



**Small Business
Development Corporation**

Our ref: D16/5626

New Car Retailing Industry Market Study
Australian Competition and Consumer Commission
via email: newcars@accc.gov.au

**SBDC Submission to the Australian Competition and Consumer
Commission's New Car Retailing Study: Issues Paper**

The Small Business Development Corporation (SBDC) welcomes the opportunity to provide a submission to this important review. The SBDC supports reform in the new car retailing industry to: better support small business owners/operators who have purchased new vehicles in enforcing their consumer guarantees under the Australian Consumer Law; and to improve choice and reduce barriers to competition in the new vehicle service and repair market.

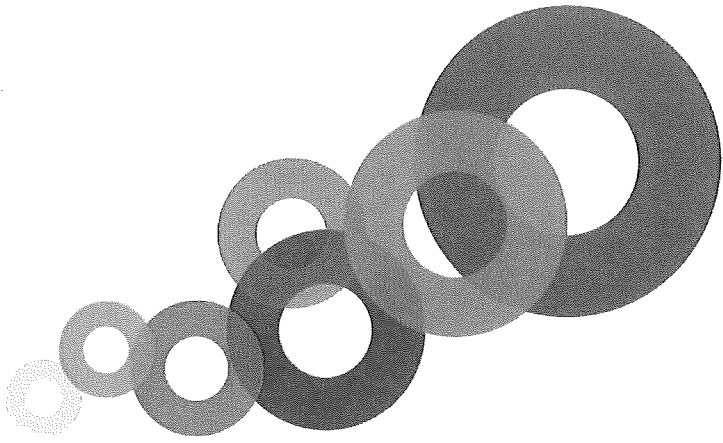
Should you require further information about this submission please contact Ms Bronwyn Gunn, Policy and Advocacy Officer on (08) 6552 3340 or Bronwyn.Gunn@smallbusiness.wa.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Eaton'.

David Eaton
SMALL BUSINESS COMMISSIONER

18 November 2016



Small Business Development Corporation

**Submission to the Australian Competition and Consumer Commission –
New Car Retailing Industry Market Study: Issues Paper**

November 2016

Background

The Western Australian Small Business Development Corporation (SBDC) welcomes the opportunity to provide a submission in response to the Australian Competition and Consumer Commission's Issues Paper (the Issues Paper) for its market study on the new car retailing industry.¹

About the Small Business Development Corporation

The SBDC is an independent statutory authority established to foster the growth and development of small businesses in Western Australia (WA). The SBDC offers a wide range of services designed to meet the needs of prospective and current small business operators such as specialist business advice and workshops, alternative dispute resolution and mediation services and advocacy to government on policy settings to ensure a fair, conducive and productive operating environment.

This submission

The SBDC is not a subject matter expert on the automotive industry, and will not attempt to address the questions posed in the Issues Paper. Instead, this submission will focus on case studies from the SBDC client database to demonstrate the problems that small business operators (as consumers) are experiencing with the regards to issues raised in the following sections of the Issues Paper:

- 2.2 - Consumer guarantees – handling of complaints;
- 2.3 - Consumer guarantees – enforcement and access to remedies;
- 3.2 - Car performance; and
- 5 – Access to repair and service information for new cars.²

Response to matters raised in the Issues Paper

Operation of consumer guarantees and warranties

The SBDC has received complaints from small businesses as consumers about vehicle faults or defects, including the way that complaints are handled and their ability to enforce their consumer guarantee rights. Complaints typically involve small business operators:

- Having to take their vehicle back to the dealership for repair multiple times (at a cost to their business operations) with problems not being identified, recognized or fixed;
- Being without a vehicle, or being supplied with a hire vehicle that was unsuitable for their business use, for lengthy periods while their vehicle is being repaired;
- Raising problems when their vehicle is being serviced at the dealership, but not having the dealership recognize or fix them until the warranty period had expired;

¹ This submission is independently provided and does not represent the views of the WA Government.

² Note: the SBDC does not have case studies on this particular matter but is aware that this is a problem for independent repair and service businesses in Western Australia.

- Being told that problems being experienced with their vehicle are within normal tolerances even when the problem was causing the car to be unsafe to drive; or
- Having vehicle parts wearing out within short periods of time and being told by dealerships that 'wear and tear' is not covered under the warranty.

The following case studies provide more detailed examples of some of the issues noted above.

Case Study 1 – Consumer Guarantees

A small business operator contacted the SBDC about a new car that since being purchased had been jumping out of reverse. The client advised that they had taken it back to the dealership at least 15 times, and that the gearbox had been replaced but that the problem had become worse. The dealer had advised the client that it was just something they would have to put up with and that they should try starting the vehicle and waiting at least five minutes for the revolutions per minute (RPM's) to drop to mitigate it. The business owner was dissatisfied with this response as they felt that driving the car in this condition would put them in an unsafe situation.

The SBDC advised the client about how to write a formal letter to the dealer principal to request a remedy, and provided information about the SBDC's alternative dispute resolution service.

Case Study 2 - Consumer Guarantees

A small business owner purchased a vehicle for use in their business, which had repeated engine faults within the warranty period. At each service the client noted the engine problem, but the service reports repeatedly came back stating that no problems were found. By the time the vehicle was out of warranty it was stalling at traffic lights and its average fuel consumption had increased by approximately 50 per cent. The client asked the dealership to assess the problems and received no response. The client then contacted the dealer principal but was referred back to the local dealership.

The SBDC advised the client to get a second opinion from a mechanic to verify the fault and provided information about the SBDC's alternative dispute resolution service.

The SBDC notes that small businesses as consumers are often unable to fully enforce their consumer guarantee rights, including appropriate remedy, when they are required to incur the (often prohibitive) costs of having an independent assessor inspect the vehicle and advise on the nature of the fault/s.

Case Study 3 - Consumer Guarantees

A small business operator purchased a new car from a dealership, and experienced vibration in the vehicle when it was being driven between 90-105 km/h without a load, and at 70km/h with a load. The dealership test drove the vehicle and confirmed that the problem existed, but that they weren't liable to fix it as:

- It was just a characteristic of the model;
- There was no standard in the Australian Design Rules in relation to vibration; and
- Vibration was a subjective matter.

The client was dissatisfied with this response, as the vibration caused discomfort, annoyance and distraction to the driver, therefore resulting in occupational health and safety issues for his employees.

The client requested assistance from the alternative dispute resolution service at the SBDC to resolve this matter. With assistance from the SBDC, the client was able to negotiate with the dealership and get them to agree to do further testing on the car, after which the dealership conceded it was a problem with the tyres and agreed to replace them.

Additionally, and as we argued in our submission to the Australian Consumer Law Review: Issues Paper of March 2016, we note that the \$40,000 threshold in s.3 of the Australian Consumer Law (ACL) which limits the definition of a consumer (for the purposes of the ACL) should be increased to at least \$100,000, if not more. Many new vehicles purchased by small businesses would cost more than \$40,000, and currently these purchases are not covered by the consumer guarantee provision of the ACL. As a vehicle can be a large investment for a small business, and its failure can often have significant consequences on their ability to carry out trade or commerce, the SBDC believes the purchase of a new car (at least up to a more relevant value³) should be covered under the ACL. The SBDC will make further comment on this matter in our submission in response to the Australian Consumer Law Review: Interim Report currently out for consultation.

Lemon laws

The SBDC has previously provided comment on the issue of car specific lemon laws in its submission to the Australian Consumer Law Review: Issues Paper⁴. In summary, the SBDC considers that there is a problem with the lack of clarity around what might be a 'reasonable timeframe' for repair,⁵ particularly for small businesses who will likely suffer losses while waiting for suppliers to provide remedy. Additionally, we note that disputes can often be prolonged due to disagreements about what constitutes a 'major failure'⁶ (particularly where there has been a series of minor failures) and therefore whether the dealership or small business customer is required to incur the cost of repairs.

³ The SBDC notes the threshold has not been amended since its introduction in 1986, and by 'relevant' we refer to an amount that is adjusted for CPI from the introduction of the threshold (currently just over \$100,000).

⁴ Available at:

https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Small_Business_Development_Corporation.pdf

⁵ S.259 of the Australian Consumer Law

⁶ S.260 of the Australian Consumer Law

We support further consideration of whether consumer guarantees need to be strengthened to include a new 'lemon law' and will make further comment on this matter in our submission in response to the Australian Consumer Law Review: Interim Report.

Fuel consumption, CO₂ emissions, noxious emissions, and car performance

The SBDC has received several complaints from small business operators regarding their car's performance, primarily in relation to vehicles not supporting their advertised towing or weight bearing capacity. When a car does not perform as promised, it can have a significant impact on the ability of a small business operator to carry out their trade or commerce.

The following case study demonstrates how small business operators can be adversely impacted by false or misleading claims about the attributes of a vehicle.

Case Study 4 – Car Performance

A small business operator purchased a utility vehicle from a dealer. While having additional fitments to the canopy by a third party, the client was advised that the rear leaf suspension was sagging under the weight of the canopy and tools. The load at the time was approximately half of the advertised one tonne capacity. The canopy company advised the client to remedy the problem as it was unsafe to drive in that condition. When the client approached the dealership about this, the salesman and assistant manager at the time agreed it was not normal and they would speak to the dealer principal about getting it rectified under warranty.

The small business operator also sought advice from an independent suspension company, who advised that the car would require two additional leaf springs for the vehicle to safely tow/carry its advertised capacity and ensure the suspension bushes did not prematurely wear out. This company advised that manufacturers are required to demonstrate by way of a load test that the springs bend to the desired weight specification but do not break. The client was also advised that even if they do not break, if there is not enough support from the springs the vehicle can become unbalanced (as there is not enough weight at the front) and steering can become an issue.

Before the dealership formally agreed to the repairs, a new service manager was appointed. This person advised the client that the car would be required for two days to test the leaf springs. The dealership ended up keeping the car for 10 days, and subsequently advised the client that the leaf springs were working, and dismissed findings of the independent report as they considered the suspension company had a vested interest in saying the customer required more leaf springs. The customer then obtained advice from a reputable automotive industry body and their mechanical engineer who advised that more springs should be fitted for the vehicle to safely carry or tow the advertised capacity.

The customer contacted the alternative dispute resolution service at the SBDC and with the assistance of this service successfully negotiated with the dealership for the provision and installation of additional leaf springs.

Access to repair and service information and data

Anecdotally, the SBDC is aware that access to motor vehicle repair and service information and data is a problem, as automotive repairers have become, and will continue to be, increasingly reliant on access to technical information and diagnostic systems that are generally only available to dealerships. Although some of the necessary information is made available to independent mechanics or repairer networks, the SBDC understands that some critical data required to service or repair new vehicles is often not released by car manufacturers to independent businesses outside of their dealership network, or is not made available at a reasonable cost.

The SBDC understands that the Federal Government has committed to conduct an independent review of the efficacy of the (voluntary) industry Agreement on Access to Service and Repair Information (the Agreement) that was signed by five leading automotive industry bodies in December 2014 to support more complete data sharing.⁷ Following this review the Federal Government may consider whether additional measures are necessary to remove barriers to competition and ensure choice of vehicle repair and servicing. The SBDC understands this may include introduction of a mandatory online portal populated (by manufacturers) with repair and service information that would be accessible by independent repairers in Australia for a fee.

The SBDC supports such a review and the introduction of a mandatory portal as this will improve choice for consumers and reduce barriers to competition. We note that consumer advocacy group Choice released a statement in October 2015⁸ that cited the Australian Automotive Aftermarket Association (AAAA) as reporting that only nine of the 68 car brands sold in Australia are making the necessary information available, and that only one car brand was honouring the voluntary agreement in any meaningful way. Additionally, a portal set up by the AAAA whereby independent repair companies can report their experience in trying to access data from manufacturers from had examples of non-disclosures by 25-30 companies as at April 2016.

The relationship between motor vehicle dealerships and manufacturers

Although not referenced in the Issues Paper, it is worth noting that the SBDC has concerns about the relationship dynamics between car manufacturers and individual dealerships, many of which are operating as small businesses under franchise agreements. Under a typical arrangement, dealerships have an agreement or contract with a car manufacturer that sets out the rules and conditions governing the relationship between the two parties, which may include provisions that allow the manufacturer to set policies and procedures (outside of the agreement) that the dealer must then comply with. This is often done to make the contract itself simpler, but can mean that the manufacturer has the unilateral right to dictate aspects of the relationship, or place the dealer in a position where it has to carry out activities that may be commercially unviable.

⁷ As described in section 5.2 of the Issues Paper

⁸ Available at: <https://www.choice.com.au/transport/cars/maintenance/articles/carmakers-not-releasing-repair-information-061015>

For example, a dealer may be obliged to carry out warranty work on behalf of a manufacturer, but may not be entitled to adequate recompense for this work. We note that while the repair work would be an obligation of the dealer under the Australian Consumer Law in any case, we believe the manufacturer should meet the financial costs of repairing or replacing vehicles that are faulty or not fit for purpose as a result of manufacturing processes.

The SBDC also understands that dealership agreements may also have provisions such as a right for manufacturers to change the sale price of vehicles, or to withdraw from the agreement entirely without adequate cause or notice. The latter can leave the owner of the dealership with substantial sunk costs in the form of a long term lease, bespoke showrooms and trained staff without a product to sell. They will often also have an obligation under the Australian Consumer Law to maintain facilities for the repair of vehicles previously sold for a reasonable amount of time, despite no longer being associated with the manufacturer.

The SBDC considers that more action needs to be taken in regard to this issue, perhaps through additional provisions in the Australian Consumer Law to give businesses on-selling goods such as motor vehicles the right to recourse from manufacturers or suppliers for product defects. We note that on-selling of goods is an issue currently being considered in the Australian Consumer Law Review.

Conclusion

In summary, the SBDC believes there are ongoing issues and industry practices that need to be addressed in relation to the operation of consumer guarantees, car performance and access to repair and service information by independent repair and service businesses. We hope the case studies provided prove useful to the ACCC in its analysis of the issues in the new car retailing market.

To discuss this submission or any further case studies, please contact Ms Bronwyn Gunn (Policy and Advocacy Officer) on (08) 6552 3340 or email Bronwyn.Gunn@smallbusiness.wa.gov.au.