

ACT 126

S.B. NO. 1201

A Bill for an Act Relating to Motor Vehicle Franchises.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 437, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately inserted and to read as follows:

“§437-A Waivers void. Any condition, stipulation, or provision in a franchise or distributorship agreement purporting to bind any person acquiring or holding any franchise or distributorship to waive compliance with any provision of this chapter or any other law of the State is void; provided that no person acquiring or holding any franchise or distributorship shall be prohibited under this section from electing in writing, at or after the time a dispute arises, to use any voluntary dispute resolution procedure, or from entering into any voluntary agreement to settle legitimate disputes between the disputing parties.

§437-B Procedures, protections, rights, and remedies made available to licensees. (a) The same procedures, protections, rights, and remedies provided to a dealer under section 437-28(a)(21) and section 437-A shall apply to a distributor that is not a manufacturer; provided that for a distributor that is not a manufacturer, the measure of compensation under section 437-28(a)(21)(C) upon cancellation or failure to renew a franchise agreement shall include compensation related to that distributor’s dealer operations and franchise agreements with other dealers.

(b) Notwithstanding the terms, provisions, or conditions of any dealer or distributor agreement or franchise or the terms or provisions of any waiver, and notwithstanding any other legal or administrative remedies available, any person who is licensed under this chapter and whose business or property is injured by a violation of section 437-28(a)(21), may bring a civil action in a court of competent jurisdiction in the State to enjoin further violations and to recover any damages together with the costs of the suit.

(c) Any person that brings or defends against a civil action under subsection (b) shall be entitled to recover reasonable attorneys’ fees as a part of any damages or injunction; provided that the person substantially prevails in establishing or defending against a violation of section 437-28(a)(21).”

SECTION 2. Section 437-1, Hawaii Revised Statutes, is amended to read as follows:

“§437-1 Legislative findings and declaration. The legislature finds that [the]:

- (1) The manufacture, distribution, and sales of motor vehicles in the State vitally affects the general economy of the State and the public interest and public welfare;
- (2) Manufacturers of motor vehicles whose physical manufacturing facilities are not located within the State, and motor vehicle distributors, are doing business in the State through their control over, and relationships and transactions with their dealers, branches, and representatives; and [that the]
- (3) The geographical location of Hawaii makes it necessary to [insure] ensure the availability of motor vehicles and parts and dependable service therefor within the State to protect and preserve the transportation system and the investments of its residents.

The legislature declares, on the basis of the foregoing findings, that it is necessary to regulate and to license motor vehicle manufacturers, distributors, dealers, salespersons, and auctions in the State, [in order] to prevent frauds, impositions, and other abuses against its residents, and to protect and preserve the economy and the transportation system of the State."

SECTION 3. Section 437-1.1, Hawaii Revised Statutes, is amended by amending the definition of "franchise" to read as follows:

""Franchise" means any contract or agreement between a dealer and a manufacturer or distributor [or branches or representatives thereof, which] that authorizes the dealer to engage in the business of selling or purchasing any particular make or makes of new motor vehicles or parts therefor manufactured or distributed by such manufacturer or distributor."

SECTION 4. Section 437-2, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) No person shall engage in the business as or serve in the capacity of, or act as a motor vehicle dealer, [~~motor vehicle~~] salesperson, [~~or motor vehicle~~] auction, manufacturer, or distributor in this State, or otherwise engage in the business of selling or negotiating for the purchase of motor vehicles in this State without being licensed as provided in this chapter. A license issued under this chapter shall authorize the holder to engage in the business or activities permitted by the license, only in the county for which the license is issued.

(b) A license issued under this chapter shall authorize the holder to engage in the same business at branch locations in the same county for which the license is issued during the term thereof; provided that each branch location of a motor vehicle dealer is approved by the board."

SECTION 5. Section 437-6, Hawaii Revised Statutes, is amended to read as follows:

"§437-6 Powers and duties of the board. In addition to any other powers and duties authorized by law, the board shall:

- (1) Adopt, amend, and repeal from time to time rules not inconsistent with this chapter, as the board deems appropriate for the carrying out of the provisions and purposes of this chapter and for the efficient administration thereof, and the proper conduct of the business that is subject to this chapter, including every matter or thing required to be done or which may be done with the approval or consent or by order or under the direction or supervision of, or as prescribed by the board, which rules, when adopted under chapter 91, shall have the effect of law;
- (2) Grant, deny, suspend, or revoke licenses that are authorized by this chapter, fine licensees, and impose conditions as may be set forth in the rules of the board in connection with the granting of licenses;
- (3) Prescribe the nature of the proof to be furnished, the notices to be given, and the conditions to be met or observed for the issuance of a duplicate license in place of one alleged to have been lost or destroyed, including a requirement for any indemnity deemed appropriate to the case;
- (4) Prescribe all forms to be used for the purposes of this chapter not otherwise provided for;
- (5) Establish, by rules, minimum qualifications [~~for salespersons or dealers~~] which [~~must~~] shall be met by applicants prior to the issuance of any license; and

- (6) The exercise by the board of power, authority, and discretion in it so vested shall be final in each case and shall not be reviewable by or appealable to any court or tribunal, except as otherwise provided in chapter 91 or in this chapter.”

SECTION 6. Section 437-7, Hawaii Revised Statutes, is amended by amending subsections (f) and (g) to read as follows:

“(f) All applicants for the issuance of a ~~new license shall pay a fee concurrently with each application, except the application fee]~~ manufacturer’s or distributor’s license shall submit:

- (1) If the manufacturer or distributor is publicly traded, a financial statement signed by a certified public accountant or an annual report;
- (2) A copy of the executed agreement granting the distributor applicant the franchise to distribute motor vehicles in this State;
- (3) If the applicant is the manufacturer of the motor vehicles to be distributed, a certified statement to this effect;
- (4) Any other documents or information that may be provided for in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91; and
- (5) The following fees, which shall apply until fees are adopted by the director under this subsection in accordance with chapter 91:
 - (A) Non-refundable application fee: \$50;
 - (B) Original license fee: \$500;
 - (C) Annual compliance resolution fund fee: \$250 for each dealer franchised by the manufacturer or distributor;
 - (D) Biennial compliance resolution fund fee: \$500 for each dealer franchised by the manufacturer or distributor; and
 - (E) Verification or duplicate fees as provided in title 16 Hawaii Administrative Rules, chapter 53.

The nonrefund provisions of section 16-53-4, Hawaii Administrative Rules, shall apply to fees under this subsection. Application fees for a new salesperson’s license shall be a lesser amount than the fee for other licenses issued under this chapter.

(g) Upon the filing of any application, a staff member shall endorse on it the date of filing. If no patent disqualification of the applicant is disclosed or no valid objection to the granting of the application is apparent and if all requirements relative to the filing of the application appear to have been complied with, the chairperson of the board or executive officer shall review a self-inspection report completed by the applicant and made a part of the application. The report shall include:

- (1) A statement that the applicant is not disqualified by this chapter from obtaining or exercising a license and has complied with all the requirements of this chapter relative to the making and filing of the licensee’s application;
- (2) Information relating to any and all other matters and things which pertain to or affect the matter of the application or the issuance or the exercise of the license applied for;
- (3) In the case of an application for a dealer’s or auction’s license the applicant shall submit a report which shall include:
 - (A) A description of the premises intended to become the licensed premises, and the equipment and surrounding conditions; and
 - (B) If the applicant has held a prior dealer’s or auction’s license for the same or any other premises within two years past, a statement as to the manner in which the premises have been operated and the business conducted under the previous license; and

- (4) In the case of an application for a dealer's license, if the applicant proposes to engage in the business of selling new motor vehicles, a copy of the dealer sales and service agreement from the applicable manufacturer[~~-, factory branch, factory representative,~~] or distributor[~~-, distributor branch, or distributor representative.~~]"

SECTION 7. Section 437-23, Hawaii Revised Statutes, is amended to read as follows:

“§437-23 Term of license. (a) Expiration. All licenses issued pursuant to this chapter shall expire on June 30 of each even-numbered year unless sooner terminated, suspended, or revoked. All applications for renewal of license shall be filed on or before June 30 of each even-numbered year together with the applicable fees.

(b) Reapplication. If a licensee fails to renew the licensee's license on or before June 30 of each even-numbered year and desires to continue in the business or activity for which the license was issued, the licensee shall file a new application for a license and shall pay in addition to the license and filing fee a penalty of twenty-five per cent of the original license fee; provided that the board may for good cause waive the collection of all or a part of the penalty; and provided that nothing contained in this section shall limit the power of the board to deny any application on the grounds provided in this chapter.

(c) Renewal fees for manufacturers and distributors shall be as follows until renewal fees are adopted by the director under this subsection in accordance with chapter 91:

- (1) Biennial renewal fee: \$1,000; and
- (2) Biennial compliance resolution fund fee: \$500 for each dealer franchised by the manufacturer or distributor.”

SECTION 8. Section 437-28, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) In addition to any other actions authorized by law, the board, after notice and hearing as provided in chapter 91, and subject to appeal to the circuit court of the circuit in which the board has jurisdiction under the procedure and rules prescribed by the laws of the State or the applicable rules of the courts pertaining to appeals to circuit courts, may suspend, revoke, fine, or deny the renewal of any license, or prior to notice and hearing deny the issuance of any license for any cause authorized by law, including but not limited to circumstances where the board finds that the applicant or holder, or any officer, director, general manager, trustee, partner, or stockholder owning more than ten per cent interest of the applicant or holder:

- (1) Has intentionally made a false statement of a material fact in the application for a license or in any other statement required by this chapter or has obtained or attempted to obtain a license by fraud or misrepresentation;
- (2) Has failed to comply[~~-,~~] with, observe, or adhere to any provision of this chapter or any other law relating to the sale, taxing, or licensing of motor vehicles or any rule or order made pursuant to this chapter;
- (3) Has committed a fraudulent act in selling, purchasing, or otherwise dealing in motor vehicles or has misrepresented the terms and conditions of a sale, purchase, or contract for sale or purchase of a motor vehicle or any interest therein including an option to purchase motor vehicles;

- (4) Has engaged in business under a past or present license issued pursuant to this chapter, in a manner as to cause injury to the public or to those with whom one is dealing;
- (5) Has failed to comply[;] with, observe, or adhere to any law in any other respect on account whereof the board may deem the applicant or holder to be an unfit or improper person to hold a license;
- (6) Has failed to meet or maintain the conditions and requirements necessary to qualify for the issuance of a license;
- (7) Is insolvent or has filed or is the subject of petition for bankruptcy, wage earner's plan, or financial reorganization plan; or has made or proposes to make an assignment for benefit of creditors;
- (8) In the case of an individual applicant or holder of a license, if the applicant or holder is not at least eighteen years of age; in the case of a partnership applicant or holder of a license, if any general or limited partner thereof is not at least eighteen years of age;
- (9) Has charged more than the legal rate of interest on the sale or purchase or attempted sale or purchase or in arranging the sale or purchase of a motor vehicle or any interest therein including an option to purchase;
- (10) Has violated any of the laws pertaining to false advertising or to credit sales in the offering, soliciting, selling, or purchasing, or arranging to sell or purchase a motor vehicle or any interest therein;
- (11) Has wilfully failed or refused to perform any unequivocal and indisputable obligation under any written agreement involving the sale or purchase of a motor vehicle or any interest therein including an option to purchase;
- (12) Has been denied the issuance of a license under this chapter for substantial culpable cause or for having had a license issued under this chapter suspended, revoked, or the renewal thereof denied for substantial culpable cause;
- (13) Has entered or has attempted to enter or proposes to enter into any contract or agreement contrary to this chapter or any rule adopted thereunder;
- (14) Has been or is engaged or proposes to engage in the business of selling new motor vehicles as a dealer or auction without a proper franchise therefor;
- (15) Has at any time employed or utilized or attempted or proposed to employ or utilize any person not licensed under this chapter who is required to be so licensed;
- (16) Has entered or attempted to enter any one-payment contract, where the contract is required to be signed by the purchaser prior to removal of the motor vehicle for test driving from the seller's premises;
- (17) Being a salesperson or dealer:
 - (A) Has required a purchaser of motor vehicles as a condition of sale and delivery thereof to purchase special features, appliances, accessories, or equipment not desired or requested by the purchaser; provided that this prohibition shall not apply as to special features, appliances, accessories, or equipment which are ordinarily installed on the vehicle when received or acquired by the dealer;
 - (B) Has represented and sold as an unused motor vehicle any motor vehicle which has been operated as a demonstrator, leased, or U-drive motor vehicle;
 - (C) Has sold a new motor vehicle without providing or securing for the purchaser the standard factory new car warranty for the

any other party, to perform any act not required by or to refrain from performing any act not contrary to the reasonable requirements of the franchise agreement with the dealer, by awarding or threatening to award a franchise to another person for the sale of the same make of any motor vehicle in the same sales area of responsibility covered by the existing franchise agreement of the dealer;

- (C) Has attempted to or has canceled or failed to renew the franchise agreement of any dealer in the State without good faith, as defined herein. Upon such a cancellation or failure to renew the franchise agreement, the party canceling or failing to renew the franchise agreement, at the dealer's option, shall either:
- (i) Compensate the dealer at the fair market going business value for the dealer's capital investment, which shall include but not be limited to the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise, inventory of parts, and motor vehicles possessed by the dealer in connection with the franchise, plus reasonable attorney's fees incurred in collecting compensation; provided that the investment shall have been made with reasonable and prudent judgment for the purpose of the franchise agreement; or
 - (ii) Compensate the dealer for damages including attorney's fees as aforesaid, resulting from the cancellation or failure to renew the franchise agreement.

As used in this paragraph, "good faith" means the duty of each party to any franchise agreement to fully comply with that agreement, or to act in a fair and equitable manner towards each other;

- (D) Has delayed delivery of or refused to deliver without cause, any new motor vehicle to a dealer, franchised to sell the new motor vehicle, within a reasonable time after receipt of a written order for the vehicle from the dealer. The delivery to another dealer of a motor vehicle of the same model and similarly equipped as the vehicle ordered by a dealer who has not received delivery thereof, but who had placed the written order for the vehicle prior to the order of the dealer receiving the vehicle, shall be prima facie evidence of a delayed delivery of, or refusal to deliver, a new motor vehicle without cause. The nondelivery of a new motor vehicle to a dealer within sixty days after receipt of a written order for the vehicle from a dealer shall also be prima facie evidence of delayed delivery of, or refusal to deliver, a new motor vehicle without cause; provided that the delayed delivery of, or refusal to deliver, a motor vehicle shall be deemed with cause if the manufacturer establishes that the delay or refusal to deliver is due to a shortage or curtailment of material, labor, transportation, utility service, labor or production difficulty, or other similar cause beyond the reasonable control of the manufacturer;
- (E) Has discriminated against any of their franchised dealers in the State by directly or indirectly charging the dealer more for a new motor vehicle or services, parts, or accessories or a higher rate of transportation for transporting the vehicle from the manufacturing or assembly plant to the dealer or any portion of the distance,

than is charged to any other of their franchised dealers in the State for the same make, model, and year of a new motor vehicle or for the same devices, parts, or accessories for the similar transportation for the vehicle during the same period. A manufacturer or distributor who provides or causes to be provided greater transportation benefits for a new motor vehicle as aforesaid to any of their franchised dealers in the State than is provided to any of their competing franchised dealers in the State for the same or lesser price or charge than that imposed upon the franchised dealer in the State during the same period is deemed to have so discriminated against the competing franchised dealer in the State. Evidence of similar discriminatory practice against franchised dealers in other states shall not constitute a defense to or justification of the commission of the discriminatory act against the franchised dealer in the State. The intent and purpose of this subparagraph is to eliminate inequitable pricing policies set by manufacturers or distributors which result in higher prices of new motor vehicles to the consumer in the State. This subparagraph shall be liberally interpreted to effect its intent and purpose and in the application thereof, the substance and effect and not the form of the acts and transactions shall be primarily considered in determining whether a discriminatory act has been committed. Nothing contained in this subparagraph shall prohibit establishing delivered prices or destination charges to dealers in the State which reasonably reflect the seller's total transportation costs incurred in the manufacture or delivery of products to the dealers, including costs that are related to the geographical distances and modes of transportation involved in shipments to this State, or which meet those lower prices established by competitors;

- (F) Has required a dealer of new motor vehicles in the State as a condition of sale and delivery of new motor vehicles to purchase special features, appliances, accessories, or equipment not desired or requested by the dealer; provided that this prohibition shall not apply to special features, appliances, accessories, or equipment, except heaters, that are regularly installed on that particular model or new motor vehicles as "standard" equipment or to special features, appliances, accessories, or equipment that are an integral part of the new motor vehicles and cannot be removed therefrom without substantial expense. Nothing in this subparagraph shall make it unlawful for a dealer to sell a vehicle that includes a heater that has been installed as standard equipment;
- (G) Has failed to adequately and fairly compensate its dealers for labor, parts, and other expenses incurred by the dealer to perform under and comply with manufacturer's warranty agreements. In no event shall any manufacturer or distributor pay its dealers a labor rate per hour for warranty work that is less than that charged by the dealer to the retail customers of the dealer nor shall the rates be more than the retail rates. All claims made by the dealers for compensation for delivery, preparation, and warranty work shall be paid within thirty days after approval and shall be approved or disapproved within thirty days after receipt. When any claim is disapproved, the dealer shall be notified in writing of the grounds for disapproval;

- (H) Has wilfully failed to affix the vehicle bumper impact notice pursuant to section 437-4.5(a), or willfully misstated any information in the notice. Each failure or misstatement is a separate offense;
- (I) Has wilfully defaced, or removed the vehicle bumper impact notice required by section 437-4.5(a) prior to delivery of the vehicle to which the notice is required to be affixed to the registered owner or lessee. Each wilful defacement, alteration, or removal is a separate offense; or
- (J) Has required a dealer to refrain from participation in the management of, investment in, or the acquisition of, any other line of new motor vehicle or related products; provided that the new motor vehicle dealer maintains a reasonable line of credit for each make or line of new motor vehicle, remains in compliance with reasonable facilities and other franchise requirements of the manufacturer or distributor, and makes no unauthorized change in the principal management of the dealer.”

SECTION 9. Section 437-29, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) Notification of the application of each dealer or auction approved by the board, or a report of the suspension, revocation, or change of status of a dealer’s or auction’s license shall be furnished to the treasurer of the affected county motor vehicle registration division or finance department promptly upon the granting, suspension, revocation, or change of status of the license.”

SECTION 10. Section 437-35, Hawaii Revised Statutes, is amended to read as follows:

“**§437-35 Penalty.** Any person who violates any provision of this chapter or rules of the board, or who engages in the business as, or serves in the capacity of, or acts as a motor vehicle dealer, ~~[motor vehicle]~~ salesperson, ~~[or motor vehicle]~~ auction, manufacturer, or distributor in the State or otherwise engages in the business of selling or negotiating for the purchase of motor vehicles in this State without being licensed as provided in this chapter, shall be fined not more than \$1,000, and each day’s violation or failure to comply shall be deemed a separate offense.”

SECTION 11. Section 437-35.5, Hawaii Revised Statutes, is amended to read as follows:

“**§437-35.5 Misdemeanor.** Any person who is convicted of violating any provision of this chapter or rules of the board, or who engages in the business as or serves in the capacity of, or acts as a motor vehicle dealer, ~~[motor vehicle]~~ salesperson, ~~[or motor vehicle]~~ auction, manufacturer, or distributor in the State or otherwise engages in the business of selling or negotiating for the purchase of motor vehicles in this State without being licensed as provided in this chapter, shall have committed a misdemeanor and be subject to a fine of not more than \$1,000, or imprisoned not more than one year, or both.”

SECTION 12. Section 437-1.1, Hawaii Revised Statutes, is amended by deleting the definitions of “distributor branch”, “distributor representative”, “factory branch”, and “factory representative”.

~~["“Distributor branch” means any office or establishment maintained by a distributor which is not at the same address as the distributor and is used, either directly or indirectly, for the purpose of selling, offering for sale, promoting the sale of, or distributing new motor vehicles to dealers, or for the purpose of directing or supervising, in whole or in part, factory or distributor representatives.~~

~~“Distributor representative” means any representative, employee, agent, contractor, or any person, other than an independent advertising agency, employed by or under a contract with a distributor, directly or indirectly, for the purpose of selling, promoting the sale of, or distributing new motor vehicles or for the purpose of supervising or regulating the business affairs of motor vehicle dealers or prospective dealers.~~

~~“Factory branch” means any office or establishment maintained by a manufacturer, directly or indirectly, for the purpose of selling, offering for sale, or promoting the sale of new motor vehicles to a distributor or dealer, or for directing or supervising, in whole or in part, factory or distributor representatives.~~

~~“Factory representative” means a representative, employee, agent, contractor, or any person, other than an independent advertising agency, employed by a manufacturer or factory branch for the purpose of selling or promoting the sale of new motor vehicles of such manufacturer or for supervising the franchised dealers or prospective dealers of such manufacturer.”]~~

SECTION 13. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 14. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 15. This Act shall take effect upon its approval; provided that sections 6 and 7 shall take effect on January 1, 2004.

(Approved June 2, 2003.)

Note

1. Edited pursuant to HRS §23G-16.5.