AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION

STATUTORY REVIEW OF THE MOTOR DEALERS AND REPAIRERS ACT 2013

14 AUGUST 2020

CONTENT

FOREWORD

The Australian Automotive Dealer Association (AADA) is the peak industry body exclusively representing the interests of franchised new car Dealers in Australia. The AADA welcomes the opportunity to comment on the review of the Motor Dealers and Repairers Act 2013.

There are over 1,000 new vehicle outlets in New South Wales employing over 16,000 people. Dealers across New South Wales generate $3.7 billion in economic activity and more than $600 million in taxes for both the state and federal governments.

These businesses are scattered across the state in cities and country towns. They are usually family-owned businesses and play an important role in the community, taking on apprentices, sponsoring local sporting teams and donating funds and vehicles to local charities.

They undertake massive investments as required in their Dealer Agreements and these investments bring many benefits to local communities across NSW.

Our comments will be limited to Part 6 of the Act which deals with the protection of Dealers against unfair contract dealings with Manufacturers. The imbalance of power between franchised new car Dealers and offshore vehicle Manufacturers to which they are franchised is something that has been recognised both overseas and here in Australia. The Australian Competition and Consumer Commission, the Office of the Australian Small Business and Family Enterprise Ombudsman and the Office of the NSW Small Business Commissioner are only some of the statutory authorities to have highlighted the issue.

It is the existence of this power imbalance which prompted the NSW Government to introduce Part 6 of the Act.

Overall, the AADA is very supportive of the intent of Part 6 and considers that it has established protections for NSW Dealers which are greater than those that apply federally or in any other state or territory.

However, in the years since Part 6 was introduced there have been growing instances of NSW Dealers suffering unconscionable behaviour at the hands of the offshore Manufacturers.

The most public of these cases has been the decision in February by Detroit-based General Motors to end the Holden brand in Australia. This decision resulted in 185 Holden Dealers, including 62 in NSW, having their contracts terminated at short notice. Many of these businesses had been recently acquired and many Dealers had recently or were in the process of committing significant capital to a facility upgrade. So many businesses and their employees were financially harmed by the conduct of General Motors which refused to pay reasonable compensation. Dealers in this case were afforded no legislative protection and calls for arbitration were flatly refused by Holden.

Sadly, this is not the only example which has occurred over recent years and there are other car Manufacturers which have engaged in exploitative behaviour towards their Dealers.

In the United States, there is widespread recognition of this power imbalance and Dealers enjoy far stronger protection through automotive-specific franchise laws at the state level. Like Part 6, these US laws are often contained as articles or parts of legislation covering a range of automotive businesses.

Given the endemic power imbalance, the AADA urges the NSW Government to adopt similar Automotive Franchising regulations as those that exist at a state level in the United States. Dealers in NSW need Part 6 strengthened in order to fulfill the intent which is to protect locally owned and operated businesses from abuses by offshore multinationals.

James Voortman

Chief Executive Officer

New South Wales

1,029 Dealerships

16,352
Dealer Employees

1,307
Dealer Apprentices

$4.34 million
Community Donations

$1.49 billion
Dealer Wages

$606.11 million
Tax Contribution

$3.70 billion
Total Economic Contribution

KEY RECOMMENDATIONS

1. The NSW Motor Dealers and Repairers Act provides important protections for Dealers, but it needs to be strengthened.

2. Part 6 of the NSW Motor Dealers and Repairers Act needs to be strengthened to resemble legislative protections available to Dealers in the US. Some elements to be considered are:
   - Consider an appropriate minimum term for Dealers;
   - Requiring “good cause” for the termination or non-renewal of a Dealer;
   - Upon termination or non-renewal mandate the buyback of vehicles, parts, accessories, special tools and equipment;
   - Stipulate minimum payment required for parts and labour associated with warranty claims;
   - Eliminate the practice of warranty extrapolation;
   - Provide an avenue for binding arbitration in the event of a dispute not being settled through mediation.

3. Develop and outline a procedure in the Act for Dealers in dispute to obtain anonymous representation by their representative association.

4. Part 6 and other relevant areas of the Act should be amended to explicitly state that new distribution models, such as agency arrangements, are regulated by this legislation.

THE POWER IMBALANCE

New car Dealers in Australia are franchised to global automotive Manufacturer brands or Original Equipment Manufacturers (OEMs).

The automotive retail sector in Australia is one of the most competitive in the world. Around 67 brands offer over 350 models for sale in a relatively small market of about 1 million units annually (less than 1.5 per cent of global demand). The competition means there is significant pressure on the Australian subsidiaries of the global automotive Manufacturers and by extension their franchised new car Dealer networks to perform.

In short, success in this highly competitive industry is by no means assured and franchised new car Dealers often run on razor thin profit margins. In 2019 the average dealership achieved a net profit of around 0.9 per cent of revenue, and about one-third of all franchised new car Dealers failed to make a profit.

Dealers who enter into a franchise agreement (Dealer Agreement) with OEMs are given the exclusive right to market and sell new vehicles and associated services within a specific geographic location. In return, Dealers are bound by these Dealer Agreements, the terms of which are very much skewed in favour of the OEM. The imbalance in relationship leads to a number of practices, such as:

- **No security of tenure:**

  Despite Dealers making significant capital investments, the length of tenure offered by OEMs varies from a minimum of one year to a maximum of five years making it difficult to recoup investment. Furthermore, Dealers are not always given a right of renewal. When they are it is generally at the discretion of the OEM.

- **Termination and Non-Renewal Notices:**

  Manufacturers terminate Dealers and issue ‘non-renewal notices’ despite them having met or exceeded their performance targets and/or not being in breach of the Dealer Agreement. Dealers have been given only a few months’ notice that an agreement will be terminated, which is very little time for a business which has made significant investments, employs a substantial number of people and has an ongoing relationship with customers. In other similar countries non-renewal and termination can only be done with good cause.

- **Aggressive sales targets:**

  Manufacturers provide Dealers with sales targets which are difficult to achieve and based on methodology and data not revealed to the Dealer. OEMs then threaten non-renewal or termination in the event of these targets not being achieved.

- **Warranty claims:**

  Dealers conduct warranty work on behalf of the Manufacturer, but often these claims are unreasonably denied or are clawed back.

- **Inadequate Capital Expenditure Protections:**

  OEMs easily circumvent the Franchising Code of Conduct's safeguards to franchisees with respect to having to incur significant capital expenditure during the term of an agreement as they link it to the next term of the agreement.

- **Compensation:**

  Manufacturers have a track record of offering inadequate compensation. GM's withdrawal of the Holden brand is a case in point. GM refused to acknowledge goodwill, employee entitlements, leases and other elements of Dealer expense. There have been many other examples where Manufacturers have refused to buy back vehicle stock, parts, tools or equipment once a Dealer Agreement expires or is terminated, leaving Dealers vulnerable to further financial hardship.

- **Consumer welfare:**

  Dealers are often constrained by the OEM in responding and assisting consumers in relation to a potential product defect due the OEM exercising strict control around the warranty/repair processes.

In the United States, state Automotive Franchise laws apply black letter provisions to rein in the behaviour of Manufacturers. While Part 6's provisions around unfair contract terms and unjust conduct are appropriate, they have not been effective because Dealers have not been willing to test them due to a fear of reprisal. All car Manufacturers are very well-resourced corporations and thrive on laws which are open to interpretation. Dealers usually buckle at the prospect of a lengthy and costly court process. The AADA believes the only way to make a real difference to this very unique power imbalance is to have US-like regulations which leave very little in the way of doubt as to how OEMs can behave.

THE NEED TO ACT

It is incredibly important that Part 6 is urgently strengthened. The General Motors Holden example has set a very dangerous precedent, and in the process, they have emboldened other vehicle Manufacturers to exploit the imbalance in power that exists between them and their Dealers.

Honda has recently announced a move to an agency distribution model and terminated many of its Dealers, including a substantial number in New South Wales. Mercedes-Benz has already said it will be changing its distribution model in Australia in 2022 and will not be compensating its Dealers. Recently one of their global executives told the media that they would be moving to this model in Australia because the law allowed for it, whereas other markets such as the US do not.

We have even seen some Manufacturers start inserting clauses into new Dealer Agreements stating that a Dealer can be terminated for any reason and will not be entitled to compensation.

It has been widely publicised that several other Manufacturers are considering or already in the process of drastically changing their retailing arrangements. These changes involve moving to an Agency Model, under which the Dealer does not own the inventory but sells it for a fixed price set by the Manufacturer. We have mentioned Honda and Mercedes-Benz above, but other Manufacturers are looking at moving towards similar models.

Dealers do not dispute the right of Manufacturers to change their distribution models, but Dealers should not be denied the ability to ensure reasonable compensation, underpinned by binding and mandatory arbitration. Anything less poses a significant threat to Dealers who have invested in people and facilities based on the requirements prescribed in their Dealer Agreements.

ANSWERS TO RELEVANT QUESTIONS

1. ARE THE CURRENT OBJECTS OF THE ACT STILL VALID? DO THE TERMS OF THE ACT REMAIN APPROPRIATE FOR SECURING THOSE OBJECTS?

The current objects of the Act remain valid and provide important protection and dispute resolution mechanisms for Dealers that are not available elsewhere.

The dispute resolution process, whereby Dealers or representative groups can take disputes to the Small Business Commissioner for mediation and then on to the Civil and Administrative Tribunal also remains valid. Unfortunately, many Dealers remain fearful of repercussions by the Manufacturer if they follow this process and are therefore reluctant to utilise the Act. The AADA is of the view that the only way to rein in the behaviour of Manufacturers is to include specific black letter obligations on Manufacturers, similar to those which exist in states all across the US.

2. DOES THE ACT APPROPRIATELY BALANCE THE INTERESTS OF CONSUMERS AND LICENCE HOLDERS WITH BROADER OBJECTS?

Generally, the Act appropriately balances consumer interests with those of Dealers, however, there is an issue concerning the interaction between consumer guarantees under the Australian Consumer Law and the Manufacturer warranty policies that Dealers are obliged to comply with. These concerns were highlighted by the ACCC in its '*New Car Industry Market Study of 2017*' which said:

> *"Dealers respond to consumer guarantee or warranty claims within the framework of the policies and procedures set by the Manufacturer. Dealer Agreements, policies and procedures commonly provide Manufacturers with broad discretion to direct a dealer's handling and resolution of customer complaints. This can further constrain and adversely influence the response of dealers to customer complaints and have the potential to prevent dealers from satisfying their ACL responsibilities. Dealers are often under commercial pressure to comply with Manufacturer requirements in order to maximise the likelihood that their Dealer Agreement will be renewed. This may have consequences for how a dealer responds to consumer guarantee claims that are not adequately covered by a Manufacturer's systems, policies and procedures."*

Dealers should not be placed in a situation where they are forced to choose between their obligations to the customer and their relationship with the Manufacturer to whom they are franchised. Manufacturer warranty policies and procedures should be identified under the provisions of the Act as having the potential to be unfair of unjust terms. This is potentially something which can be addressed in Part 6.

3. ARE THERE OTHER OBJECTS THAT SHOULD BE INCLUDED? IF SO, PLEASE IDENTIFY WHAT THESE SHOULD BE AND EXPLAIN WHY. WHAT ARE THE COMPLEMENTARY MEASURES THAT NEED TO BE INCLUDED IN THE ACT TO GIVE EFFECT TO THESE OBJECTS?

Every state in the United States has recognised the power imbalance between car Manufacturers and car Dealers by developing automotive-specific franchising laws which regulate Manufacturer/Dealer relations. While there are slight differences between the various state laws, they generally cover the following elements:

- Consider an appropriate minimum term for Dealers
- Requiring “good cause” for the termination or non-renewal of a Dealer
- Upon termination or non-renewal mandate the buyback of vehicles, parts, accessories, special tools and equipment
- Stipulates minimum payment required for parts and Labour associated with warranty claims
- Eliminates the practice of warranty extrapolation
- Provide an avenue for binding arbitration in the event of a dispute not being settled through mediation.

Given the quantum of investment made by Dealers and the number of people they employ, it is evident that their importance to the economy is well understood in the US. There is no reason why those same laws should not apply in the Australian market, which bears close structural similarities to that of the US.

CONCLUSION

We look forward to the opportunity to further discuss this submission. If you have any questions, please contact me on:

James Voortman
Chief Executive Officer
M: +61 452 535 696
E: jvoortman@aada.asn.au

CANBERRA OFFICE
Level 3, 10 National Circuit, Barton ACT 2600
PO Box 4409 Kingston ACT 2604

E info@aada.asn.au

aada.asn.au