand the obligations placed upon them. It has been the Board's experience that a number of dealers do not ask to see criminal records when taking on new sales staff, and sometimes seem uninterested in the backgrounds of those they employ. Many are unaware that their staff members are attending a Board hearing.*

27. *The Board firmly believes that the 100 point system, which it uses to determine whether repair certificate applicants meet the 'sufficiently qualified' test under the Motor Vehicle Repairers Act ('the MVRA'), should be retained. The technology of automobiles is constantly changing and becoming more advanced and it is therefore essential that repairers seeking to obtain a repair certificate are able to demonstrate that they have the requisite technical skills and qualifications.*
28. *The Board has developed 29 different classes of repairer under the MVRA, to enable repairers to establish that they are 'sufficiently qualified' under the Act. Training providers such as TAFE and the MTA have adopted these disciplines of repairer, and have developed course structures which are aligned with the 29 different disciplines. Courses are now being offered in respect of many of the 29 classes of repairer, and this initiative encourages a greater spread of types of repairer into the industry, and a wider range of skilled repairers who may become certified.*
29. *If the Minister is considering replicating or replacing the Board's contribution to the licensing regime, it is difficult to understand why the Board is being abolished.*

COMMENT (Paragraphs 25-29)

The Department has not implemented or considered any of the changes about which the Board expressed concern. A comprehensive review of the *Motor Vehicle Dealers Act 1973* and *Motor Vehicle Repairers Act 2003* has commenced.

Question (5)

What would be the most effective way in which on-going consultation could be established between the Board and the Department in the development of the detailed policy considerations (legislative and administrative) that need to be resolved to implement the Government's decision to transfer the Board's role to the Department?

30. *The Board is willing to provide its input to the Department on specific issues as and when that input is required, and in each case an item could be added to the Board's Agenda. It would be preferable if issues could be circulated to the Board well before it meets, so that more than the usual 2 working-days' notice could be given.*

COMMENT (Paragraph 30)

Consultation with the Motor Vehicle Industry Board continued until its abolition on 30 June 2011. Industry consultation is ongoing through the Motor Vehicle Industry Advisory Committee.