

14 March 2022

Policy Team
NSW Fair Trading

By email: motordealersandrepairersact@customerservice.nsw.gov.au

Dear Sir/Madam

MOTOR DEALERS AND REPAIRERS AMENDMENT (STATUTORY REVIEW) BILL 2022

carsales.com Ltd (**carsales**) welcomes the opportunity to respond to the proposed Motor Dealers and Repairers Amendment (Statutory Review) Bill 2022 (**the Bill**). carsales is the number one online automotive classifieds business in Australia and has recently launched a new digital car buying experience called 'carsales SELECT'. In this context, carsales has responded to questions 1 and 3 of the Explanatory Paper below.

carsales SELECT

Consumers and motor dealers are increasingly looking to complete more of the car buying process online, a shift which has been expedited by COVID-19. To address this desire, carsales has recently launched carsales SELECT, which facilitates an increasingly seamless online experience (further information about carsales SELECT is available at <https://www.carsales.com.au/carsales-select>).

The initial iteration of carsales SELECT enables customers to reserve a vehicle for 2 days by paying a \$500 refundable fee. Payment of the purchase price and execution of the sale contract currently take place offline. However, carsales' intention is to expand the product to facilitate online end-to-end sales. It is anticipated that this may involve the payment of a substantial deposit or the entire purchase price and include both new and used vehicles.

As a trusted online platform, carsales has implemented a range of steps to allow consumers to transact online with greater confidence and peace of mind. All carsales SELECT vehicles come with:

- a. a vehicle inspection report completed by a certified mechanic;
- b. a Personal Property Securities Register (PPSR) report;
- c. photos of any vehicle imperfections;
- d. a car history report, providing information about registration details, accidents and any identified odometer roll-backs; and
- e. a 7-day money back guarantee. If the customer is not satisfied with their purchase, they may return the vehicle for a full refund (including reimbursement of stamp duty payments, if applicable).

Only vehicles that meet quality thresholds (under 7 years old and under 100,000 kilometres) are able to be listed as carsales SELECT vehicles.

Market research conducted on behalf of carsales indicates that consumers' comfort with wholly online transactions has been increasing over time, with 73% of consumers now

considering that there is a future for buying new and/or used cars online (up from 57% in 2017).¹

In addition to benefitting consumers, carsales SELECT also offers considerable benefits to motor dealers. carsales SELECT lowers the barrier to entry for dealers that may otherwise not have the resources to develop their own online sales platform. By leveraging carsales' technology, even small dealers can enjoy the benefits of an online sale process. This injects greater competition into the market by enabling smaller dealers to compete with larger dealer groups, as well as vehicle manufacturers that sell directly to consumers online. Further, carsales SELECT provides dealers with a valuable additional sales channel to move stock, which is especially important in the current low-inventory environment.

End-to-end online vehicle sales is an exciting area of innovation in Australia. carsales is aware of a range of new and emerging competitor products operating in New South Wales that would be adversely affected by the Bill. Internationally, there are numerous examples of end-to-end online vehicle platforms that are not subject to the type of restrictions contemplated by the Bill. Many of these platforms involve both new and used cars, and full prepayment of the purchase price. Examples include Carvana, Carmax and Vroom (US), Cazoo and Cinch (UK), Symle by AutoScout 24 (Germany) and Cars24 (India, Dubai and Thailand).

Responses to the Explanatory Paper

Q1. Do the current amendments adequately recognise new online and emerging business models in the industry?

carsales is concerned that the Bill fails to adequately address online and emerging business models in the industry. In broad terms, this is for three reasons:

- a. **An emphasis on rigid restrictions rather than consumer protection measures:** carsales considers restricting online sales to new cars only and prescribing a maximum deposit percentage to be a significant and unnecessary constraint on innovation. The risk of consumer detriment may be addressed in ways that do not necessitate such restrictions. For example, the change-of-mind refund right and information disclosure features of carsales SELECT provide a high degree of consumer protection, whilst still allowing for flexible business models.
- b. **Inconsistent with market demands:** Experience both in Australia and internationally suggests there is strong demand from customers and dealers for end-to-end online sales, including for second-hand vehicles. The Bill would make New South Wales a regulatory outlier in Australia and internationally, and would constrain innovation in the automotive sales industry.
- c. **Unjustified focus on motor vehicle sales:** carsales appreciates that the draft Bill has arisen as a result of a review of the *Motor Dealers and Repairers Act 2013 (the Act)*. However, taking a broader view, it is unclear why online motor vehicle sales should be singled out for additional regulation, as compared to other online sales which present similar or greater risks. Consumers can purchase a range of high value products online. carsales considers the risks posed by the purchase of motor vehicles from regulated NSW motor dealers to be comparably lower than purchases from sellers in unregulated industries or sellers located overseas. The Act's existing provisions effectively regulate motor dealers, including by regulating accounting arrangements, complaint handling, advertising and record keeping, as well as imposing a statutory disciplinary regime. These requirements apply equally to both offline and online vehicle sales by motor dealers. These existing avenues for recourse are available to any consumers who suffers detriment from the unlawful actions of a motor dealer, whether due to an offline or online transaction.

¹ Ipsos, The Journey to Vehicle Ownership research (October 2021), n = 800.

In terms of the legislative provisions contemplated by the Bill, carsales has concerns with proposed Division 3A (specifically sections 66A, 66B, 66D and 66E)) and section 20B(2)(a1).

1A. Proposed section 66A - Definition of “online motor dealer”

carsales considers that the proposed definition of *online motor dealer* could give rise to confusion. Proposed section 66A deems a *motor dealer* who “offers for sale and sells motor vehicles” to be an *online motor dealer*. However, the concept of ‘sells’ is not further defined. There are a range of interim steps in the sales process that carsales believes should not constitute ‘selling’ for the purposes of the Act, such as:

- a. paying a refundable reservation fee, deposit or portion of the purchase price online; and
- b. indicating a non-binding intention to purchase a vehicle online, but signing a binding contract of sale offline.

carsales considers that ‘sells motor vehicles’ should be defined to require the execution of a binding contract for sale for the purchase of a vehicle. The payment of a refundable deposit or non-binding commitment should not constitute the selling of a vehicle, as a consumer is free to walk away from the transaction, so the risk of any consumer detriment is low. In carsales’ view, the payment of a refundable deposit or non-binding commitment is merely an interim step that a customer may take which may or may not lead to a binding purchasing commitment.

1B. Proposed section 66B – Motor vehicles that may be sold online

carsales is extremely concerned by the suggestion in the Explanatory Paper that the regulatory powers contemplated by proposed section 66B may be used to restrict online end-to-end sales to new cars only.

carsales considers that both new and used vehicles should be able to be sold by *online motor dealers*. carsales notes that:

- a. The risk of consumer detriment is not necessarily higher for online vehicle sales than conventional in-person sales. This is especially so by virtue of proposed sections 66C, 66D and 66F, which effectively address risks associated with lack of information, opportunities for inspection and remedy arrangements.
- b. The risk of consumer detriment is not materially higher for many second hand cars than for new cars. Many second hand vehicles are subject to the residual portion of a manufacturer’s warranty (which can span from 3 to 10 years) and have been independently inspected by a third-party inspection service.
- c. The guarantee of consumer protections can adequately address any risk associated with the sale of cars online, making it unnecessary to take the extreme measure of restricting online sales to new cars only. For example, carsales provides prospective purchasers of carsales SELECT vehicles (including second hand vehicles) with a 7 day refund right, which provides customers with superior protection than they would typically receive for a new car.

If Fair Trading NSW nevertheless proceeds with restricting end-to-end online sales to new cars only, carsales submits that greater guidance be provided in relation to what constitutes a “new car”, and specifically that “new cars” should include dealer demonstration vehicles.

1C. Proposed section 66D – Opportunities to inspect motor vehicles

Proposed section 66D provides *online purchasers* with the right to carry out an inspection of the motor vehicle prior to purchase. carsales believes that greater clarity should be provided about the scope of this inspection right. Specifically:

- a. Whether the right of inspection extends to the *online purchaser’s* agent or delegate. It is common practice for pre-purchase vehicle inspections to be carried out by a third party inspection service as consumers often do not have the expertise to assess a vehicle’s condition.

- b. Whether the right of inspection is limited to a purely visual inspection of a static vehicle (e.g. looking for oil leaks, visible damage), or whether it extends to a right to perform road testing and mechanical inspections.
- c. Whether the right of inspection extends to a virtual inspection conducted remotely by an *online purchaser* (or their agent or delegate). It is common practice for pre-purchase vehicle inspections that involve an interstate transaction to utilise virtual inspections. Innovation in this field is ongoing and is expected to provide additional convenience and value to consumers in the future.

1D. Proposed section 66E – Maximum deposit

carsales considers that *online motor dealers* should not be constrained by a maximum *relevant percentage*, as contemplated by proposed new section 66E.

The proposed section states ‘An online motor dealer must not require an online purchaser to pay more than the relevant percentage of the purchase price of a motor vehicle **before the online purchaser takes possession of the motor vehicle**’ (emphasis added). In a traditional vehicle purchase, and indeed traditional purchases of most items, the seller requires payment of the full purchase price before the purchaser takes possession of the item. Providing a restriction such as that contained in proposed section 66E would place car dealers in a disadvantageous position, whereby they would presumably need to release goods to a purchaser before receiving full payment. Provided that consumer protections are in place, carsales does not see any requirement for a restriction of the kind in proposed section 66E,

In addition to the above, carsales notes that:

- a. The Bill treats all deposits equally, regardless of whether they are refundable. For example, a refundable deposit of 25% of the purchase price presents less risk of consumer detriment than a non-refundable deposit of 5%, but proposed new section 66E does not reflect this distinction.
- b. *Online motor dealers* would be placed in a worse position than conventional *motor dealers*. For example, a *motor dealer* that advertises a vehicle online (but does not sell it online) could accept deposits exceeding the *relevant percentage* (e.g. over the phone or by email, even where the customer had not viewed/inspected the vehicle), but an *online motor dealer* could not do so.
- c. Making high value payments through a trusted online intermediary such as carsales may provide consumers with additional comfort, rather than making large payments directly to dealers.
- d. Dealers may require flexibility to charge different deposit amounts based on the nature of the vehicle for sale. For example, a dealer may require a larger up front deposit in order to reserve a highly sought after vehicle for a prospective customer. Depending on the *relevant percentage* that is prescribed, this flexibility may be constrained.
- e. The international experience shows that there are many online end-to-end car sale businesses that are operating successfully with a full or substantial pre-payment model.

1E. Proposed section 20B(2)(a1) – Application for licence to carry on business at premises

carsales understands the need for *online motor dealers* to provide NSW Fair Trading with the URL at which they will be selling vehicles online, as contemplated by proposed section 20B(2)(a1).

However, carsales is concerned that proposed section 20B(2)(a1) will create administrative delays when read in conjunction with existing section 20B(3). Under that section, a licence holder must provide at least 20 business days’ notice of any changes under section 20B(2), which would include any new or changed URLs. The effect of this requirement would be that

a motor dealer seeking to sell vehicles online would need to wait for that period before they could commence using their website.

It is anticipated that *online motor dealers* may add and remove URL details more frequently than the other items listed in existing section 20B(2) (such as the changing of physical premises). For example, at any given time an *online motor dealer* may wish to sell motor vehicles on carsales.com.au, as well as its own website, or via another online classifieds platform or marketplace. The associated administrative burden may have the effect of reducing the range of purchasing options for consumers and the level of competition in the market for online classifieds and marketplaces, given that many *online motor dealers* will likely be more reluctant to list and sell their vehicles on a range of different platforms if they are required to meet the stringent notice requirement.

An alternative to this approach would be to carve out section 20B(2)(a1) from the requirements of section 20B(3). This could be supplemented with a requirement that a *motor dealer* must advise Fair Trading NSW about any new URL at any time prior to its use (but not at least 20 business days' prior to its use). Ideally this simple notification could be effected through the Service NSW portal, rather than needing to submit a licence variation form.

Q3. For online purchasing, how should vehicle returns be handled?

carsales considers it undesirable to prescriptively regulate vehicle return arrangements. It is anticipated that a range of innovative business models will be developed over time to manage vehicle returns. It would be preferable to focus on key consumer protections that could be built into the online sales process (such as a right to return), rather than impose prescriptive requirements for returns handling processes.

Overall, carsales considers that the Bill in its current form would be likely to:

- a. unduly prevent products such as carsales SELECT from operating as intended, even where such products contain consumer protections that go over and above a conventional in-person sale;
- b. constrain innovation and increased efficiencies by imposing overly rigid requirements that do not effectively mitigate risks of consumer detriment; and
- c. place New South Wales motor dealers at a competitive disadvantage to interstate motor dealers that are not constrained by similar online selling requirements.

carsales thanks NSW Fair Trading for the opportunity to provide feedback on the draft Bill.

Yours sincerely

Nicole Birman
General Counsel & Company Secretary
carsales.com Ltd

David McIndoe
Senior Legal Counsel
carsales.com Ltd