

The Senate

Education and Employment
References Committee

Driving a fairer deal: Regulation of the
relationship between car manufacturers
and car dealers in Australia

March 2021

© Commonwealth of Australia 2021

ISBN 978-1-76093-210-7

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 4.0 International License.



The details of this licence are available on the Creative Commons website:
<https://creativecommons.org/licenses/by-nc-nd/4.0/>.

Printed by the Senate Printing Unit, Parliament House, Canberra

Members

Chair

Senator Louise Pratt ALP, WA

Deputy Chair

Senator the Hon James McGrath LP, QLD

Members

Senator the Hon Don Farrell ALP, SA

Senator Mehreen Faruqi AG, NSW

Senator Deborah O'Neill ALP, NSW

Senator Matt O'Sullivan LP, WA

Secretariat

Dr Jane Thomson, Committee Secretary (until 27 April 2020)

Mr Alan Raine, Acting Committee Secretary (from 28 April 2020)

Ms Pothida Youhorn, Principal Research Officer (until 29 April 2020)

Ms Kate Campbell, Acting Principal Research Officer (until 4 September 2020)

Ms Aysha Osborne, Principal Research Officer (from 14 September 2020)

Mr Michael Perks, Senior Research Officer (from 14 September 2020)

Mr Russell Thomson, Research Officer (from 13 July 2020)

Ms Jade Monaghan, Administrative Officer (until 27 April 2020)

Ms Stephanie Oberman, Administrative Officer (from 28 April 2020)

Committee web page:

www.aph.gov.au/senate_eec

PO Box 6100

E-mail: eec.sen@aph.gov.au

Parliament House

Ph: 02 6277 3521

Canberra ACT 2600 Fax:

02 6277 5706

Table of contents

Members	iii
List of Recommendations	vii
Chapter 1 – Introduction.....	1
Scope of the inquiry	1
Conduct of the inquiry	2
Acknowledgement and references	3
Structure of this report	3
Chapter 2 – Background.....	5
Australian retail automotive industry	5
Franchised new car dealers	7
Current and proposed business models for selling vehicles	9
Agency model	9
Chapter 3 – GM Holden's withdrawal	13
GM's decision to withdraw from the Australian market	13
Concerns regarding the decision process.....	14
Lack of consultation	14
GM Holden's conduct prior to the announcement.....	17
Transition support for dealers.....	19
Concerns regarding the TSP offer	21
Adequacy of compensation.....	22
Conditions attached to the TSP offer	24
Lack of genuine negotiation and good faith bargaining.....	26
GM's obligations to consumers	29
Committee view	31
Chapter 4 – Relationships between manufacturers and dealers.....	35
The power imbalance between manufacturers and dealers	35
Concerns regarding practices employed by manufacturers	37
Investment required and tenure provided.....	37
Termination, non-renewal and change of distribution model	39
Changes to distribution models	41

Performance requirements	42
Behaviour around warranty claims.....	44
Unfair terms in contracts	48
Goodwill and data ownership	49
Committee view	52
Chapter 5 – Regulatory framework and reforms.....	55
Recent changes to regulatory arrangements for new car dealerships.....	55
Amendments to the Franchising Code	55
Development of best practice principles for dealership agreements	56
Need for further reform	57
Overall level of current regulation	58
Appropriateness of the Franchising Code.....	59
The effectiveness of the Franchising Code.....	60
Dispute resolution processes	60
Penalties and enforcement	63
Automotive-specific amendments	65
Strengthening the best practice principles	68
Proposed changes to the regulatory regime.....	69
Enhancements to unfair contract term protections.....	69
Penalties and mandatory best practice principles.....	70
Committee view	71
Appendix 1 – Submissions and additional information	75
Appendix 2 – Public hearings and witnesses	81

List of Recommendations

Recommendation 1

3.92 The committee recommends that the Australian Competition and Consumer Commission should expedite its investigations into the behaviour and actions of GM Holden and should commit to provide regular public updates on this investigation and similar investigations into the relationship between manufacturers and dealers in the future.

Recommendation 2

3.93 The committee recommends that the Australian Competition and Consumer Commission proactively ensures that General Motors Australia and New Zealand is meeting its Australian Consumer Law obligations to Holden vehicle owners in relation to warranty and recalls, technical support and access to parts.

Recommendation 3

5.82 The committee recommends that the Australian Government prioritise the new automotive reforms announced on 12 March 2021 and implement the increased fines, mandatory principles and protection of dealers operating as a manufacturer's agent by 1 July 2021.

Recommendation 4

5.83 The committee recommends that the mandatory best practice principles include a provision for the reimbursement for all reasonable expenses incurred in relation to warranty and recall work, including expenses associated with diagnosis, administration of claims and claim audits.

Recommendation 5

5.84 The committee recommends that the Australian Government introduce mandatory binding arbitration to resolve disputes during contracted negotiation in the automotive industry which are not able to be resolved by other dispute resolution mechanisms.

Recommendation 6

5.85 The committee recommends that the Australian Government appoint a senior officer in the Office of the Australian Small Business and Family Enterprise Ombudsman to investigate and coordinate dispute resolution investigations and facilitate mediation and arbitration arising from the transformation of the voluntary best practice principles into mandatory obligations.

Recommendation 7

5.86 The committee recommends that the Australian Government undertake a review into effectively enforcing alleged contraventions of the *Competition and Consumer Act 2010* as it relates to the regulation of the relationship between car manufacturers and car dealers.

Chapter 1

Introduction

1.1 On 27 February 2020, the Senate referred the announcement by General Motors (GM) on 17 February 2020 to withdraw the Holden brand and operations from Australia to the Education and Employment References Committee (the committee) for inquiry and report by the first sitting day in May 2020. The committee was to give particular reference to:

- (a) the impacts of that decision on:
 - (i) Holden employees,
 - (ii) the Holden dealership network (small and medium sized businesses and family enterprises, and their employees),
 - (iii) the Holden research and development facilities, and
 - (iv) owners of Holden vehicles (including service and repair);
- (b) the role of the Franchise Code and the Government's proposed dealership amendments to the Franchise Code;
- (c) Government or other policy settings on manufacturing, research and development, business support and transition, and employee support; and
- (d) any related matters.¹

1.2 On 23 March 2020, the Senate granted the committee an extension of time to report until 12 November 2020.² On 8 October 2020, the Senate granted a further extension of time to report until 10 December 2020.³ The committee sought a further extension of time to report until 18 March 2021, which the Senate granted on 3 December 2020.⁴

Scope of the inquiry

1.3 During the course of the inquiry, GM significantly wound down their operations in Australia with all affected employees departing the company by the end of 2020. General Motors Holden's (GM Holden) remaining research and development facilities in Australia were integrated into GM's global operations, decommissioned, or sold to other automotive manufacturers.⁵

¹ *Journals of the Senate*, No. 46, 27 February 2020, p. 1509.

² *Journals of the Senate*, No. 47, 23 March 2020, p. 1545.

³ *Journals of the Senate*, No. 69, 8 October 2020, p. 2405.

⁴ *Journals of the Senate*, No. 77, 3 December 2020, p. 2710.

⁵ GM Holden, *Submission 14*, p. 11. See also, Sam Jeremic, 'Holden's Lang Lang proving grounds sold to Vietnamese start-up VinFast, GMSV to continue testing on site', *The West Australian*, 9 September 2020.

- 1.4 Many Holden car dealers felt that they were treated unfairly during the withdrawal process and voiced these concerns to the committee. Stakeholders also raised concerns that GM's departure could set a precedent for how other manufacturers could exit the Australian market, rationalise their dealership networks or change their distribution models in the future. Indeed, during the course of the inquiry, Mercedes-Benz Australia/Pacific and Honda Australia progressed plans to change their distribution models in Australia and some affected dealers shared their experiences with the committee.
- 1.5 Accordingly, the committee resolved on 7 October 2020 to investigate the regulation of the relationship between car manufacturers and car dealership models in Australia, including:
- (a) practices employed by manufacturers in their commercial relations with dealers, with specific focus on:
 - (i) investment required and tenure provided
 - (ii) termination and compensation practices
 - (iii) performance requirements
 - (iv) behaviour around warranty claims and Australian Consumer Law
 - (v) unfair terms in contracts
 - (vi) goodwill and data ownership;
 - (b) existing legislative, regulatory and self-regulatory arrangements;
 - (c) current and proposed government policy;
 - (d) dispute resolution systems and penalties for breaches of the Franchising Code of Conduct;
 - (e) current and proposed business models in selling vehicles;
 - (f) legislative, regulatory and self-regulatory arrangements found in international markets; and
 - (g) the imposition of restraints of trade on car dealers from car manufacturers.

Conduct of the inquiry

- 1.6 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant stakeholders and other interested parties inviting them to make written submissions by 20 March 2020. The committee subsequently extended the deadline for submissions to 25 June 2020.
- 1.7 Following the committee's decision to refocus the inquiry on 7 October 2020, the committee invited further submissions from relevant stakeholders by 30 October 2020.
- 1.8 The committee received 77 submissions (of which 47 were confidential), as well as additional information and answers to questions taken on notice, which are listed at Appendix 1.

- 1.9 The committee held four public hearings:
- Canberra – Monday, 3 August 2020;
 - Canberra – Thursday, 19 November 2020;
 - Canberra – Tuesday, 24 November 2020; and
 - Canberra – Friday, 5 February 2021.
- 1.10 A list of witnesses that appeared at these hearings is available at Appendix 2.
- 1.11 Links to public submissions, *Hansard* transcripts of evidence and other information published by the committee for this inquiry are available on the committee's website.

Acknowledgement and references

- 1.12 The committee thanks those individuals and organisations who contributed to this inquiry by preparing written submissions and giving evidence at public hearings.
- 1.13 References in this report to the *Hansard* transcripts for the public hearings are to the proof *Hansard*. Page numbers may vary between proof and official *Hansard* transcripts.

Structure of this report

- 1.14 Consistent with the refocusing of the inquiry, this report primarily considers the impact of GM Holden's decision to cease distributing cars, the broader relationships between car manufacturers and dealers, and the adequacy of the current regulatory regime upon those relationships.
- 1.15 This report comprises five chapters, including this introductory chapter, with the remaining chapters set out as follows:
- Chapter 2: provides background information on the Australian automotive retail industry, including proposed business models for selling vehicles.
 - Chapter 3: looks at GM Holden's exit from the Australian market and the impact of the withdrawal on Holden car dealers and consumers.
 - Chapter 4: examines issues raised by stakeholders in relation to the regulation of the relationship between car manufacturers and car dealers in Australia.
 - Chapter 5: considers recent changes to the governance and regulatory arrangements for the Australian automotive industry and the need for further reforms in the sector.

Chapter 2

Background

2.1 This chapter provides some background to the Australian retail automotive industry and explores changes in the distribution models employed by manufacturers, including the introduction of the agency sales model.

Australian retail automotive industry

2.2 The Australian automotive industry is broad and includes a variety of activities and businesses. According to the joint submission from the Department of Industry, Science, Energy and Resources, and the Department of Education, Skills and Employment (the departments), the new car retailing industry encompasses three key areas:

- Manufacturers (represented by distributors) – import vehicles to distribute to dealers and commercial fleet buyers. Distributors are typically wholly owned subsidiaries of foreign car manufacturers and act as links between foreign manufacturers and Australian dealer networks.
- Dealers – sell new and used cars to consumers and businesses. While large businesses often purchase cars directly from distributors, smaller businesses typically purchase vehicles from dealers. Dealers also provide a range of other services, including servicing and repair, aftermarket sales and finance and insurance services.
- Independent repairers – typically small, independent establishments that service a local area.¹

2.3 The new car market in Australia is one of the most competitive and deregulated car markets in the world and contains between 60–72 brands and more than 400 model variants.² This compares to between 35–40 brands servicing the needs of around 320 million people in the United States of America market.³

2.4 Following the cessation of Toyota Motor Corporation Australia (TMCA) and General Motors-Holden's (GM Holden) domestic manufacturing operations in October 2017, all new passenger vehicles sold in Australia have been manufactured and imported from overseas. As a result, Australia's vehicle

¹ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 32.

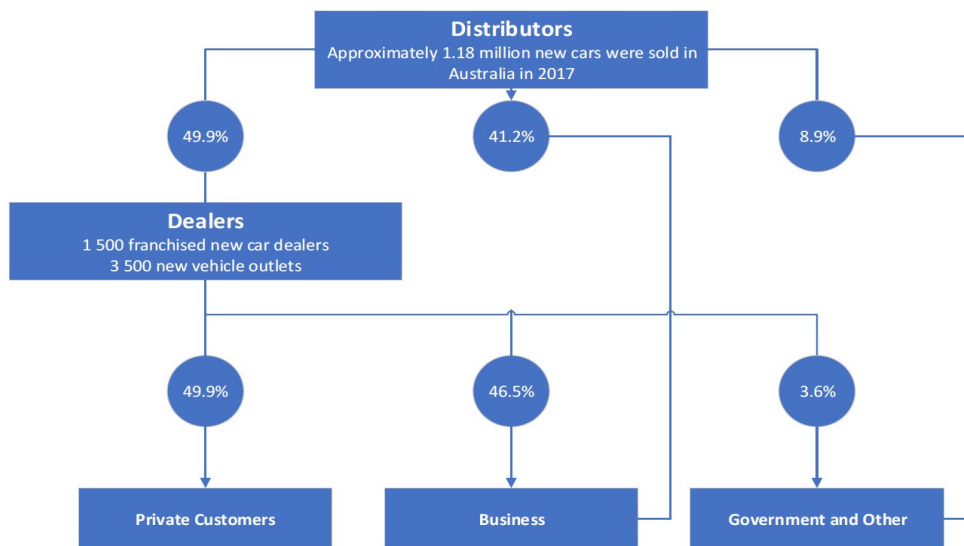
² See, for example, Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 32; Motor Trades Association of Australia Limited, *Submission 15*, p. 8; Federal Chamber of Automotive Industries, *Submission 5*, p. 2; Mr John Crennan, *Submission 19*, [p. 2].

³ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 7.

manufacturing industry now primarily produces heavy vehicles, engines, and other vehicle components.⁴

- 2.5 During 2019, over 1 million new cars were sold in Australia with car dealer revenues estimated at \$56 billion.⁵ This compared to around 1.2 million new cars that were sold in 2016–17 and revenues for the same period of \$64 billion.⁶ According to the Australian Automotive Dealer Association, the new car retailing sector employs an estimated 55 815 people, including 4463 apprentices.⁷ An overview of the supply chain for new car retailing in Australia is shown in Figure 2.1.⁸

Figure 2.1 Supply chain for new car retailing in Australia



Source: FCAI (VFACTS) motor vehicle sales data (as at December 2017); IBISWorld Industry Report F3501 Motor Vehicle Wholesaling in Australia, May 2018; IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia, April 2018.

- 2.6 Submitters to the inquiry commented on the many unique characteristics of the Australian automotive market. For example, the Motor Trades Association of Australia (MTAA) noted that:

⁴ For example, Volvo Group Australia (through its subsidiary) manufactures the Mack Titan, Super-Liner, Trident, Metro-Liner, and Granite heavy-duty models at its Wacol facility in Brisbane. (IBIS World, *IBIS World Industry Report X0014 Automotive Industry in Australia*, June 2020).

⁵ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 6.

⁶ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 32.

⁷ Australian Automotive Dealer Association, *Submission 13.2*, p. 4. See also, Motor Trades Association of Australia Limited, *Submission 15.1*, p. 6.

⁸ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 33.

Many factors contribute to Australia's unique automotive market. Geographic dispersal of a comparatively small population; one of only 75 global right hand drive markets (as opposed to 165 left hand drive markets); national reliance on road transport for goods and service delivery and community connection; and trade policy including free trade agreements.⁹

- 2.7 The MTAA also observed that Australia has one of the youngest motor vehicle fleets in the world and pointed out that each vehicle is unique to Australia 'due to design rules and regulatory requirements'.¹⁰ As a result, it argued that 'even though a particular make and model of vehicle may look the same as one sold internationally, it has attributes that can only be found in Australia'.¹¹
- 2.8 The Federal Chamber of Automotive Industries (FCAI) indicated that the small size of the Australian market and the large number of brands 'results in numerous suppliers with very-low overall volumes' and noted that 'in 2019 25 passenger vehicle brands sold less than 5000 units nationally'.¹²
- 2.9 In addition to these factors, the Australian automotive market is also being influenced by the broader structural transformation occurring in the global automotive industry. The departments pointed out in their joint submission that 'disruptions such as electric vehicles, automation, changing ownership models and other emerging technologies have the potential to transform the industry and how we view transportation'.¹³
- 2.10 The departments also noted that:
- ...analysts predict automotive retail will shift from being product-driven to a customer-centric approach with key supply chain participants (manufacturers, dealers and independent repairers) garnering consumer loyalty through responding to consumer behaviour and expectations.¹⁴

Franchised new car dealers

- 2.11 A key component of Australia's two-tier automotive franchise distribution system are the more than 1500 new car dealers in Australia that operate more

⁹ Motor Trades Association of Australia Limited, *Submission 15*, p. 8.

¹⁰ Motor Trades Association of Australia Limited, *Submission 15*, p. 8.

¹¹ Motor Trades Association of Australia Limited, *Submission 15*, p. 8.

¹² Federal Chamber of Automotive Industries, *Submission 5*, p. 2.

¹³ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 33. See also, Motor Trades Association of Australia Limited, *Submission 15.1*, pp. 8–9; Toyota Motor Corporation Australia, *Submission 42*, p. 2; FCA Australia, *Submission 77*, p. 2.

¹⁴ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 33 (citation omitted).

than 3000 dealerships that link overseas manufacturers and local dealer networks.¹⁵

2.12 These authorised dealership networks are used by manufacturers 'as the primary retail distribution mechanism for the localised stocking, display, demonstration, sale, pre-delivery, accessories, service, parts supply, and warranty provision, safety recall, financing, and marketing, of their vehicles'.¹⁶

2.13 As noted in submissions to the inquiry, the last five years saw significant consolidation in the Australian car retailing industry, with larger public dealership companies taking over smaller private dealerships.¹⁷ As a consequence, the FCAI reported that 'fewer than 16% of all dealerships were owned and operated as a single new motor vehicle dealership' and that '60% of new car sales in Australia are made by dealer conglomerates that own five or more new car dealerships'.¹⁸

2.14 Mr Bruce Wilson, Head of Division, Industry Growth, at the Department of Industry, Science, Energy and Resources, stated that while Australia's highly competitive automotive market had delivered benefits to consumers, it had also put 'a lot of pressure on the dealership component of the market'.¹⁹

2.15 Similarly, the MTAA noted that:

Tightening returns, on margins that are already lean, encourages dealers to increase emphasis on finance and insurance and servicing revenue streams to gain even a modest return on investment. Since 2018 this emphasis has been undermining and severely impacted by targeted regulatory changes to the provision of finance and insurance products by dealers.²⁰

2.16 While acknowledging the challenges presented by a rapidly evolving new car market, the FCAI argued that 'new car dealers have adapted to meet the challenges and opportunities afforded through this competition'.²¹ The FCAI submitted:

Significantly, most dealers have diversified to retail multiple brands across their dealer sites. As such, an overwhelming majority of dealers are multi-

¹⁵ Australian Automotive Dealer Association, *Submission 13.2*, p. 3. See also, Motor Trades Association of Australia Limited, *Submission 15.1*, p. 8.

¹⁶ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 10.

¹⁷ See, for example, Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 6; Motor Trades Association of Australia Limited, *Submission 15.1*, p. 9; Federal Chamber of Automotive Industries, *Submission 5.1*, p. 7.

¹⁸ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 7.

¹⁹ *Committee Hansard*, 3 August 2020, p. 14.

²⁰ Motor Trades Association of Australia Limited, *Submission 15*, p. 9.

²¹ Federal Chamber of Automotive Industries, *Submission 5*, p. 4.

franchise operations, with, for example, this model accounting for approximately 90 per cent of Holden dealerships in 2020. Many dealers also own their strategically important sites, which is an extremely significant advantage in the competitive Australian market.²²

- 2.17 The implications of increased domestic competition on automotive dealerships was also addressed by the MTAA which submitted:

There has also been significant growth in public listed dealership entities, which now account for almost 20% of total dealerships nationwide. Traditional family-owned-and-operated, or private, dealerships continue to survive, but in decreasing numbers, and these are arguably dealers who are impacted most by decisions of car manufacturers and/or their distributors/importers to vacate the Australian market or substantially change their retail distribution network or method of retailing.²³

Current and proposed business models for selling vehicles

- 2.18 As noted above, the standard model of new car sales in Australia involves independent car dealers entering into agreements with manufacturers to purchase new vehicles and selling them to customers.
- 2.19 In addition to selling new cars, dealers and associated salespeople also provide a variety of other services, including assisting with administrative tasks, undertaking vehicle maintenance and repairs, and facilitating trade-ins of older vehicles where required. Traditionally, the dealer has been the sole point of contact for the customer.²⁴
- 2.20 However, manufacturers are increasingly exploring alternative approaches to the traditional sales model to better leverage off consumer preferences to research and purchase new cars online with limited dealer interactions.
- 2.21 For example, many newer car brands, such as Tesla, do not have a traditional dealer network and sell new cars almost entirely over the internet. In Australia, Tesla only has four physical galleries located in Sydney, Melbourne, Brisbane and the Gold Coast.²⁵

Agency model

- 2.22 The 'agency model' of new car sales enables direct sales of new cars from manufacturers to customers while still utilising traditional dealerships, albeit to a reduced extent. In an agency model, the role of car dealers is transformed to

²² Federal Chamber of Automotive Industries, *Submission 5*, p. 4.

²³ Motor Trades Association of Australia Limited, *Submission 15*, p. 9. See also, Federal Chamber of Automotive Industries, *Submission 5*, p. 4.

²⁴ Accenture, *The future of automotive sales: Direct. A new way for OEMs and dealers to thrive in times of disruption*, 2019, p. 15, <https://www.accenture.com/acnmedia/pdf-108/accenture-study-the-future-of-automotive-sales.pdf> (accessed 13 November 2020).

²⁵ As derived from the Tesla website on 16 March 2021.

that of agents who act on behalf of the manufacturer and are remunerated through a commission on each vehicle that is sold or delivered.

2.23 For example, Honda Australia has announced that it will be moving to agency sales for its Australian retail network and has indicated that it will restructure its dealer network from 1 July 2021.²⁶ This restructure will reduce the number of existing Honda dealers.²⁷

2.24 Mercedes-Benz Australia/Pacific (MBAuP) has also announced that it will move to an agency model in 2022 and has given all its dealers the opportunity to transition to the new model 'when the tenure of their current Sales, Service and Parts Dealer agreements expire at the end of 2021'.²⁸ It argued in its submission that under its new model:

Dealers will continue to use the same facilities, signage and resources that exist within their current businesses as both agents for MBAuP, and importantly, in relation to the continued operation of other aspects of their business that will continue to operate under a traditional licensing model (i.e. sale of pre-owned vehicles, vehicle servicing, parts sales and vehicle financing).

MBAuP will not require agents to make any additional or significant capital expenditure specifically in connection with the transition to the agency model.²⁹

2.25 MBAuP noted that the global brand has successfully introduced an agency model for new car sales in South Africa and Sweden.³⁰

2.26 Similarly, Volkswagen has also proposed an agency model in Germany to sell its flagship electric car, the ID.3, and upcoming electric vehicles in its ID range at a standardised price regardless of whether it is purchased from a physical branch or online. Dealerships will receive a commission to deliver the cars to customers.³¹

2.27 The agency model has also been introduced in New Zealand by several brands which have each introduced their own version of the concept.

²⁶ Honda Australia, 'Honda Australia announces plans to transform its sales and customer service', *Media Release*, 24 March 2020, <https://www.honda.com.au/en/media-centre/2020/honda-australia-announces-plans-to-transform-its-sales-and-customer-service> (accessed 13 November 2020).

²⁷ Honda Australia, answers to written questions on notice from Senator O'Neill, 24 November 2020 (received 1 December 2020). See also, Honda Australia, 'Honda shapes future network for enhanced customer experience', *Media Release*, 10 March 2021.

²⁸ Mercedes-Benz Australia/Pacific, *Submission 43*, p. 5.

²⁹ Mercedes-Benz Australia/Pacific, *Submission 43*, p. 5.

³⁰ Mercedes-Benz Australia/Pacific, *Submission 43*, p. 6.

³¹ Joe Miller and Peter Campbell, 'Carmakers launch direct internet sales', *Financial Times*, 16 August 2020, <https://www.ft.com/content/6681b877-348b-486e-8149-aa9dc6bd7fa4> (accessed 13 November 2020).

In 2000, Honda New Zealand's Price Promise effectively introduced an agency model in that jurisdiction.³² Toyota New Zealand moved to an agency model in 2018.³³

2.28 The National Toyota Dealers Association (NTDA) noted that Toyota New Zealand's introduction of an agency model 'was not without difficulties and faults but ultimately, it is proving to be a model that could work in New Zealand'.³⁴ It also noted:

TMCA has assured the NTDA and all Toyota dealers that there is no plan to introduce a similar model or some other new model in Australia for the foreseeable future. TMCA has advised that it considers that the agency model is suited to New Zealand and that it is not indicative of a general shift to that business model.³⁵

2.29 According to a study conducted by Accenture, the agency model holds five major benefits for manufacturers:

- access to customer data which is currently only available to dealers;
- full control over online and offline channels, allowing manufacturers to build seamless customer journeys with a consistent experience;
- ability to set a single price across all sales channels to eliminate intra-brand competition;
- effective steering of sales activities, enabling manufacturers to push digital services and new offerings into the market; and
- increased transparency about market performance at the showroom level, allowing manufacturers to continually optimise the sales network.³⁶

2.30 That said, moving to an agency model requires manufacturers to develop the capability to take over direct sales functions, such as, pricing, order and stock management, marketing, customer services, and associated online portals.

2.31 The agency model also has benefits for dealers, including:

- reduced capital requirements and financial risk as ownership of new cars rests with the manufacturer;
- increased accessibility to a national stock pool of new vehicles; and

³² Neil Dowling, 'How the agency model works', *GoAutoNews Premium*, 12 March 2020, <https://premium.goauto.com.au/how-the-agency-model-works/> (accessed 13 November 2020).

³³ John Mellor, 'Toyota reinvents NZ dealers as agents', *GoAutoNews Premium*, 5 April 2018, <https://www.goautonews.com.au/toyota-reinvents-nz-dealers-as-agents/> (accessed 17 November 2020).

³⁴ National Toyota Dealer Association, *Submission 44*, p. 4.

³⁵ National Toyota Dealer Association, *Submission 44*, p. 4.

³⁶ Accenture, *The future of automotive sales: Direct. A new way for OEMs and dealers to thrive in times of disruption*, 2019, p. 24, <https://www.accenture.com/acnmedia/pdf-108/accenture-study-the-future-of-automotive-sales.pdf> (accessed 13 November 2020).

- reduced cost base associated with a small physical footprint (e.g. showrooms and associated facilities).

2.32 Indeed, the Australian Competition and Consumer Commission noted that changes to distribution models could have a positive impact on consumer guarantee issues and be beneficial to dealers:

As noted in our new car retailing market study, certain features of the commercial arrangements between manufacturers and franchised dealers can act to constrain and influence the behaviour of dealers in responding to consumer guarantee claims. However, we also note that in our experience, individual dealer franchisees can and do advocate on behalf of their customers with the manufacturer. There can be differences in approaches between a dealer and a manufacturer in dealing with consumer guarantees claims. Under an agency model, such conflicts may be reduced, which may make it easier for consumers to obtain remedies for consumer guarantees claims.³⁷

2.33 During the transition to an agency model, there may be costs for dealers who choose to reduce the size of their facilities to more appropriately accommodate a smaller number of vehicles in stock. Likewise, some dealers may be left with the legacy costs associated with significant showroom investments which cannot easily be changed to service other brands. In extreme cases, some dealers may not have their dealer contract renewed as manufacturers make decisions to reduce the overall number of dealers in a geographic area.

2.34 Indeed, concerns were raised by submitters in relation to the announcement by some manufacturers that they intended to move away from a standard dealer model to an agency model. In particular, submitters expressed concern in relation to the potential impact such structural changes would have on individual dealerships. These concerns are explored in Chapter 4 of this report.

³⁷ Australian Competition and Consumer Commission, *Submission 1.1*, p. 3.

Chapter 3

GM Holden's withdrawal

3.1 This chapter explores the events associated with the exit of General Motors-Holden (GM Holden) from the Australian new car market, including the impact of the withdrawal on Holden car dealers and its implications for consumers.

GM's decision to withdraw from the Australian market

3.2 After playing a significant part in Australia's industrial history over the last 160 years, GM announced on 17 February 2020 that it would retire the Holden brand from sales in Australia and New Zealand, with its remaining local design and engineering operations to be wound down by 2021.¹

3.3 In its submission, GM Holden outlined the rationale for the company's decision:

GM explored numerous options to maintain Holden operations. Every realistic possibility was carefully examined but none could overcome the challenges of the investments needed for Australia's highly fragmented and right-hand-drive market, the economics to support growing the brand, and the need for an appropriate return on investment.

Despite hopes of reaching a different outcome, the inescapable conclusion was that GM could not sustain further investment into Holden. GM reluctantly made its decision to wind down Holden a few days before the public announcement which was made with great sadness on 17 February 2020.²

3.4 GM Holden's former Interim Chairman and Managing Director, Mr Kristian Aquilina, provided further context for GM's decision at the hearing on 3 August 2020. Mr Aquilina explained:

It was a result of GM being confronted, as I outlined at the time, with some decisions it needed to make around some key investments required by General Motors that were bespoke and unique to Holden continuing in the Australian market. And, as I said, it was not just around right-hand drive vehicles—although, that is a major part of it—but there were investments required in technology, the customer experience, our distribution, our brand and our marketing going forward. And, as I outlined in my opening statement, one per cent of global sales emanate from Australia. It's a very small market, without the scale necessary to recover some of those investments, and, unfortunately, the decision was taken at the time.³

¹ General Motors Holden, 'Holden vehicle sales, design and engineering to cease in Australia and New Zealand', *Media Release*, 17 February 2020.

² GM Holden, *Submission 14*, p. 5.

³ *Committee Hansard*, 3 August 2020, p. 20.

- 3.5 GM Holden indicated that it would close most of its operations in Australia, including its Holden National Sales Company, Design, Engineering, Maven and Holden Financial Services entities, with the loss of approximately 600 employees.⁴ Following the wind-down of its design and engineering operations by the end of 2020, a team of around 200 people would remain 'in the business to support a network of authorised Holden Service Outlets across Australia to service and repair vehicles for Holden customers'.⁵
- 3.6 GM Holden also offered affected dealers a transition package, which provided compensation for the early termination of the final two and a half years of its dealership agreement. The transition package is discussed in more detail later in the chapter.

Concerns regarding the decision process

- 3.7 A number of submitters raised concerns in relation to GM's conduct and actions leading-up to its decision to withdraw from the Australian market. Two key concerns raised with the committee were:
- the lack of prior consultation with employees, dealers or the Australian Government (the government) in relation to GM's decision; and
 - GM Holden's conduct in relation to capital investments and transfer of dealerships in the knowledge that they might be withdrawing from the Australian market.

Lack of consultation

- 3.8 Mr Aquilina confirmed that he was first advised of the decision to retire the brand on 14 February 2020, three days ahead of the formal announcement on 17 February 2020.⁶ Mr Aquilina rejected criticism that there was a lack of prior consultation by GM Holden:

A decision was taken in the days leading up to our announcement and we announced it very quickly after the decision was taken. I don't know how much sooner we could have done it. Essentially, we were advised, we discussed our plans as a local board and a local leadership team and, as soon as we could possibly let the public know about it and let our constituents know about it, we did so, which was the Monday morning that followed.⁷

⁴ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 7.

⁵ GM Holden, *Submission 14*, p. 2.

⁶ Mr Kristian Aquilina, former Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, pp. 20–21.

⁷ Mr Kristian Aquilina, former Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 21.

- 3.9 In relation to the timing of GM's announcement, Mr Aquilina noted that he had been providing input into GM's internal deliberations about the future of the Holden brand since December 2019:

My role was to provide as much input as I could on the various scenarios that we were considering for Holden in Australia, including a future which would have needed to attract significant investment, and of course it would have had to provide input on how you would conduct an orderly wind-down, if that was the decision that it took.⁸

- 3.10 In addition, Mr Aquilina observed:

If we were to tell people, for example, that we were going through a wind-down of the Holden brand, and then not do it for several years, we would have seen such a deterioration and such poor returns for everyone involved, it would have been a much worse situation than telling people and doing it swiftly. We did it to mitigate losses for everyone involved.⁹

- 3.11 The Australian Automotive Dealer Association (AADA) told the committee that many dealers were only advised of GM's decision on a conference call about 15 minutes before the public announcement, with some dealers not 'in a position to tell their staff before their staff heard it in the media'.¹⁰

- 3.12 Mr Mark Palmer, who operated a Holden dealership in Inverell, New South Wales, submitted:

I was travelling en-route to New Zealand when Holden released the news to Dealers. The media and public found out at the same time. There was no prior discussions or suggestions from Holden that they were planning this.¹¹

- 3.13 Similarly, a former engineer in GM Holden's engineering department, who did not wish to be identified, also indicated that there was no advance warning to Holden employees 'about the potential closure of the business and there was no request from Holden management for staff to make any contribution to avoid the closure'.¹² The submitter noted:

Given the recent growth of the Holden Engineering team, the announcement of the closure of Holden operations was a complete shock. On the day of the closure announcement, 8 new engineers commenced

⁸ Mr Kristian Aquilina, former Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 24.

⁹ Mr Kristian Aquilina, former Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 26.

¹⁰ Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 3 August 2020, p. 2.

¹¹ Mr Mark Palmer, *Submission 17*, p. 2.

¹² Name withheld, *Submission 12*, [p. 1].

employment at Holden. Perhaps nothing better illustrates how unprepared we were for this announcement.¹³

- 3.14 The Department of Industry, Science, Energy and Resources, and the Department of Education, Skills and Employment (the departments) both indicated that they were advised of GM's decision on the same day as the official announcement.¹⁴ Mr Bruce Wilson, Head of Division, Industry Growth, Department of Industry, Science, Energy and Resources, observed:

We would like more consultation on decisions such as this. Various car manufacturers have given both the industry and us more warning on their proposed changes. But you can't regulate this sort of consultation; that doesn't work.¹⁵

- 3.15 Submitters questioned whether GM made the strategic decision to withdraw from the Australian market well before its announcement, despite indicating 'both privately with its dealers and publicly through the media that it was in Australia for the long haul'.¹⁶
- 3.16 Indeed, the AADA highlighted that 'the sale of the plant in Thailand where Australia's top selling Holden vehicle, the Colorado ute, was manufactured was announced at the same time as the closure of Holden'.¹⁷

- 3.17 Mr James Voortman, Chief Executive Officer, AADA, commented:

I believe this decision was in the pipeline for some time because common sense dictates that it would have been. My view is that the minute that they decided that that factory was to be sold, that was when the whole future of Holden in Australia was called into question. At that point, I believe GM had the moral obligation to many of its long-term partners to inform them to cease capital expenditure programs, to refrain from engaging in a buy/sell process and to basically protect them financially.¹⁸

- 3.18 However, GM Holden rejected the suggestion that GM's decision to sell its Thailand plant was linked with its decision to withdraw from the Australian retail market. Mr Aquilina argued:

We knew a decision was made on the sale of the Thailand plant in the days leading up to 17 February. I can't be specific about the dates when GM

¹³ Name withheld, *Submission 12*, [p. 1].

¹⁴ Mr Bruce Wilson, Head of Division, Industry Growth, Department of Industry, Science, Energy and Resources and Ms Benedikte Jensen, First Assistant Secretary, Labour Market Strategy Division, Department of Education, Skills and Employment, *Committee Hansard*, 3 August 2020, p. 15.

¹⁵ *Committee Hansard*, 3 August 2020, p. 15.

¹⁶ Australian Automotive Dealer Association, *Submission 13*, p. 10. See also, Name withheld, *Submission 23*, [p. 1].

¹⁷ Australian Automotive Dealer Association, *Submission 13*, p. 10. See also, Name withheld, *Submission 23*, [pp. 1–2].

¹⁸ *Committee Hansard*, 3 August 2020, p. 3.

decided to sell that plant in the days leading up to 17 February, when it was announced in Thailand. I just want to put to bed this whole conspiracy, which has been a long-held view of General Motors to unwind our operations right across South-East Asia and Australia and so forth. We were producing the highest volume and most popular model, the Colorado, in three plants around the world. If, for whatever reason, there was a shock to supply out of our Thailand plant, we had options to source vehicles from two other plants that we have to produce the Colorado.¹⁹

GM Holden's conduct prior to the announcement

3.19 Some submitters raised concerns that GM Holden allowed dealers to make capital investments, approved the transfer of dealerships and prevented dealers from taking on additional franchises, in the knowledge that they would be withdrawing from the Australian market. For example, the AADA submitted:

...many dealers were asked until very recently, to make significant capital expenditures. In one case, the company demanded that one Dealer Group build a \$6.5 million 'Holden Dealership of the Future', which was not slated to open until May 2020, three months after GM announced the demise of the brand in Australia.²⁰

3.20 The Motor Trades Association of Australia (MTAA) also expressed similar concerns on behalf of its members:

...MTAA suggests it is incomprehensible that (as reported by a Holden Dealer constituent) a GMH business development executive can travel from one side of the nation to the other in the first week of February 2020 to consult a dealer on plans for a new facility, the capital investment and requirements of GMH for that facility, and progress being made on those plans, when only 14 days later an announcement is made to end the Dealer's franchise agreement and vacate the Australian market.²¹

3.21 The AADA also submitted that GM approved the transfer of dealerships right up until several weeks before its announcement and that 'a regional Holden Dealership sale was completed barely three weeks before the announcement that Holden Dealerships would no longer exist'.²² The AADA argued:

...the applications for consent to transfer Holden Dealerships have been approved by GM knowing that the purchaser was relying on the usual industry practice of rolling over Dealership Agreements. Had the purchasers known of GM's intentions, they would most likely not have

¹⁹ Mr Kristian Aquilina, former Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 22.

²⁰ Australian Automotive Dealer Association, *Submission 13*, p. 11. See also, Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 3 August 2020, p. 3; and Motor Trade Association SA/NT, *Submission 2*, p. 6.

²¹ Motor Trades Association of Australia Limited, *Submission 15*, p. 6.

²² Australian Automotive Dealer Association, *Submission 13*, p. 12.

proceeded or would not have paid as much goodwill for the Holden Dealerships.²³

- 3.22 In addition, the AADA submitted that GM had prevented dealers from taking on additional franchises:

Even as sales figures continued to decline and many Dealers had been discontinued, Holden continually refused to allow Dealers to take on other franchises. Indeed, the Holden Dealer Council has stated that 'Dealers can prove that Holden has consistently disallowed applications for multi-franchise arrangements and caused immense loss through their unconscionable acts over the past 15 years'.²⁴

- 3.23 In response, GM Holden rejected any suggestions that it approved projects in the knowledge that it would be exiting the country. Mr Aquilina pointed out:

In 2018, or recently before that, we had struck new dealer agreements of five years in length, we had introduced a new finance company into the market, we'd kicked off these new engineering projects, we'd introduced new programs that were firsts for Holden and we'd introduced new products that we committed significant right-hand-drive investment to. To think that we would do all that whilst having a plan to wind up our operation just defies any logic whatsoever and it's just a big red herring.²⁵

- 3.24 GM Holden also disputed the suggestion from the AADA that it refused to allow dealers to take on other brands:

Over the 18 months prior to Holden's announcement to withdraw, more than 60 multi-franchise applications were approved by Holden. For the same period, our records indicate only 3 applications were found not to meet our multi-franchising criteria and we remained open to these dealers for them to re-submit applications that did so.²⁶

- 3.25 In its submission, the Australian Competition and Consumer Commission (ACCC) stated that it had:

...also heard concerns that GM encouraged some dealers to make large financial investments, despite having knowledge that they would be withdrawing from the Australian market. It has been suggested that GM did not conduct its negotiations with dealers in good faith, and did not give adequate disclosure of materially relevant facts, as is required under the Franchising Code.²⁷

²³ Australian Automotive Dealer Association, *Submission 13*, p. 12 (citation omitted).

²⁴ Australian Automotive Dealer Association, *Submission 13*, p. 12 (citation omitted).

²⁵ Mr Kristian Aquilina, former Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 26.

²⁶ GM Holden, *Submission 14.1*, p. 4.

²⁷ Australian Competition and Consumer Commission, *Submission 1*, p. 3.

3.26 However, the ACCC also indicated that it had:

...not heard directly from any dealerships who have recently made such financial investments or are involved in the negotiation process. We are mindful that many franchisees may be unwilling to voice their concerns because they fear retribution from their franchisors.²⁸

3.27 The ACCC elaborated on this point in its submission:

Even where there is no overt retaliation, we recognise that individual franchisors may be unwilling to approach the ACCC for fear of damaging their ongoing commercial relationships with their franchisor.²⁹

Transition support for dealers

3.28 At the time of GM Holden's announcement on 17 February 2020, there were approximately 185 Holden dealers operating some 203 facilities across Australia.³⁰ Most of these dealers had signed or renewed five-year franchise agreements with GM Holden in 2018. These agreements were due to expire at the end of 2022.

3.29 GM's decision to withdraw the Holden brand and operations from Australia meant the existing five-year agreements with dealers were effectively terminated two and half years before they were due to expire.

3.30 Following GM's announcement, GM Holden offered affected dealers a Transition Support Program (TSP), which set out compensation and transition arrangements.³¹ The TSP offer included:

- compensation for the loss of new vehicle profit opportunity for the remaining balance of dealer agreements;
- additional compensation for unamortised capital investment in Holden showrooms, as well as for special circumstances and dealers who were solely dependent on the Holden brand;
- payment for the removal of signage and additional cash assistance to help clear new vehicle inventories; and
- a guarantee of full margin opportunity for every new car sold in 2020.³²

3.31 At the hearing on 3 August 2020, Mr Aquilina provided the committee with an explanation of the various components of the compensation package:

The compensation offer was multifaceted. There was an offer that dealt on a per vehicle amount; there was \$1,500 per car for every car which they sold

²⁸ Australian Competition and Consumer Commission, *Submission 1*, p. 3.

²⁹ Australian Competition and Consumer Commission, *Submission 1*, p. 3.

³⁰ Australian Automotive Dealer Association, *Submission 13*, p. 6. See also, Motor Trades Association of Australia Limited, *Submission 15*, p. 4.

³¹ GM Holden, *Submission 14*, p. 2.

³² GM Holden, *Submission 14*, p. 2.

in 2019, multiplied by the 2½ years remaining in their agreement. There was also an offer to make good on capital investment expended on selling new Holden vehicles. We took into account any special circumstances associated with the decision that we needed to comprehend. We also provided dealers with significant liquidation support to help them move on their unsold inventory and their inventory in pipeline, which they accepted.³³

3.32 In addition, affected Holden dealers were offered the opportunity to become authorised Holden Service Outlets. GM Holden indicated:

All Holden dealers are getting the opportunity as part of a transition support package to continue as authorised Holden Service Outlets for an initial term of five years, which is double the remaining term on the existing agreement. This will enable dealers to maintain an extensive customer base to service Holden vehicles and provide spare parts and accessories.

Holden dealers benefit from one of the biggest vehicle brand populations in Australia. There are about 1.6 million Holdens on Australian roads, making it a lucrative brand for service and repair work. This is typically a very profitable ongoing business stream for dealers.³⁴

3.33 In its submission, GM Holden also pointed out that it expected that 'most - if not all - dealers would wish to continue with Holden Service Operations given that service and spare parts have been profitable for the dealer network'.³⁵ GM Holden noted:

Each time a vehicle is serviced under, for example, the 'free service for 7-years' offer or under warranty arrangements, the work is undertaken by dealers but is paid for by Holden. Holden will continue to fund this arrangement on the same basis as present.³⁶

3.34 GM Holden initially requested that Holden dealers provide a response to its TSP offer by 31 May 2020, which it argued was a timeframe 'consistent with or longer than on previous occasions where GM has exited its brands from markets, such as Europe and South Africa'.³⁷

3.35 However, the response date was subsequently extended until 30 June 2020 following the intervention of the ACCC. The ACCC noted that:

The ACCC had received complaints that Holden was placing undue pressure on dealers by imposing an unnecessary deadline for acceptance of the proposed compensation package. This meant that dealers would have

³³ Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, pp. 22–23.

³⁴ GM Holden, *Submission 14*, p. 8. See also, Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, correspondence received 20 May 2020, p. 3.

³⁵ GM Holden, *Submission 14*, p. 8.

³⁶ GM Holden, *Submission 14*, p. 8.

³⁷ Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, correspondence received 20 May 2020, p. 4.

been forced to choose whether to accept the compensation offer before completing a dispute resolution process.

The ACCC was concerned that this conduct may raise concerns under the good faith obligations of the Franchising Code of Conduct and the unconscionable conduct provisions of the Australian Consumer Law.³⁸

3.36 After further unsuccessful attempts to resolve the issues with the TSP via mediation, the Minister for Employment, Skills, Small and Family Business wrote to GM and the Australian Holden Dealer Council (the dealers representative body) on 27 June 2020, requesting that both parties should settle the dispute via arbitration, and that GM should extend the 30 June 2020 deadline for acceptance of the TSP offer.³⁹

3.37 GM Holden subsequently advised Holden dealers:

As you may be aware there was some publicity over the weekend regarding a suggestion that GM Holden and the Australian Holden Dealer Council would seek to settle their current dispute via arbitration, and that the deadline for the acceptance of transition support packages (TSP) would be extended beyond 30 June.

This is not the case. Arbitration was suggested by the Federal Government but GM Holden does not agree that an arbitration process would be appropriate or helpful. We have responded to the Government accordingly.⁴⁰

3.38 On 6 November 2020, GM Holden advised the committee that '92% of its dealers have now accepted Holden's TSP offer and almost all of these dealers are continuing business with Holden as authorised Holden Service Outlets'.⁴¹

Concerns regarding the TSP offer

3.39 Stakeholders raised several concerns in relation to the adequacy and terms of the TSP package offered by GM Holden. These concerns included:

- the adequacy of the compensation provided for in the package;
- the eligibility to become an authorised Holden Service Outlet and other conditions linked to dealers acceptance of the compensation package; and

³⁸ Australian Competition and Consumer Commission, 'Holden commits to negotiate in good faith with Holden dealers', *Media Release*, 22 May 2020. See also, Mr Rami Greiss, Executive General Manager Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 3 August 2020, p. 44.

³⁹ John Mellor, 'GM ignores Canberra – GM is raising tempers in Canberra over dealer compensation and patience is wearing thin', *GoAutoNews Premium*, 29 June 2020, <https://premium.goauto.com.au/gm-ignores-canberra/> (accessed 24 November 2020).

⁴⁰ John Mellor, 'GM ignores Canberra – GM is raising tempers in Canberra over dealer compensation and patience is wearing thin', *GoAutoNews Premium*, 29 June 2020, <https://premium.goauto.com.au/gm-ignores-canberra/> (accessed 24 November 2020). See also, *Committee Hansard*, 3 August 2020, p. 4.

⁴¹ GM Holden, *Submission 14.2*, [p. 1].

- whether GM acted in good faith before and after its announcement, including during its negotiations with Holden dealers.

Adequacy of compensation

3.40 One of the principal concerns raised by submitters was in relation to the adequacy of the compensation package offered by GM Holden to affected dealers. For example, a Holden dealer, who did not wish to be identified, submitted:

The compensation offer made to dealers is significantly unfair. Holden offered \$1,500 per unit, times the volume a dealer sold in 2019, times 2.5 years (the remaining term of the Franchise agreement).

KPMG told us they calculated that the true compensation should be in the order of \$6,000 per unit, times the average volume a dealer sold in the past three years (which is what dealers based their continuing investment on), times 7.5 years (being the remaining term of this agreement plus an Expectation of a further agreement term).⁴²

3.41 At the hearing on 3 August 2020, Mr Palmer also told the committee:

Their formula of \$1,500 a car is less than half of what I gross out of car sales alone for the General Motors Holden product—less than half—without taking into account service and without taking into account parts, without taking into account finance, and without taking into account the used car business that goes along with trading and operating a motor dealership.⁴³

3.42 Similarly, Northam Holden submitted that the compensation offered by GM Holden did not adequately compensate for the loss of capital invested in their business:

Holden's position that they will only consider claims for capital investment for the last five years is unnecessarily arbitrary and should be expanded to include the capital paid for goodwill and building investment at least for 10 years, the very minimum that our decision was made upon.⁴⁴

3.43 Indeed, the AADA argued in its submission that the 'compensation offered by GM has been described by almost every dealer as grossly inadequate'.⁴⁵ The AADA pointed out that:

While GM has claimed publicly that it would also take into consideration the unamortised costs of facilities and signage, there is no indication of how this would be done.

⁴² Name withheld, *Submission 23*, [p. 2].

⁴³ Mr Mark Palmer, *Committee Hansard*, 3 August 2020, p. 32.

⁴⁴ Northam Holden, *Submission 35*, [p. 1].

⁴⁵ Australian Automotive Dealer Association, *Submission 13*, p. 13. See also, Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 3 August 2020, p. 4.

Further, the compensation is based on the number of cars sold in 2019, a number which reflected the previous poor product design and planning decisions made by Holden leading to the lowest ever number of Holden vehicles sold in Australia. Adding insult to injury, Holden Dealers in New Zealand have received substantially more in compensation than their Australian counterparts.⁴⁶

3.44 In addition, the AADA argued that the 'offer makes no provision for staff redundancies, length of service or goodwill and lease commitments, which can be as long as 20 years'.⁴⁷

3.45 The MTAA also questioned the adequacy of the compensation in relation to dealership employees. The MTAA submitted:

Although GM has indicated that it believes the impact of Holden's departure is primarily limited to its new car sales staff, it fails to recognise the flow on effects to other dealership employees including finance, service, customer relations and administration.

The compensation package offered by GMH under the 'Transition Plan' makes no mention of nor offers any compensation or assistance for the costs associated with Holden associated staff in these areas being made redundant.⁴⁸

3.46 In its submission, GM Holden outlined the basis for its compensation offer to Holden dealers and argued that the level of compensation was what it 'believed is fair and the structure of which has been accepted by dealer networks in other markets where GM has exited'.⁴⁹

3.47 GM Holden observed that it used a similar 'approach to methodology that was used to formulate offers for Australian and New Zealand dealers'.⁵⁰ It argued that over 'recent years, New Zealand dealers were more profitable than Australian dealers, so the same formula used in both countries resulted in more compensation in New Zealand, as they have suffered greater loss of new-car-sale profit opportunity'.⁵¹

3.48 GM Holden also pointed out that the TSP had been scrutinised by PricewaterhouseCoopers (PwC):

Holden's analysis, based on data provided by dealers, showed average profit to be \$351 per vehicle over the period 2017-2019. Holden's compensation offer of \$1,500 per vehicle is over four times that amount.

⁴⁶ Australian Automotive Dealer Association, *Submission 13*, p. 13.

⁴⁷ Australian Automotive Dealer Association, *Submission 13*, p. 13.

⁴⁸ Motor Trades Association of Australia Limited, *Submission 15*, p. 10.

⁴⁹ GM Holden, *Submission 14*, p. 9.

⁵⁰ GM Holden, *Submission 14*, p. 3.

⁵¹ GM Holden, *Submission 14*, p. 3.

In 2019, on average Holden's Australian dealers made a loss of \$600 on each new car sale. With the TSP offering \$1,500 cash per lost sale – through to the end of 2022 – this represents an increased payout of \$2,100 per vehicle sale, based on 2019 sales and locked in for 2.5 years.

PwC's analysis concluded an appropriate range of compensation is \$350–1,409 per vehicle.⁵²

- 3.49 Overall, GM Holden rejected suggestions that it compelled dealers to accept inadequate compensation. GM Holden reiterated that:

In 2019, Holden dealers on average (sometimes described as 'a single dealer') made a loss of \$600 on the sale of a new vehicle. This is based on data provided by dealers. Holden's compensation offer of \$1500 per new vehicle sale, for the remainder of the agreement, is a \$2100 improvement on this previous loss-making position. On top of this, dealers can continue the profitable service and repair operations. Nearly all dealers have opted to do that.⁵³

Conditions attached to the TSP offer

- 3.50 A further issue of concern raised by submitters was in relation to the conditions attached to the acceptance of the TSP offer. This included the concern that if dealers did not sign-up to the compensation package they would be ineligible to become an authorised Holden Service Outlet.

- 3.51 For example, the AADA questioned the offer and pointed out that it had been made subject to dealers' acceptance of the compensation offer, and that the servicing contracts were being offered for only five years.⁵⁴ The AADA argued:

Most of those dealers will reluctantly take up a role as Service and Parts agents in what was meant to be a ten-year support transition for the fleet of Holden vehicles currently on the road. However, even this undertaking by GM proved disingenuous, as a proposal sent to dealers offered servicing contracts for only five years.⁵⁵

- 3.52 Similarly, the MTAA noted its concerns about the linkage of the offer to become authorised Holden Service Outlets with the broader compensation package:

MTAA is concerned that participation in ongoing service provision via a 5-year contract (despite assurances of GMH that it will meet consumer obligations for the next 10 years) was part of the 'Transition Package' and a condition of the offered compensation package. MTAA respectfully suggests this contract and provisions within it should have been de-coupled from the compensation package and negotiated separately when the matters surrounding compensation are completed.

⁵² GM Holden, *Submission 14*, p. 9.

⁵³ GM Holden, *Submission 14.1*, p. 4.

⁵⁴ Australian Automotive Dealer Association, *Submission 13*, p. 14.

⁵⁵ Australian Automotive Dealer Association, *Submission 13*, p. 14 (citation omitted). See also, Mr John Crennan, *Submission 19*, [p. 6].

MTAA views the offering of ongoing service provision as a component of compensation negotiations as an inappropriate 'carrot' to 'entice' dealers to accept the compensation package. MTAA suggests this is a further example of not negotiating in good faith by making an important contract that has implications for the sustainability of many businesses part of the compensation package.⁵⁶

3.53 In correspondence to the committee, Mr Aquilina responded to these concerns and advised that:

...there are still two and a half years under the current dealer agreement during which dealers can continue to be authorized Holden service and repair operations. If dealers accept the TSP, they have the opportunity to continue as authorized Holden Service Outlets through to the end of 2025 and at the end of that time, a new agreement for an additional five years could potentially be negotiated.⁵⁷

3.54 The committee also heard from a former Holden dealer, who did not wish to be identified, who submitted:

...the new Holden Service Operations Agreement that they have forced dealers into, is also riddled with unfair terms and completely lacks any protection from the Franchise Code because of the way they have structured the agreement. The Terms and Conditions are actually worse than the previous Franchise Agreement. But for a Holden Dealer to receive ANY compensation, they actually had to sign away their rights and sign up to the new agreement, before they would receive a cent.⁵⁸

3.55 The MTAA also expressed concern in relation to the ongoing consumer obligations of former dealers:

There are also concerns regarding the lack of clarity regarding GMH ongoing consumer obligations to warranty and recall and compensation for future problems that may occur for GMH product and the lack of specificity on what service providers (former dealers) obligations and requirements are versus those of GMH as the product manufacturer.⁵⁹

3.56 Consideration of Holden's obligations to consumers under the Australian Consumer Law (ACL) is considered later in the chapter.

⁵⁶ Motor Trades Association of Australia Limited, *Submission 15*, p. 24.

⁵⁷ Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, correspondence received 20 May 2020, p. 3.

⁵⁸ Name withheld, *Submission 23*, [p. 2].

⁵⁹ Motor Trades Association of Australia Limited, *Submission 15*, p. 24.

Lack of genuine negotiation and good faith bargaining

3.57 The committee heard concerns from submitters in relation to the conduct of GM Holden during the TSP negotiation process. In particular, that GM Holden failed to act in good faith during its negotiations with Holden dealers and its reluctance to participate in dispute resolution processes.

3.58 In its submission, the AADA argued that 'GM's actions leading into the decision to close down Holden as well as its actions after the decision beg the question as to whether it has acted in good faith'.⁶⁰ The AADA submitted:

The AADA believes that the failure to offer fair compensation for walking away from its contracts; the way GM has conducted itself since presenting its offer of compensation; and the actions in the lead up to its withdrawal announcement all pose serious questions as to whether GM has acted in good faith.⁶¹

3.59 GM Holden submitted that its discussions with the Holden dealership network were conducted 'on an individual basis as well as with the Holden Dealer Council's representative, HWL Ebsworth'. It also argued that it had 'acted in good faith throughout this transition process with its dealers and its discussions have been cordial and respectful'.⁶²

3.60 However, at the hearing on 3 August 2020, Mr Palmer commented on the pressure felt by Holden dealers to accept the compensation offer. Mr Palmer argued that:

...whilst it might be true that 90 per cent of the dealers accepted the agreement by the deadline of 30 June, two days prior to that, at midday on Monday 28 June, 176 dealers were still ready and willing to proceed towards litigation. The fact that that fell away so desperately in the last two days indicates the pressure that was on them, some of it financial, to take the offer. Then there was—I think many dealers will readily admit this—FOMO, fear of missing out, and, once the numbers dropped away, their deemed cost of litigation frightened them, so most of them took the offer. One of my very good friends and colleagues has openly stated to me, in the one and only time he's been able to speak to me since 1 June—we used to talk all but daily—that he hates himself for accepting the offer, so strong, in my opinion, was the pressure from General Motors Holden.⁶³

3.61 GM Holden noted that it had appointed Dealer Transition Managers (DTMs) to undertake individual discussions with dealers which included:

⁶⁰ Australian Automotive Dealer Association, *Submission 13*, p. 15.

⁶¹ Australian Automotive Dealer Association, *Submission 13*, p. 15.

⁶² GM Holden, *Submission 14*, p. 7.

⁶³ Mr Mark Palmer, *Committee Hansard*, 3 August 2020, pp. 29–30.

...asking dealers to provide information about capital investment costs and other special circumstances in order for Holden to understand and negotiate suitable additional compensation specific to those dealers.⁶⁴

- 3.62 In contrast, Mr Palmer described his dealings with the DTM who was appointed to his Holden dealership:

From the very first meeting with our terribly unprepared and inexperienced DTM, it was evident that there was to be no discussion or negotiation. Holden's offer was fixed and final. This was extremely unfair to this Dealership as we are and have always been a 'benchmark' Dealer. It was clear that there was absolutely no consideration of our past or present performance. Also, right from the start Holden had indicated there was to be a deadline for the first and final offer.⁶⁵

- 3.63 In its submission, the ACCC pointed out that the protections under the ACL and the Franchising Code of Conduct (Franchising Code) applied to the negotiations between Holden dealers and GM Holden:

The prohibitions under the ACL relating to misleading or deceptive conduct and unconscionable conduct and the Franchising Code's obligation that the parties act in good faith apply to these negotiations. This means that parties to the negotiations must act honestly and not arbitrarily, and must cooperate to achieve the purposes of the agreement.⁶⁶

- 3.64 However, a number of submitters indicated that the Franchising Code offered dealers with little or no protection in their negotiations with GM Holden. For example, Mr Voortman argued:

The biggest failing in GM's withdrawal of Holden from Australia was that dealers could not access justice. It demonstrated the frailties of the franchising code and it showed how important it is that we take the action that is needed and entrench a system of justice for dealers. There is a major power imbalance. We see that there is a system of arbitration for other industries where there is a major power imbalance—whether its the dairy industry or the food and grocery industry.⁶⁷

- 3.65 The MTAA also observed:

The GMH experience in 2020 demonstrated a considerable lack of, or inherent flaws in, enforceable regulations to ensure dispute resolution, good faith negotiations and fair and reasonable compensation outcomes. The acceptance by dealers of the termination and compensation package should not be misinterpreted. It was more to be able to walk away with something

⁶⁴ Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, correspondence received 20 May 2020, p. 4. See also, GM Holden, *Submission 14*, p. 9.

⁶⁵ Mr Mark Palmer, *Submission 17*, p. 2.

⁶⁶ Australian Competition and Consumer Commission, *Submission 1*, p. 3.

⁶⁷ Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 3 August 2020, p. 5.

rather than walk away with nothing after, in some cases, a 40, 50 years relationship.⁶⁸

- 3.66 At the hearing on 3 August 2020, Mr Aquilina strongly rejected assertions that GM Holden had not engaged in good faith negotiation with Holden dealers:

...since we originally made the offer, we were asked to extend time lines, which we did. We had an economic situation arise, which only deteriorated the future outlook for Holden dealers, yet we held our offer firm during that time, and we did not reduce it; we kept it going at the levels that we originally put forward. I think that speaks to a company that acted in extraordinarily good faith, that participated in all the discussions that we were requested to. We gave people every opportunity to identify any issues through the process.⁶⁹

- 3.67 GM Holden also rejected comments that dealers were unable to access adequate dispute resolution processes:

From the outset, dealers engaged legal representatives who from very early on and repeatedly, threatened Holden with litigation on behalf of all Holden dealers. Holden and the dealers utilised the dispute resolution mechanism in the dealer agreement and the Franchise Code of Conduct, and, with their respective legal representatives and financial analysts, PwC (paid for by Holden) and KPMG (paid for by dealers), engaged in a two-day settlement conference in May that was overseen by the Honorable Peter Jacobson QC to discuss and debate at great length their respective positions.⁷⁰

- 3.68 In relation to GM Holden's refusal to participate in an arbitration process with dealers, Mr Aquilina argued:

In the end, arbitration was indeed suggested in the final days leading up to a time when we said we needed to know an answer from Holden dealers as to which way they would like to go with this. In those final days, we had had an indication from a vast number of dealers saying that they were going to sign up. So it wasn't appropriate to then launch into an arbitration process in the final days of this dispute when there were some parties who were not satisfied with it and wanting to push for that. In the end, we allowed the time to elapse.⁷¹

- 3.69 When asked about GM Holden's actions throughout the withdrawal process at the hearing on 3 August 2020, the ACCC explained that it was:

...in the middle of an investigation at the moment looking into allegations of unconscionable conduct and misleading and deceptive conduct levelled against General Motors Holden. We are assessing evidence and assessing

⁶⁸ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 15.

⁶⁹ Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 27.

⁷⁰ GM Holden, *Submission 14.1*, p. 5.

⁷¹ Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 28.

the complaints to see whether or not there is a matter that's actionable under the Competition and Consumer Act and the Australian Consumer Law.⁷²

3.70 When pressed about possible timelines, the ACCC indicated that:

...we're certainly giving this investigation the highest of priorities, and, at this stage, we expect to have a public outcome this year – either proceedings or an announcement that we haven't found any actionable conduct. But we are certainly hoping to wrap up our investigation this year.⁷³

3.71 However, at the time of writing the ACCC had yet to publicly release an update on the progress of this investigation.

GM's obligations to consumers

3.72 GM Holden indicated that it would continue to provide 'aftersales support – servicing, spare parts, honouring warranties and conducting recall actions if required – for at least the next 10 years through a national aftersales network'.⁷⁴ In its submission, it stated:

Holden will continue to honour all commitments given to consumers at the time of purchase, including the 7-year free service commitment. This service commitment is funded by Holden, which pays dealers for services undertaken on Holden vehicles. Holden will also be providing appropriate resourcing for warranty claims and product quality issues.

Holden will continue to maintain local operations to handle any recall and safety-related issues if they arise, working as usual with relevant government agencies.⁷⁵

3.73 At the hearing on 3 August 2020, Mr Voortman emphasised the importance of GM Holden's 'ongoing obligations to the owners of its vehicles and to the dealers servicing these vehicles'.⁷⁶ He argued that GM Holden:

...needs to honour its Australian Consumer Law obligations and honour its recall and warrant obligations and guarantee the supply of parts. It should demonstrate what funds it has set aside to honour these commitments, particularly under the obligations its parent company has under US federal law and certain statutory obligations.⁷⁷

⁷² Mr Rami Griess, Australian Competition and Consumer Commission, *Committee Hansard*, 3 August 2020, p. 42.

⁷³ Mr Rami Griess, Australian Competition and Consumer Commission, *Committee Hansard*, 3 August 2020, p. 44.

⁷⁴ GM Holden, *Submission 14*, p. 11.

⁷⁵ GM Holden, *Submission 14*, p. 12.

⁷⁶ Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 3 August 2020, p. 2.

⁷⁷ Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 3 August 2020, p. 2.

3.74 Mr David Blackhall, Managing Director, Raglan Ridge Advisory, also commented on GM's obligations to the owners of Holden vehicles and to the dealers servicing those vehicles. Mr Blackhall argued:

As regards warranty, what I know of General Motors' reputation globally leads me to the view that they're unlikely to maliciously go out and put their customer relationships, their legacy customer relationships, at risk.

...I don't think they're going to purposefully go out and do that. I'd be staggered if they did. It's not in line with their overall global reputation, and I think they understand their obligations under the consumer legislation in Australia anyway. They made a warranty. They made an arrangement. I think they'll stand behind it.⁷⁸

3.75 In its submission, the ACCC explained that consumers are entitled to a remedy in the event of a failure to comply with a guarantee.⁷⁹ The ACCC advised:

...that consumers may experience a greater difficulty in enforcing their rights and obtaining an appropriate remedy, particularly where faults arise with their vehicles after the finalisation of Holden's initial withdrawal at the end of 2020.⁸⁰

3.76 The ACCC also noted that GM Holden's undertaking to provide servicing and spare parts for at least ten years, may not be sufficient to comply with automatic consumer guarantees under the ACL:

...depending on the particular circumstances, this may not be enough to comply with the guarantee as to repair facilities and spare parts. 10 years may also be an insufficient timeframe in relation to product safety obligations which may arise.⁸¹

3.77 At the hearing on 3 August 2020, Mr Aquilina reiterated GM's commitment to continue to meet servicing and repair obligations for at least ten years. Mr Aquilina told the committee:

Ten years gives people a lot of comfort. It's well beyond the ownership cycle—even numerous ownership cycles—of that one particular vehicle. Typically, there are opportunities to continue to provide parts well beyond that, if that is the case. We've said this, and we'll say it proudly: we will continue to support our customers for a long time. As to what that timing is, well, it's at least beyond 10 years.⁸²

3.78 In relation to the enforcement of these rights following the exit of the brand in Australia and New Zealand, the ACCC noted:

⁷⁸ *Committee Hansard*, 24 November 2020, p. 33.

⁷⁹ Australian Competition and Consumer Commission, *Submission 1*, p. 2.

⁸⁰ Australian Competition and Consumer Commission, *Submission 1*, p. 2.

⁸¹ Australian Competition and Consumer Commission, *Submission 1*, p. 2.

⁸² Mr Kristian Aquilina, Interim Chairman and Managing Director, GM Holden, *Committee Hansard*, 3 August 2020, p. 27.

We understand that a local entity will remain, and I assume it's the entity the dealers that enter into the service agreement have contracted with. We expect that would be the entity that would ultimately be responsible for consumer guarantee issues.⁸³

3.79 The ACCC also indicated that it had 'previously taken enforcement action against a number of motor vehicle companies, including GM Holden, for unconscionable conduct and misrepresenting the availability of consumer guarantee rights to consumers'.⁸⁴

3.80 At the hearing on 3 August 2020, Mr Nicholas Heys, Deputy General Manager Enforcement Coordination, ACCC, outlined the specific action:

The action we took in relation to GM Holden was concluded in August 2017 by way of a court enforceable undertaking that the ACCC accepted from GM Holden. Primarily the concerns related to issues raised by consumers with the ACCC and other consumer law regulators that General Motors Holden wasn't repairing vehicles or providing them with a remedy in accordance with the consumer guarantees, which, depending on the extent of the fault, could be a refund or some form of compensation or restoring the vehicle to a reasonable standard. That was the context of our investigation.⁸⁵

3.81 The ACCC assured the committee that it would 'continue to monitor reports from consumers having problems enforcing their consumer guarantees rights and, where appropriate, undertake further enforcement and compliance initiatives'.⁸⁶

3.82 In relation to consumer reports about possible misleading conduct or representations, the ACCC noted:

GM will need to ensure it complies with any representations it has made to consumers regarding entitlements to express warranties, fixed price servicing, roadside assistance, or fixed-term vehicle replacement offers. Failure to do so may breach the misleading or deceptive conduct or false representations provisions of the ACL.⁸⁷

Committee view

3.83 The committee notes that the complete withdrawal of a major player like GM Holden from the Australian automotive market was unusual in that it resulted in the termination of an entire dealer network. However, the committee is mindful that GM Holden's subsequent negotiation and compensation

⁸³ Mr Rami Greiss, Executive General Manager Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 3 August 2020, p. 44.

⁸⁴ Australian Competition and Consumer Commission, *Submission 1*, p. 2.

⁸⁵ *Committee Hansard*, 3 August 2020, p. 43.

⁸⁶ Australian Competition and Consumer Commission, *Submission 1*, p. 2.

⁸⁷ Australian Competition and Consumer Commission, *Submission 1*, p. 2.

arrangements with its former dealers are likely to set a precedent for how other manufacturers may conduct themselves in Australia. Indeed, with other manufacturers changing their distribution models in Australia, similar stories are already emerging.

- 3.84 Based on the evidence received, it is apparent to the committee that there was a clear imbalance in bargaining power between GM Holden and its dealership network. For example, the committee was made aware of dealer concerns, both publicly and confidentially, in relation to GM Holden's failure to engage in genuine negotiation over the TSP, including that dealers felt pressured into accepting the TSP offer despite concerns about the adequacy of the compensation. The committee was also made aware of concerns that the offer to dealers to become Holden Service Outlets was made conditional on the acceptance of the TSP.
- 3.85 In addition, the committee remains concerned by allegations that GM Holden may have breached the good faith obligations of the Franchising Code and the unconscionable conduct provisions of the ACL. The committee is particularly disappointed that GM Holden only agreed to extend the deadline for acceptance of its TSP offer following the intervention of the ACCC, and subsequently ignored requests from the government to settle its dispute with dealers through arbitration.
- 3.86 The committee also notes concerns raised by submitters that the Franchising Code was not helpful in providing dealers with a mechanism to resolve their dispute with GM Holden when attempts at mediation were unsuccessful. Further, it appears that the ACCC investigative mechanism was not effective in assisting in the timely resolution of disputes between dealers and GM Holden.
- 3.87 It is of little comfort to former Holden dealers that the ACCC investigation into GM Holden's exit appears to have not progressed, despite an initial indication that it would be wrapped up by the end of 2020. Accordingly, the committee considers that the ACCC should expedite its investigation into concerns raised by former Holden dealers and provide regular public updates on this investigation. Indeed, to instil greater public confidence in the operation of the regulatory framework, the ACCC should in future provide regular public updates for similar investigations relating to car manufacturers and dealers.
- 3.88 The committee is confident that GM Holden intends to meet its obligations to consumers and its undertaking to continue to service and support Holden vehicles for at least ten-years. However, given the large number of Holden vehicles still on the road in Australia, the committee recommends that the ACCC proactively undertake increased oversight of GM's operations in Australia to ensure that it meets its obligations under the ACL to vehicle owners in relation to warranty and recalls, technical support and access to parts.

-
- 3.89 Finally, while acknowledging and respecting the right of private companies to make their own decisions, the committee condemns as un-Australian the actions of GM in the lead-up, during and following the shutting down of Holden. The committee censures GM for their treatment of Holden dealers, employees and their families.
- 3.90 Considering the disappointing conduct of GM during the retirement of the Holden brand, the committee is not convinced that the Holden brand is likely to be preserved in perpetuity. The committee is particularly concerned that the rich history associated with one of Australia's great cultural icons should not be lost to the Australian people and calls on GM to reaffirm its commitment to ensuring that Holden's historic collection of motor vehicles and memorabilia remains on public display in Australia.
- 3.91 Given the importance of the Holden brand to the Australian psyche, the committee requests that the Holden brand is not sold unless to an Australian entity.

Recommendation 1

- 3.92 The committee recommends that the Australian Competition and Consumer Commission should expedite its investigations into the behaviour and actions of GM Holden and should commit to provide regular public updates on this investigation and similar investigations into the relationship between manufacturers and dealers in the future.**

Recommendation 2

- 3.93 The committee recommends that the Australian Competition and Consumer Commission proactively ensures that General Motors Australia and New Zealand is meeting its Australian Consumer Law obligations to Holden vehicle owners in relation to warranty and recalls, technical support and access to parts.**

Chapter 4

Relationships between manufacturers and dealers

- 4.1 This chapter explores the power imbalance between car manufacturers and car dealers, including the practices employed by manufacturers in their commercial relations with dealers, and considers issues raised by stakeholders as part of the extended terms of reference.

The power imbalance between manufacturers and dealers

- 4.2 As exemplified by the General Motors-Holden (GM Holden) withdrawal, the inherent power imbalance between manufacturers and local new car dealers was the dominant theme of the inquiry. The extent to which any power imbalance exists, and the need for additional legislative and regulatory intervention to address it, was disputed by submitters to the inquiry.
- 4.3 Manufacturers and their representatives considered that there was no power imbalance, arguing that car dealers are typically large and sophisticated businesses who often control access to prime real estate to showcase manufacturers' products.¹ For example, submissions from the Federal Chamber of Automotive Industries (FCAI) rejected the notion that there is a significant power imbalance between car dealers and car manufacturers that requires further regulatory intervention. Indeed, the FCAI argued:

The often quoted but seriously misleading statements about significant power imbalances in the sector are simply not true. Most dealerships are very significant commercial enterprises, with significant financial, legal and business acumen to call upon in considering the acceptance of a new or renewed dealership agreement. FCAI would like to stress the positive aspects of the relationship between dealers and distributors. It is by far and away a more positive relationship than is portrayed by many. The relationship is symbiotic and supportive.²

- 4.4 Similarly, Toyota Motor Corporation Australia (TMCA) submitted that:

Toyota is dedicated to ensuring best practice is exercised across our dealership network to deliver the best experience for our dealers and our customers. The National Toyota Dealer Association (NTDA) was established to ensure a collaborative relationship between the dealership

¹ See, for example, Federal Chamber of Automotive Industries, *Submission 5.1*, pp. 7–8; Mazda Australia, *Submission 49*, [p. 2]; Volvo Car Australia, *Submission 47*, [p. 4]; FCA Australia, *Submission 77*, pp. 3–4; Nissan Motor Co. (Australia), *Submission 48*, p. 2.

² Mr Tony Weber, Chief Executive, Federal Chamber of Automotive Industries, *Committee Hansard*, 3 August 2020, p. 56.

network and Toyota while respecting the requirements of the *Competition and Consumer Act 2010* (Cth).³

- 4.5 Conversely, many car dealers considered that there was an imbalance in bargaining power significantly favouring manufacturers, given that dealers are presented with franchise agreements on a 'take or leave it basis', and manufacturers retained considerable discretion to impose obligations and to terminate or not renew such agreements.⁴
- 4.6 For example, the committee heard evidence from Mr Richard Bennett, Managing Director, Magic Enterprises, who argued:
- There is a definite power imbalance between the car manufacturer and the dealer. In a large amount of cases there is a professional relationship that works well and benefits the manufacturer, the dealer and the customer. When this is broken, or there is a different direction to be taken, the manufacturer holds all the cards and can have little regard for the dealer or its customers.⁵
- 4.7 Tellingly, the large number of submissions and documents the committee received on a confidential basis appeared to be symptomatic of relationships where dealers were fearful of retribution for making public statements that were critical of manufacturers.
- 4.8 The Department of Industry, Science, Energy and Resources, and the Department of Education, Skills and Employment (the departments) acknowledged in their joint submission that dealership agreements between manufacturers and dealers shared 'features common within franchising, namely the power imbalance and information asymmetry which favours franchisors'.⁶ The departments observed that the power imbalance between franchisees and franchisors was 'also true for dealings between car dealers, as franchisees and car manufacturers, as franchisors, within new car retailing'.⁷
- 4.9 Similarly, Mr Rami Greiss, Executive General Manager, Enforcement Division, Australian Competition and Consumer Commission (ACCC), commented that '[w]hile it's difficult to generalise across such a broad sector, I think experience

³ Toyota Motor Corporation Australia, *Submission 42*, p. 2. See also, National Toyota Dealer Association, *Submission 44*, p. 5.

⁴ See, for example, Australian Automotive Dealer Association, *Submission 13*, p. 4; Northam Holden, *Submission 35*, [pp. 1–2]; Autopolis, *Submission 40*, pp. 4–5.

⁵ Mr Richard Bennett, Managing Director, Magic Enterprises, *Committee Hansard*, 5 February 2021, p.1.

⁶ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 12 (citation omitted). See also, Mr Bruce Wilson, Head of Division, Industry Growth, Department of Industry, Science, Energy and Resources, *Committee Hansard*, 24 November 2020, p. 47.

⁷ Department of Industry, Science, Energy and Resources and the Department of Education, Skills and Employment, *Submission 16*, p. 12.

suggests that there is often a power imbalance between franchisors and franchisees, in favour of franchisors'.⁸

4.10 Indeed, the ACCC market study into the new car retailing industry in 2017 found that:

Certain issues raised by dealers in relation to the imbalance of power in their commercial arrangements with manufacturers may require further examination.⁹

4.11 Many of the issues raised in the ACCC market study, such as minimum tenure and capital investment requirements, reasons for non-renewal, changes to commercial arrangements and reimbursement for remedies, were also raised by stakeholders to this inquiry.

Concerns regarding practices employed by manufacturers

4.12 This section addresses issues raised by stakeholders about the practices employed by manufacturers in their commercial relationships with dealer groups in Australia. This included specific concerns around the terms and conditions contained in dealership agreements, including:

- investment required and tenure provided;
- termination, non-renewal and change of distribution model;
- performance requirements;
- requirements around warranty claims;
- unfair contract terms; and
- goodwill and data ownership.

Investment required and tenure provided

4.13 The committee heard that most manufacturers require dealers to commit to significant capital expenditure as a condition of their dealer agreements. The level of investment can vary depending on a range of factors, including the nature of existing dealer facilities and the requirements of the manufacturers.

4.14 Some manufacturers pointed out that they worked closely with their dealers to ensure the level of expenditure was appropriately linked to the length of an agreement. For example, TMCA noted:

In 2018 Toyota developed a 'Facilities Calculator' to assist dealers in calculating the pay-back term for the required capital investment in line with the term of the dealer agreement. Dealers are also provided with a facilities manual that outlines the minimum standards for a Toyota

⁸ Mr Rami Greiss, Executive General Manager, Enforcement Division, Australian Competition and Consumer Commission, *Committee Hansard*, 24 November 2020, p. 69.

⁹ Australian Competition and Consumer Commission, *New Car Retailing Industry: A market study by the ACCC*, December 2017, p. 90.

dealership, including details around layout and merchandising, down to the specific materials that will be required.¹⁰

4.15 The National Toyota Dealer Association (NTDA) supported TMCA's claims that it had adopted a 'transparent process' in relation to its requirements for dealers to invest in upfront and/or continuing improvements to facilities and equipment.¹¹ The NTDA also noted that TMCA 'sets out the expenses, expected outcomes, return on investment and payback period' and it also conducted a 'financial feasibility study for the benefit of the dealer before significant expenditure has commenced'.¹²

4.16 Other manufacturers indicated that their process for requiring dealers to undertake capital investments was also transparent. Mercedes-Benz Australia/Pacific (MBAuP) submitted:

MBAuP has high-quality standards. Prior to joining the network, dealers are made aware of the requirements to represent our brand. Strategies are shared with dealers to ensure they are relevant and realistic, and MBAuP supports dealers to adapt their operations to create efficiencies and meet their objectives.¹³

4.17 Ford Australia also highlighted that it worked closely with its dealers in relation to any planned expenditure under its dealer agreements:

We clearly outline, and discuss, any planned expenditure required with proposed dealers before an agreement is signed. The outcomes are then outlined in the dealer agreement. As a result, dealers have all the information they need to make an informed choice to enter an arrangement or not if they should choose.¹⁴

4.18 Indeed, the FCAI argued that there was no evidence that dealers were being asked to make uneconomic capital investments and that dealerships were 'very stable across established brands and have been for many years'.¹⁵ It also pointed out:

If the dealer does not think the tenure offered is enough to give the dealer the opportunity to make an adequate return, the dealer can seek to negotiate with the distributor. If an acceptable agreement cannot be reached, the dealer can simply not accept what is being offered. Unlike most other franchise systems, dealers control their sites and the locations of the sites are

¹⁰ Toyota Motor Corporation Australia, *Submission 42*, p. 3. See also, National Toyota Dealer Association, *Submission 44*, p. 2.

¹¹ National Toyota Dealer Association, *Submission 44*, p. 2.

¹² National Toyota Dealer Association, *Submission 44*, p. 2.

¹³ Mercedes-Benz Australia/Pacific, *Submission 43*, p. 4

¹⁴ Ford Australia, *Submission 50*, p. 3.

¹⁵ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 10.

strategically significant. Therefore, the dealer has a real opportunity to enter into another dealer agreement with another distributor.¹⁶

- 4.19 Nevertheless, other stakeholders raised concerns that the tenure terms offered by some vehicle manufacturers in dealership agreements may not allow sufficient time for dealers to secure a fair and reasonable return on these capital investments.
- 4.20 For example, the Australian Automotive Dealer Association (AADA) argued that one of the 'main factors that differentiates car dealers from other franchisees is the significant level of investment which is required to be undertaken'.¹⁷ The AADA noted:

The cost often does not end with the initial investment and manufacturers constantly ask their dealers to upgrade facilities or even move to new locations to build a new facility. The cost of building these facilities often runs into millions of dollars. Furthermore, significant costs are committed to prescribed equipment, special tools, training and various other costs. This is before all the other costs such as wages, stock, marketing etc.¹⁸

- 4.21 The Motor Trades Association of Australia Limited (MTAA) observed that it was 'not unusual for the establishment costs of a franchise dealership to be in a range of \$10 to \$20 million'. In addition, it noted that costs of 'refurbishments can be between \$500k to \$3–5m depending on the requirements and the size and scope of alterations required'.¹⁹
- 4.22 The AADA noted that certainty of tenure through dealer agreements in Australia were 'relatively short, averaging around 5 years, but we are now seeing examples of even shorter-term agreements'.²⁰ It argued that:

The lack of tenure and the increasing use of agreements that span as little as one-year is the key underlying characteristic of the power imbalance. For a dealer that is constantly facing the fear of being 'non-renewed' it is impossible to push back against unreasonable demands of an offshore manufacturer.²¹

Termination, non-renewal and change of distribution model

- 4.23 The termination or non-renewal of dealership agreements and the level of compensation offered to dealers were raised as significant issues by many

¹⁶ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 10.

¹⁷ Australian Automotive Dealer Association, *Submission 13.2*, p. 6.

¹⁸ Australian Automotive Dealer Association, *Submission 13.2*, p. 6 (citations omitted).

¹⁹ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 12. See also, Mr Richard Bennett, Managing Director, Magic Enterprises, *Committee Hansard*, 5 February 2021, p. 4.

²⁰ Australian Automotive Dealer Association, *Submission 13.2*, p. 6.

²¹ Australian Automotive Dealer Association, *Submission 13.2*, p. 6.

submitters to the inquiry. For example, the MTAA noted that for dealers 'the termination, or cancellation, of their dealership agreement remains the most significant concern and has been amplified by the GM decision'.²²

The MTAA submitted:

Invariably, dealers have a personal investment in their operations that, on many levels, exceeds the core capital investments. Individual and family financial exposure is often inextricably linked to the finances and financial performance of the business.²³

4.24 The FCAI and manufacturers highlighted the relatively low number of dealer terminations (excluding the Holden withdrawal).²⁴ However, information on the level of non-renewals was less forthcoming.

4.25 The AADA argued that there were 'various examples of manufacturers terminating or not renewing a Dealer Agreement and providing no or very little compensation'.²⁵ The AADA argued that in many instances:

Dealers are unable to sell their business on the open market without interference, they immediately lose all the goodwill built up over a period of time. Manufacturers argue that goodwill belongs to the franchisor, but we have seen numerous examples where Manufacturer-owned dealerships have been sold with a large component of goodwill.²⁶

4.26 The MTAA highlighted that the parts and service components of dealer businesses were also impacted by dealer terminations:

...dealers invariably own their parts stock as part of capital investment and, therefore, the risk exposure. In termination events, franchisors can be under no obligation whatsoever to relieve the dealer of the remaining spare parts holdings. Parts stock can be as irrelevant to the details of the termination as the refrigerator in the dealership lunchroom.

Similarly, in the servicing area of the business, the dealer will have been compelled to have a range of specialist equipment, tools, software and other requirements as specified by the franchisor. In termination events, these items are rarely reflected appropriately or in sufficient detail in termination arrangements and not appropriately compensated if at all.²⁷

²² Motor Trades Association of Australia Limited, *Submission 15.1*, p. 14.

²³ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 14.

²⁴ See, for example, Federal Chamber of Automotive Industries, *Submission 5.1*, p. 5; Nissan Motor Co. (Australia), *Submission 48*, p. 2; Mitsubishi Motors Australia Limited, *Submission 46*, [p. 3].

²⁵ Australian Automotive Dealer Association, *Submission 13.2*, p. 8. See also, Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 19 November 2020, pp. 10 and 15.

²⁶ Australian Automotive Dealer Association, *Submission 13.2*, p. 8.

²⁷ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 15.

4.27 Indeed, the AADA argued that 'non-renewal has become the favoured approach for manufacturers which want to end their commercial relationships with dealers'.²⁸ It argued:

This is why we are seeing more and more manufacturers make use of shorter-term agreements – because it allows manufacturers the flexibility to issue non-renewal notices at more regular intervals. For example, one Manufacturer which has publicly flagged that it will be changing its distribution model has put the entire network on a one-year agreement which it keeps rolling over until the manufacturer is ready to issue non-renewal notices to the entire network.²⁹

Changes to distribution models

4.28 Some stakeholders raised concerns, both publicly and confidentially, about the potential impact of changes to distribution models on individual dealerships. For example, the AADA submitted:

Under an agency arrangement a dealer ceases to be the owner of the vehicle stock and instead is given a fee for service. Vehicles are sold at a non-negotiable fixed price. This is a key change because it limits the dealers ability to use their entrepreneurial skills to compete and maximise profits.

It also means that dealers no longer hold the stock at traditional levels and as a result there is a strong risk that they will be stuck with large expensive facilities which are no longer fit for purpose. OEMs have the right to shift to new distribution models. However, when this shift occurs dealers should be adequately compensated to account for the reduced earning capacity and the significant investments they have made.³⁰

4.29 Consistent with this sentiment, Astoria Honda Brighton argued that it was significantly disadvantaged following Honda Australia's decision to move to an agency sales model for its Australian retail network. Astoria Honda Brighton submitted that its dealer agreement with Honda Australia was terminated with effect from 30 June 2021. It argued:

The financial compensation offered does not even cover our loss of profit had the dealer agreement been performed for the balance of its term. As a consequence we are forced to go to court against a multi-national organisation to receive just and fair compensation.³¹

4.30 In response, the FCAI submitted that 'all businesses should be positioned to evolve and adapt to an ever-changing business environment and in response to

²⁸ Australian Automotive Dealer Association, *Submission 13.2*, p. 8.

²⁹ Australian Automotive Dealer Association, *Submission 13.2*, p. 8.

³⁰ Australian Automotive Dealer Association, *Submission 13.2*, p. 22.

³¹ Astoria Honda Brighton, *Submission 51*, [p. 2].

shifting consumer preferences and advances in technologies'.³²
The FCAI also pointed out that:

It is the consumer that drives innovation in the new vehicle purchasing experience. It is quite likely that over the next twenty years there will be a mix of delivery and purchasing options available for the same vehicle, and consumers will be able to choose which pathway to take based on their own wishes. Whichever pathway is chosen, it is the view of the FCAI that dealerships will still play an important part in achieving the highest degree of customer satisfaction in an incredibly competitive market.³³

- 4.31 According to the ACCC, there was nothing in the Franchising Code or the *Competition and Consumer Act 2010* (CCA) 'that prevents a manufacturer from changing its business model or commercial arrangements in this way'.³⁴
However, the ACCC noted:

...the CCA, through the Franchising Code and the ACL [Australian Consumer Law], requires that a manufacturer acts in good faith, and does not engage in any unconscionable conduct, or make any false or misleading representations in its dealings with franchisee dealerships to implement such changes.³⁵

- 4.32 The ACCC submitted that it had 'not received any reports from individual dealers alleging any contraventions of the CCA by a manufacturer in relation to its conduct towards dealers in implementing a decision to move from a franchise model to an agency model'.³⁶

Performance requirements

- 4.33 Manufacturers indicated they used a range of mechanisms, including Key Performance Indicators (KPIs) to monitor the profitability and performance of dealers as part of their dealership agreements.

- 4.34 For example, Mitsubishi Motors Australia Limited (MMAL) argued that 'performance requirements for automotive dealers were usually well defined and reasonable':

Clearly, it is important that OEMs are able to establish and enforce KPIs to ensure that customer expectations are met and high standards of representation and performance within the dealer network are realised.³⁷

³² Federal Chamber of Automotive Industries, *Submission 5.1*, p. 15.

³³ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 16.

³⁴ Australian Competition and Consumer Commission, *Submission 1.1*, p. 3.

³⁵ Australian Competition and Consumer Commission, *Submission 1.1*, p. 3.

³⁶ Australian Competition and Consumer Commission, *Submission 1.1*, p. 3.

³⁷ Mitsubishi Motors Australia Limited, *Submission 46*, [p. 5].

4.35 Mazda Australia also submitted that:

...the performance requirements for individual dealers are set having regard to both dealer specific criteria (including location and size of the dealership) as well as more general criteria applicable to the network as a whole such as post-sales service level requirements.

Dealers are kept informed regularly of their performance against these requirements and are provided with the necessary support, through Mazda's Dealer Support staff, to assist them to identify and address the issues which are impacting on performance.³⁸

4.36 In its submission, Ford Australia indicated that while its standard agreement term is five years, this could be of lesser duration 'where a dealer has not met the performance metrics during the prior term'.³⁹ It also indicated that new Ford dealers were offered an initial two-year term 'which allows both parties to assess whether the relationship is a right fit'.⁴⁰

4.37 The FCAI highlighted that:

...distributors must act in accordance with existing laws in areas such as the obligation under the Franchising Code to act in 'good faith', and the obligation not to engage in 'unconscionable conduct' in accordance with the Australian Consumer Law. Importantly, these performance requirements and any incentives attached to them are clearly evident at the time of entering the dealer agreement or during the consideration of any renewal.⁴¹

4.38 Concerns about the impact of KPIs on the financial viability of dealerships were raised by stakeholders. For example, the AADA noted in its submission that:

Manufacturers link incentive payments to these performance measures, the achievement of which is often the difference between profit and loss. Failure to meet performance requirements can result in performance management and eventually termination or non-renewal.⁴²

4.39 For example, Mr Richard Bennett, who owns a Renault dealership in Western Australia, outlined how his dealership had been the subject of performance management from Renault:

Three months earlier I was runner-up national dealer of the year, so I must have been going okay, but then I received the letter. I was achieving my targets. The month after this letter, I'd achieved 130-odd per cent—I think it was 133 per cent—of my target. I got 130 per cent on my target for that quarter. The issue is someone just said, 'Let's write some letters.' This is where the bullying comes in. I spoke to one dealer, who didn't want to be

³⁸ Mazda Australia, *Submission 49*, p. 5.

³⁹ Ford Australia, *Submission 50*, p. 3.

⁴⁰ Ford Australia, *Submission 50*, p. 2.

⁴¹ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 11.

⁴² Australian Automotive Dealer Association, *Submission 13.2*, p. 9.

named, who was on a second letter for non-performance, but the metrics were all wrong. It wasn't a fair letter.⁴³

- 4.40 The committee received many confidential submissions from dealers, who had experienced similar behaviour from some manufacturers. Many of these submitters argued that when unrealistic sales targets and KPIs were not met, dealers could be subject to performance management, loss of incentive payments and threats of termination or non-renewal of their franchise agreements.

Behaviour around warranty claims

- 4.41 Under the CCA, there is a requirement for manufacturers to indemnify suppliers for consumer guarantee claims made under the ACL.
- 4.42 The FCAI informed the committee that dealers were 'an integral part of distributors' warranty and ACL claims handling processes. Dealers essentially act as the distributor's agent for the purposes of manufacturer's warranty claims'.⁴⁴ The FCAI explained how the process worked in practice:

It is impractical for distributors to assess every single warranty claim at the time the claim is made, as to do so would cause delays, and thereby lower customer satisfaction and engagement. Distributors authorise dealers to assess warranty claims on their behalf, with certain limits and authority. Dealers then submit an expense claim to the distributor.⁴⁵

- 4.43 Various manufacturers indicated that they readily complied with their obligations under the ACL and worked cooperatively with their dealer networks to facilitate this outcome (see Box 4.1).

Box 4.1 Manufacturers views on compliance with ACL

TMCA noted in its submission that it provided its dealers with a 'statutory indemnity from Toyota for cost incurred by them as a result of manufacturing defect claims under the ACL'.⁴⁶ TMCA submitted:

Toyota assists dealers with manufacturer's warranty repairs. Toyota works together with our dealers in respect of warranty claims. Dealers can contact the Toyota warranty and technical help desks if they have any warranty or technical concerns.

Dealers are required to diagnose vehicles and lodge warranty claims. Most claims (more than 90%) are approved automatically. Toyota only reviews warranty claims for significant amounts or when specific requirements are not met. Toyota also allows dealers to claim any reasonable time incurred in respect of

⁴³ Mr Richard Bennett, Managing Director, Magic Enterprises, *Committee Hansard*, 5 February 2021, p. 5.

⁴⁴ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 12.

⁴⁵ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 12.

⁴⁶ Toyota Motor Corporation Australia, *Submission 42*, p. 6.

inspecting/diagnosing vehicles as part of a warranty claim. Toyota does not deny warranty claims that are legitimate.⁴⁷

In its submission, MMAL noted that:

MMAL is highly conscious of its obligations under the ACL, and is committed to fostering a culture of compliance within its organisation. MMAL regularly engages external specialists to deliver ACL training to all levels of MMAL's organisation (from front-line staff to senior executives). MMAL also provides ACL training to its dealer network.⁴⁸

Mazda Australia noted in its submission that:

...Mazda supports dealers in the management of many claims made by customers against the dealer, whether it fall under Warranty or the consumer guarantees. Mazda approaches such issues with a view to providing the customer with assistance (as a matter of customer service and to ensure a good customer experience) and will frequently offer a remedy even though it is not legally bound to do so and where it would otherwise be the dealer's responsibility.⁴⁹

4.44 Notwithstanding these statements by manufacturers, a number of stakeholders expressed reservations about the conduct of some manufacturers. For example, the Motor Trade Association SA/NT noted that its members had also raised concerns in relation to 'the practice of franchisors shifting the costs of legislative compliance to the franchisee when they are dealing with warranties'.⁵⁰

4.45 Similarly, the MTAA claimed there had been an increase in the incidence of manufacturers 'further tightening the area of warranty definitions and process to reduce manufacturer costs'.⁵¹ Examples cited by the MTAA of costs not included in warranty reimbursement include:

- initial and potential ongoing diagnostic work (when often a problem is presented when previously unknown);
- unrealistic times set by the manufacturer for repair;
- administration costs, including time taken to assist customers;
- freight costs; and
- costs associated with loan vehicles supplied to customers during warranty work.⁵²

4.46 The MTAA also submitted that:

⁴⁷ Toyota Motor Corporation Australia, *Submission 42*, p. 6.

⁴⁸ Mitsubishi Motors Australia Limited, *Submission 46*, [p. 6].

⁴⁹ Mazda Australia, *Submission 49*, [p. 5].

⁵⁰ Motor Trade Association SA/NT, *Submission 2*, p. 7.

⁵¹ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 16.

⁵² Motor Trades Association of Australia Limited, *Submission 15.1*, p. 16.

Too often delays in parts supply, lack of information, lack of support, unrealistic work process expectations and procedures in undertaking warranty work, disputes over whether the required repair is a warranty problem or not, are forced on the dealer as the only intermediary with the consumer.

MTAA and Members over recent years have been fielding increasing verbal reports regarding manufacturers/distributors and distributors further tightening the area of warranty definitions and processes to reduce manufacturer costs. Of course, like many elements in a relationship that has soured, there is an evident reluctance to provide written evidential material because of fear of retribution and the absence of a 'good enough' safe harbour.⁵³

4.47 Reflecting on the experience in the United States of America, Mrs Lauren Bailey, Director, Franchising and State Law, National Automobile Dealers Association, highlighted that:

Nearly every state has passed a law guaranteeing that dealers are compensated for both parts and labour on warranty repairs at their customer pay rates. Manufacturers mandate facilities, special tools, equipment and training to carry out warranty repairs for the manufacturers, and all of this costs dealers a lot of money. But that investment benefits consumers, as dealers are the ones who fill the warranty made by the manufacturers.⁵⁴

4.48 The ACCC observed the impact of this behaviour on customers and noted that they 'face significant difficulties in enforcing their rights under the ACL consumer guarantees when problems occur with new cars' and indicated that 'a significant body of evidence suggests this is systemic across the new car retailing industry'.⁵⁵ The key issues identified by the ACCC as contributing to these customer difficulties included:

- manufacturers' focus on warranty obligations to the exclusion of their consumer guarantee obligations under the ACL;
- manufacturers' responses to 'major failures' defaulting to repairs;
- the widespread use of non-disclosure agreements by manufacturers when resolving complaints;
- the lack of effective independent dispute resolution options for consumers; and
- particular features of the commercial arrangements between manufacturers and dealers that can constrain and influence the behaviour of dealers in responding to complaints.⁵⁶

⁵³ Motor Trades Association of Australia Limited, *Submission 15.1*, pp. 15–16.

⁵⁴ Mrs Lauren Bailey, Director, Franchising and State Law, National Automobile Dealers Association, *Committee Hansard*, 19 November 2020, p. 2.

⁵⁵ Australian Competition and Consumer Commission, *Submission 1.1*, p. 2.

⁵⁶ Australian Competition and Consumer Commission, *Submission 1.1*, p. 2.

4.49 The ACCC also submitted that it was 'concerned by what appears to be a dominant "culture of repair" underpinning manufacturers' systems and policies for dealing with car defects and failures, even where cars have known and systemic mechanical failures which would entitle a consumer to a replacement or refund under the ACL consumer guarantees'.⁵⁷ The ACCC noted that it had pursued 'successful enforcement actions in relation to the manner in which various car manufacturers have approached consumer guarantee claims'.⁵⁸

4.50 However, in relation to the verification of warranty claims, the FCAI argued:

Distributors should be entitled to verify that these warranty claims and statutory indemnity claims dealers submit to them are bone fide and accurate. To achieve this aim, most distributors have in place some form of periodical claims audit process. In operating these claims audit processes, distributors must also act in accordance with existing laws in areas such as the obligation under the Franchising Code to act in 'good faith', and the obligation not to engage in 'unconscionable conduct' in accordance with the Australian Consumer Law.⁵⁹

4.51 That said, the AADA argued that some manufacturers used a potentially unlawful audit process known as 'extrapolation' where:

...manufacturer warranty auditors, often from the head office or a contracted third party who has no regard for the ACL, will select a small representative batch of warranty claims and determine an error rate which they will then apply to claims across a nominated time period, which could be 24 months or longer. This normally results in clawbacks by the manufacturer of tens or hundreds of thousands of dollars even though the errors identified might be for small administrative oversights or process conformance mistakes.⁶⁰

4.52 The AADA submitted that despite the requirements under the ACL 'some manufacturers, normally operating under the instruction of their overseas head offices, enforce their own warranty policies and procedures in this country'.⁶¹ As a result, it argued that in some cases:

...the failure to adhere to complex warranty administration procedures can result in a 'clawback' by the Manufacturer, who upon finding examples of non-compliance with their rules will, at their sole discretion, reverse legitimate payments made to a dealer through warranty and consumer guarantee claims.⁶²

⁵⁷ Australian Competition and Consumer Commission, *Submission 1.1*, p. 2.

⁵⁸ Australian Competition and Consumer Commission, *Submission 1.1*, p. 2.

⁵⁹ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 12.

⁶⁰ Australian Automotive Dealer Association, *Submission 13.2*, p. 11.

⁶¹ Australian Automotive Dealer Association, *Submission 13.2*, p. 10.

⁶² Australian Automotive Dealer Association, *Submission 13.2*, p. 11.

4.53 The ACCC stated that the issues of 'clawback' and 'extrapolation' had previously been raised by the ACCC and that these practices had 'the potential to result in dealers being inadequately indemnified for remedies that have been provided in compliance with the ACL'.⁶³ It indicated that it was:

...highly supportive of a stronger consumer guarantee regime, which protects suppliers and introduces a prohibition for non-compliance by both manufacturers and suppliers that will remove impediments to consumers seeking to enforce their consumer guarantee rights under the ACL.⁶⁴

4.54 The ACCC noted that 'Consumer Affairs Ministers have previously agreed that further work should be undertaken to ensure suppliers are appropriately supported by manufacturers in carrying out their consumer guarantees obligations'.⁶⁵

Unfair terms in contracts

4.55 The AADA argued that unfair contract terms are commonly included in dealer agreements, which are presented on a 'take it or leave it basis'.⁶⁶ It argued:

Dealers have typically invested heavily in the brands they represent and therefore feel obliged to sign such agreements, despite the unfairness of the clauses in them, which further entrenches the power imbalance between franchisee and franchisor.⁶⁷

4.56 Similarly, the MTAA submitted that there were 'examples where terms of a dealer agreement could be considered unfair'.⁶⁸ This included:

- agreement terms that were too short to secure an adequate return on investment; and
- unilateral variation of terms during the operation of a dealer agreement, including further unspecified and un-notified investment changes to performance processes, warranty provision and reimbursement, and marketing plans.⁶⁹

⁶³ Australian Competition and Consumer Commission, answers to questions on notice, 3 December 2020 (received 17 December 2020).

⁶⁴ Australian Competition and Consumer Commission, answers to questions on notice, 3 December 2020 (received 17 December 2020).

⁶⁵ Australian Competition and Consumer Commission, answers to questions on notice, 3 December 2020 (received 17 December 2020).

⁶⁶ Examples of such clauses from dealer agreements are included in the Australian Automotive Dealer Association, *Submission 13.2*, pp. 14–15.

⁶⁷ Australian Automotive Dealer Association, *Submission 13.2*, p. 14.

⁶⁸ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 20.

⁶⁹ Motor Trades Association of Australia, *Submission 15.1*, p. 20. See also, Australian Automotive Dealer Association, *Submission 13.2*, pp. 14–15.

4.57 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) observed that 'unfair contract terms (UCTs) are still present in almost all standard form contracts'. It argued that this was due to the current rules applying to UCTs, which it argued:

- applied only to a subset of standard form contracts;
- made UCTs only voidable (not illegal and automatically void);
- required a court ruling to declare a particular term to be a UCT (rather than the ACCC and ASIC being empowered to determine this); and
- allowed for no other penalties and compensation.⁷⁰

4.58 At the hearing on 24 November 2020, Ms Alexandra Hordern, Director of Advocacy, ASBFEO, noted that it was 'uncommon for us to see a contract that doesn't have an unfair contract term of some sort, whether that's a unilateral variation clause or something else'. Ms Hordern explained:

The contracts are usually created from precedence. So, often these contract terms that had previously been acceptable practice sneak in and continue to be used in contracts as they get rolled out. They get changed as people complain about them. One of the issues we've raised about the current unfair contract terms regime is that in order to get one of those terms overturned the small business—usually it's a small business—would need to take the other party to court to have that contract term overturned.⁷¹

4.59 The ACCC acknowledged that UCTs were a problem, not just in the automotive industry, and that it had 'advocated for reforms to the unfair contract term provisions for some time, including introducing a prohibition and penalties for the inclusion of unfair contract terms in both consumer and small business standard form contracts'.⁷²

Goodwill and data ownership

4.60 An ongoing issue of concern for car dealers was the methodology for recognition of 'goodwill' and customer data in compensation arrangements in the event that a dealership agreement was terminated or not renewed.

4.61 At the committee's hearing on 5 February 2021, Dr Nicholas Gangemi, who prepared a study on the legal concept of goodwill, noted that with franchises 'there are a lot of difficulties when dealing with custom and with goodwill and with ownership'. Dr Gangemi observed:

...in Australia it's the franchisees that are the customers of the franchisor, and then the ultimate customers are the customers of the franchisees. One of the major sources of custom of the franchisee is that relationship, but

⁷⁰ Australian Small Business and Family Enterprise Ombudsman, *Submission 41*, [p. 1]. See also, Ms Kate Carnell, Ombudsman, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 24 November 2020, p. 62.

⁷¹ *Committee Hansard*, 24 November 2020, p. 64.

⁷² Australian Competition and Consumer Commission, *Submission 1.1*, p. 4 (citation omitted).

it is not the only source of custom. The personal skills of the franchisee is a major source of custom and any information that they gain could easily be a major source of that custom.⁷³

- 4.62 The FCAI identified two aspects to 'goodwill' in relation to automotive dealerships—the goodwill attached to a brand and that attached to a location/site.⁷⁴ In its submission to the inquiry, the FCAI argued:

Unlike all other franchise systems dealers do not pay any 'franchise fee', or even trade mark licence fee to distributors when they enter a dealer agreement. Rather, dealers are essentially granted a right to buy products from the distributor and sell them at a retail level to consumers/end users, utilising the well known vehicle brand that the overseas manufacturer has spent years and enormous sums building.

The other component of goodwill is that which attaches to a location. The importance of this aspect of goodwill is recognised in many other franchises where the franchisor holds a head-lease for the franchise location, so that if the franchisee ceases to operate, the franchisor still controls the location.⁷⁵

- 4.63 Further, TMCA identified another type of goodwill associated with the business itself:

...there is also goodwill that attaches to the dealer's business. That goodwill arises for accounting purposes when a sale of a business takes place at a price which exceeds the value of its net assets. That excess is called 'goodwill' and it is commonly understood and recognised as belonging to the dealer.⁷⁶

- 4.64 The AADA argued that the termination or non-renewal of a dealership agreement can lead to millions of dollars of goodwill being lost by dealers. The AADA has argued for fair and reasonable compensation to be paid to franchised new car dealers in the event of a non-renewal process or a termination.⁷⁷ It submitted:

The goodwill in a dealership can be immediately diminished to nil in the event of a non-renewal process or a termination. While non-renewals and terminations are inevitable, AADA would contend that a dealer should, where appropriate, be compensated for all of the goodwill built up in the business.⁷⁸

⁷³ *Committee Hansard*, 5 February 2021, p. 10.

⁷⁴ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 13.

⁷⁵ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 13.

⁷⁶ Toyota Motor Corporation Australia, *Submission 42*, p. 8. See also, Mitsubishi Motors Australia Limited, *Submission 46*, [p. 6].

⁷⁷ Australian Automotive Dealer Association, *Submission 13.2*, p. 16.

⁷⁸ Australian Automotive Dealer Association, *Submission 13.2*, p. 16.

4.65 The MTAA indicated that it had received evidence that some dealers had been subject to sudden cessation of dealership agreements without regard for goodwill.⁷⁹ The MTAA also argued for the inclusion of goodwill as a value component of termination arrangements, including compensation in the event of termination, cancellation or non-renewal.⁸⁰

4.66 Astoria Honda Brighton told the committee that it was significantly disadvantaged in relation to the goodwill that it had built up following Honda Australia's decision to move to an agency sales model for its Australian retail network. It noted:

The compensation methodology used (as calculated by Deloitte) grossly undervalues the actual loss we will suffer let alone the value of the goodwill we have established in our business.⁸¹

4.67 The AADA also noted its concerns in relation to the treatment of customer data. It argued that:

...there is a growing trend of manufacturers encroaching on the dealer's customer data. While some information is shared for very specific reasons, such as safety recalls, it seems as there is a growing desire for OEMs to own this data which is very valuable.⁸²

4.68 Indeed, it seems that manufacturers did not consider the customer data associated with a car dealership to be part of the goodwill associated with the business and took different approaches to sharing and managing that data.

4.69 Honda Australia's position was that customer data was 'jointly owned between us and the dealer' despite not having a formal data-sharing agreement with its dealers.⁸³

4.70 However, Mr Stephen Collins, Director of Honda Australia, acknowledged that while customer data is valuable, it did not form part of the compensation package:

Senator O'NEILL: Does Honda Australia believe that customer data is worthless? Of no value?

Mr Collins: I would say that data clearly has some value.

...

Senator O'NEILL: If I believe that my neighbour's car should be mine, I don't have a right to take it. It's theirs, they own it, they have value, they use

⁷⁹ Motor Trades Association of Australia Limited, *Submission 15.1*, pp. 21–22.

⁸⁰ Motor Trades Association of Australia Limited, *Submission 15.1*, pp. 20–23.

⁸¹ Astoria Honda Brighton, *Submission 51*, [p. 1].

⁸² Australian Automotive Dealer Association, *Submission 13.2*, p. 16.

⁸³ Mr Stephen Collins, Director, Honda Australia, *Committee Hansard*, 24 November 2020, pp. 28–29.

it. If a car dealership has data and it's of so little value that you are not willing to pay for it, why are you taking their data, Mr Collins?

Mr Collins: If this is in reference particularly to the compensation package, the principle of our compensation package is to put the dealer in the same position they would have been in had the period of the contract been continued until the end. Our view is that that's a component of loss of profit, as well as rent, capex and exit cost, not customer data.⁸⁴

- 4.71 By contrast, Mr Brett Mills, Chairman of the NTDA, indicated that TMCA and the NTDA had entered into a data-sharing agreement:

The process to get that data-sharing agreement to the point of being signed went on for years between the dealer council and Toyota—again, it's a great example of the way that we work together with Toyota—to come up with what data that we believed as dealers we were happy not only to move to the manufacturer but to share between dealers in order to give customers a better experience. It actually puts in place a set of rules and guidelines around what needs to happen should further data be requested to be shared with the manufacturer.⁸⁵

- 4.72 Volvo Car Australia commented on the 'importance of the vehicle manufacturer owning (at least jointly with the dealer) and being responsible for the management of customer data'.⁸⁶ It argued in its submission:

Manufacturers are best placed to hold and manage this customer data given their experience at meeting very stringent data protection regimes, particularly the GDPR in Europe and China's Cyber Security Law. Manufacturers make very significant investments in customer insights, technology systems and compliance and can only do this effectively if they are able to hold and manage customer data. Further as consumers seldom draw a distinction between an independent dealer and the supplying manufacturer any data breach by a dealer is likely to be perceived by the customer as a manufacturer breach, at the same time the risk of a breach is taken by the brand.⁸⁷

Committee view

- 4.73 While the committee notes that there are some examples of relationships between car manufacturers and dealers which do not seem to exploit the potential power imbalance, it appears that this is not the case across the majority of the industry.
- 4.74 The committee is very concerned by the experiences presented by car dealers, both large and small, the majority of which have had their evidence considered

⁸⁴ *Committee Hansard*, 24 November 2020, pp. 28–29.

⁸⁵ *Committee Hansard*, 24 November 2020, p. 5. See also, Toyota Motor Corporation Australia, *Submission 42*, p. 8.

⁸⁶ Volvo Car Australia, *Submission 47*, [p. 9].

⁸⁷ Volvo Car Australia, *Submission 47*, [p. 9].

confidentially to protect them from retribution, both overtly and tacitly, by manufacturers for voicing their concerns.

- 4.75 In particular, it is manifestly apparent to the committee that there is a widespread failure of manufacturers to work with dealers to ensure that capital investments can be recouped, unfair contract terms are eliminated from dealership agreements, and dubious practices to not fully reimburse dealers for warranty and recall work (including auditing of claims) is addressed. Given these issues, it is unsurprising that manufacturers are unwilling to entertain fair and reasonable compensation when dealership agreements are terminated or not renewed, even when it is the manufacturer themselves seeking to change their distribution model.
- 4.76 The committee believes the evidence presented by stakeholders in this chapter highlights the trying experiences of many other dealers when attempting to exercise their rights in their relationships with manufacturers and brings further credence to the difficulties outlined by Holden dealers during GM Holden's withdrawal. These experiences underscore the failure of the current regulatory regime and demonstrate the urgent need for further reform.

Chapter 5

Regulatory framework and reforms

5.1 This chapter first outlines the current regulatory framework governing the relationship between car manufacturers and dealers. It then explores options to strengthen the regulatory framework to allow car dealers to better exercise their rights within this relationship.

Recent changes to regulatory arrangements for new car dealerships

5.2 The regulation of the relationship between car manufacturers and dealers, including the terms and conditions contained in dealership agreements, are primarily governed by the *Competition and Consumer Act 2010* (CCA) through the Franchising Code of Conduct (the Franchising Code) and the Australian Consumer Law (ACL).¹ Best practice principles for new car dealership agreements have also been developed to address areas of concern not covered by the automotive-specific amendments to the Franchising Code.

Amendments to the Franchising Code

5.3 Following the Australian Competition and Consumer Commission (ACCC) market study in 2017, and the release of the Parliamentary Joint Committee on Corporations and Financial Services' *Fairness in Franchising* report, the Australian Government (the government) introduced amendments to the Franchising Code, to address the effects on commercial arrangements arising from the power imbalance between car manufacturers and car dealers. These changes came into force on 1 June 2020 and included:

- a requirement for franchisors to give franchisees 12 months' notice of a decision not to renew an agreement, if the agreement is for 12 months or longer, including a requirement for the franchisor to provide a statement outlining why an agreement is not renewed;
- strengthening conditions that prohibit franchisors requiring significant capital expenditure from franchisees, including the introduction of an obligation to discuss expenditure prior to entering an agreement, disclosure of the circumstances under which the franchisee is likely to recoup the expenditure and specifying, as far as practical, the amount, timing and nature of the expenditure to be provided; and
- a requirement to discuss, plan and agree end of term arrangements if an agreement is not renewed including for the handling of capital intensive stock; and

¹ As well as common law and other state and territory legislation and regulations.

- expressly allowing for multi-franchisee dispute resolution.²
- 5.4 The government also indicated that 'the automotive sector will further benefit from broader reforms to the Franchising Code, including the introduction of voluntary binding arbitration and increased civil pecuniary penalties for a breach of the Code'.³
- 5.5 Recently announced proposals to further strengthen the Franchising Code for new car dealers are outlined later in the chapter.

Development of best practice principles for dealership agreements

- 5.6 In its supplementary submission, the Department of Industry, Science, Energy and Resources (the department) advised that it was working with the franchising sector to develop principles-based guidance in relation to compensation and tenure, which it hopes will 'assist franchisees and franchisors when developing new automotive franchise agreements'.⁴ The department argued that:

An industry-driven approach, based on shared expectations developed using the expertise and experience of franchisees and franchisors, has potential to be more efficient and effective than uniform standards at a time where business models are responding to changing commercial pressures, and where the circumstances between and across brands and dealers can vary considerably.⁵

- 5.7 On 11 December 2020, the government released six voluntary best practice principles for new car dealership agreements for the automotive retailing industry to improve fairness and transparency in dealership arrangements.⁶ Details of the six principles are provided in Box 5.1.
- 5.8 The government's recently announced proposal to make the best practice principles mandatory is considered later in the chapter.

² Australian Government response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the operation and effectiveness of the Franchising Code of Conduct report: *Fairness in Franchising*, August 2020, p. 6.

³ Australian Government response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the operation and effectiveness of the Franchising Code of Conduct report: *Fairness in Franchising*, August 2020, p. 6.

⁴ Department of Industry, Science, Energy and Resources, *Submission 16.1*, p. 2.

⁵ Department of Industry, Science, Energy and Resources, *Submission 16.1*, p. 2.

⁶ The Hon Karen Andrews MP, Minister for Industry, Science and Technology, Senator the Hon Michaelia Cash, Minister for Employment, Skills, Small and Family Business, and the Hon Michael Sukkar MP, Assistant Treasurer and Minister for Housing, 'Auto principles guide to deliver for consumers', *Media Release*, 11 December 2020.

Box 5.1 Best practice principles for new car dealership agreements

Franchisors should include provisions in new dealership agreements that provide for fair and reasonable compensation for franchisees in the event of early termination resulting from:

- withdrawal from the Australian market;
- rationalisation of their networks; or
- changes to their distribution models.

Franchisors should not include provisions that exclude compensation in new dealership agreements.

The 'fair and reasonable compensation' as referred to in Principle 1 should include appropriate allowances for the loss a franchisee may incur, which can include:

- lost profit from direct and indirect revenue;
- unrecovered expenditure and unamortised capital expenditure where requested by the franchisor;
- loss of opportunity in selling established goodwill; and
- wind up costs.

When an agreement is entered into it should provide franchisees a fair and reasonable time to secure a return on investments that have been required by franchisors as part of the agreement.

Agreements should include reasonable provisions for franchisors to compensate or buy back new vehicle inventory, parts and special tools, in the event of:

- non-renewal;
- withdrawal from the Australian market;
- rationalisation of their networks; or
- changes to their distribution models.

Agreements should include provision for timely commercial settlement and dispute resolution.

Need for further reform

5.9 This section presents the views of stakeholders in relation to the current regulatory regime and suggestions for further protections to ensure that the conduct of manufacturers does not disadvantage dealers and consumers.

Overall level of current regulation

5.10 Stakeholders expressed differing views on whether the current level of regulation governing the relationship between car manufacturers and dealers was adequate.

5.11 Many manufacturers informed the committee that the current regulatory arrangements struck the right balance between car manufacturers and dealers in Australia, and included clear and appropriate checks and balances that supported fair and sustainable relationships.⁷ The Federal Chamber of Automotive Industries (FCAI) argued that:

...the Franchising Code and all other existing legislation relevant to the relationship between dealers and distributors, provides appropriate mechanisms for the regulation of arrangements between distributors and dealers, and that any further regulation governing these arrangements risks over-regulation of the sector.⁸

5.12 Toyota Motor Corporation Australia (TMCA) argued that many of the concerns raised in relation to the relationship between manufacturers and dealers had already been addressed by recent government reforms.⁹ TMCA also indicated:

Toyota's position has always been that enforcement of the current regulations should be the priority, rather than the introduction of new and over burdensome regulation that will stifle changes determined via market and consumer behaviour. In the event that reform is truly necessary, it should be the result of a coordinated, informed and measured approach in consultation with all relevant stakeholders.¹⁰

5.13 Mercedes-Benz Australia/Pacific (MBAuP) also submitted that it did not consider any further regulatory change was needed to Australia's franchising laws and regulations and indicated that it would:

...have significant concerns if regulatory changes were proposed that undermine or restrict (beyond what is currently imposed by the Code) a manufacturer/wholesaler's ability to negotiate commercially sensible and sustainable agreements with its dealers (for example, by requiring manufacturers/wholesalers to underwrite the success of dealers). If regulations became excessively prescribed and prohibitive, there is a risk

⁷ See, for example, Mazda Australia, *Submission 49*, [p. 2]; Mitsubishi Motors Australia, *Submission 46*, [p. 7]; Nissan Motor Co. (Australia), *Submission 48*, p. 3.

⁸ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 15.

⁹ Toyota Motor Corporation Australia, *Submission 42*, pp. 9–10.

¹⁰ Toyota Motor Corporation Australia, *Submission 42*, p. 10.

that dealership arrangements may no longer be commercially viable and which has the potential to negatively impact all parties.¹¹

5.14 In contrast, organisations representing dealers and dealers themselves did not believe the current regulatory regime was adequate.

5.15 For example, the Australian Automotive Dealer Association (AADA) argued that the automotive-specific protections that were introduced by the government on 1 June 2020 fell 'well short of what is required to remedy the power imbalance that exists between offshore manufacturers and Australian franchised new car dealers'.¹² It also submitted:

The AADA considers it imperative that appropriate safeguards be introduced into the automotive franchising regulations to ensure that future withdrawals do not disadvantage dealers, staff and their communities. Further, that basic conditions and calculations for compensation are enshrined in regulation so that they can become a minimum standard for negotiations going forward.¹³

5.16 Similarly, while the Motor Trades Association of Australia (MTAA) acknowledged the significant reforms that had been implemented in 2020, it argued that 'this does not mean that together industry and government should not continue to seek and implement additional enhancements as quickly as possible while there is the current concentrated focus on the sector'.¹⁴

5.17 Acknowledging the recent reforms, some stakeholders encouraged the government to review their effectiveness. For example, the Motor Trade Association SA/NT argued that 'the Federal Government should commit to a review of the effectiveness of the code at 12 months of operation, with a view to expand provisions as needed'.¹⁵

Appropriateness of the Franchising Code

5.18 Many stakeholders, representing both manufacturers and dealers, argued that the Franchising Code was not the most appropriate mechanism for regulating the relationship between car manufacturers and dealers.

5.19 The AADA argued that the Franchising Code had 'been very disappointing and is widely considered to have failed in addressing the power imbalance that

¹¹ Mercedes-Benz Australia/Pacific, *Submission 43*, p. 7. See also, Mr Horst von Sanden, Chief Executive Officer, Mercedes-Benz Australia/Pacific, *Committee Hansard*, 24 November 2020, p. 43.

¹² Australian Automotive Dealer Association, *Submission 13*, p. 16.

¹³ Australian Automotive Dealer Association, *Submission 13*, p. 16.

¹⁴ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 3.

¹⁵ Motor Trade Association SA/NT, *Submission 2*, p. 7.

exists between Australian car dealers and the multinational car manufacturers'.¹⁶ It also submitted that it:

...has long called for protections separate to the Franchising Code due to the many unique features in our industry. The Code is more suited to traditional franchising businesses such as take away and restaurants rather than automotive dealerships, which are complex businesses which require large investments.¹⁷

5.20 Similarly, the MTAA observed that 'arguments have long been that automotive franchising is a vastly different franchising and competition consideration due to the nature of relationships, the products involved, and the incomparable level of investments and after-sale interactions required'.¹⁸

5.21 The FCAI highlighted that the relationship between manufacturers (through their local distributors) and dealers was not what would normally be considered as a franchise. It argued:

Unlike traditional franchises, dealers do not pay anything in the way of franchise fees, nor do they pay anything to the distributor when they sell their business. Most typically, all that dealers pay the distributor for are the vehicles, parts and accessories they purchase from the distributor, as well as special tools for servicing/repairs.¹⁹

5.22 The FCAI further argued that:

The relationship is captured by the Franchising Code because of a specific provision in the definition of 'franchise agreement' that deems a motor vehicle dealership agreement as being a franchise agreement...²⁰

The effectiveness of the Franchising Code

5.23 Stakeholders identified a number of issues in relation to the effectiveness of the Franchising Code. These related to the dispute resolution processes, penalties and enforcement mechanisms, as well as some of the new automotive-specific amendments.

Dispute resolution processes

5.24 One of the significant issues raised by submitters in relation to the Franchising Code was the weakness of the dispute resolution process.

¹⁶ Australian Automotive Dealer Association, *Submission 13.2*, p. 17.

¹⁷ Australian Automotive Dealer Association, *Submission 13.2*, p. 17.

¹⁸ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 37.

¹⁹ Federal Chamber of Automotive Industries, *Submission 5*, p. 2. Also see, Mr Tony McDonald, Director, Industry Operations, Federal Chamber of Automotive Industries, *Committee Hansard*, 3 August 2020, p. 57.

²⁰ Federal Chamber of Automotive Industries, *Submission 5*, p. 2 (citation omitted). See also *Submission 5.1*, p. 4.

5.25 The AADA argued that the Franchising Code 'is meant to address a power imbalance between franchisors and franchisees, but it fails when these relationships break down and franchisees are in need of a cost-effective, timely and determinative outcome'.²¹ It noted that:

The limits of dispute resolution were laid bare in the dispute between GM Holden and its dealers when after mediation failed, the Minister for Small Business, Michaelia Cash, wrote to both parties requesting they agree to settle their dispute via arbitration. While the dealers agreed to participate GM bluntly refused, calling the Minister's request inappropriate and unhelpful.²²

5.26 Mr James Voortman, Chief Executive Officer of the AADA, further noted that:

Mediation under the franchising code seldom results in resolution of disputes, and manufacturers are only too happy to invite dealers to take their disputes to the courts, where an expensive, long battle awaits'.²³

5.27 He also argued that the automotive 'industry more than most is in need of dispute resolution which is cost-effective, is timely and provides a determinative outcome. We believe compulsory binding arbitration should be introduced'.²⁴

5.28 Similarly, the MTAA argued that:

Even established processes for raising and attempting to resolve disputes are complicated, time-consuming and rarely settled, if at all, within time frames set by the action taken, or deadlines for decisions. MTAA suggests an example of this conduct was GMH refusal to budge on original deadlines for a decision to accept or reject compensation arrangements and then when essentially forced to provide additional time, after eternal pressure, final deadlines were not negotiable.²⁵

5.29 The importance of better dispute resolution mechanisms was also highlighted by the ACCC:

Increased compliance and enforcement action by the ACCC will not address the multitude of issues raised by franchisees. The concerns of many franchisees are not associated with a breach of the CCA or Franchising Code, and are better addressed through more effective alternative dispute resolution processes. However, the current regulatory framework that governs the franchising sector prevents the establishment of an effective dispute resolution or arbitration mechanism scheme. As such, the ACCC believes that serious consideration needs to be given to an ex-ante

²¹ Australian Automotive Dealer Association, *Submission 13.2*, p. 21.

²² Australian Automotive Dealer Association, *Submission 13.2*, p. 21.

²³ *Committee Hansard*, 19 November 2020, p. 9.

²⁴ *Committee Hansard*, 19 November 2020, p. 9.

²⁵ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 28.

regulatory model that would allow effective and binding dispute resolution.²⁶

5.30 Indeed, Mr Nick Heys, Deputy General Manager, Enforcement Coordination and Strategy, Enforcement Division at the ACCC, noted that 'what we've seen with the franchising code in general, a lot of small disputes turn into very significant and large disputes'.²⁷ Mr Heys argued:

We need to address or have a mechanism to enable franchisees and franchisors to resolve those issues quickly along the way, whether that's through dispute resolution mechanisms or, as you discussed earlier, arbitration. I think that's one of our observations with the franchising code more generally—preventing those smaller disputes from really escalating and turning to significant, full-blown disputes that result in mediation, arbitration or even court cases.²⁸

5.31 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) also considered that dispute resolution was one area of the Franchising Code that could be improved. For example, it argued that 'the adoption of dispute resolution processes similar to those allowed for under the Dairy Code of Conduct, including arbitration processes, will provide much needed certainty for small businesses'.²⁹

5.32 However, the introduction of provisions to impose compulsory arbitration in codes of conduct can be problematic (see Box 5.2).

5.33 The ASBFEO argued for access to effective and low cost dispute resolution coupled with fair exit and termination options with the option for arbitration should mediation not be successful.³⁰

5.34 The MTAA supported this view and advocated for the creation of an Automotive Ombudsman within the ASBFEO to investigate, coordinate and facilitate complaints handling, mediation and dispute resolution. In particular, the MTAA considered that this approach could improve timeliness and streamline dispute resolution, particularly in relation to warranty repairs and compensation.³¹

Box 5.2 Issues relating to the introduction of compulsory arbitration

Mr Tom Dickson, Assistant Secretary, The Treasury, summarised the conditions that trigger compulsory arbitration in other industry codes:

²⁶ Australian Competition and Consumer Commission, *Submission 1.1*, p. 5.

²⁷ *Committee Hansard*, 24 November 2020, p. 73.

²⁸ *Committee Hansard*, 24 November 2020, p. 73.

²⁹ Australian Small Business and Family Enterprise Ombudsman, *Submission 41*, p. 1.

³⁰ Australian Small Business and Family Enterprise Ombudsman, *Submission 41*, p. 1.

³¹ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 18.

...there are other codes that provide compulsory arbitration but only when certain conditions are met. The first condition that needs to be met, for instance, is whether or not the code is voluntary. In the case of the Food and Grocery Code you would have seen that arbitration is a part of that. The reason that is a provision that exists in that code is that that code is voluntary.

The second condition is that if the code is mandatory then the provisions that trigger arbitration need to be voluntary or optional. When you look at the dairy code—I imagine that that's an example that may have been raised—you see that that code is a mandatory code but the parties are not bound to take on board a requirement to undertake arbitration. That's a voluntary element that exists within that mandatory code.

The final condition is that if the code is mandatory and the provision that trigger arbitration are also mandatory then the arbitration cannot apply to past contractual rights and obligations. It can only be applied to future obligations. So, to answer your question around why that takes place in the News Media Bargaining Code: the News Media Bargaining Code doesn't look backwards and seek to amend previous contractual arrangements. It only looks forward.³²

Penalties and enforcement

5.35 Various stakeholders were concerned about the relatively small penalties associated with the Franchising Code and the relatively few cases where enforcement action had been taken.

5.36 The AADA submitted that the 'penalties for breaches of the Franchising Code of Conduct have never been fit for purpose for multinational car Manufacturers'.³³ The AADA argued:

Even, the Government's recent proposal to increase penalties to just over \$130,000 for a breach will do little to deter bad behaviour by automotive Manufacturers. General Motors for example is a \$200 billion revenue a year company and will not be deterred by a fine of this magnitude.³⁴

5.37 Similarly, the MTAA noted its submission that:

The doubling of existing penalties, as announced by the Government in its response to the 'Fairness in Franchising' final report pales against the penalty increases called for by the ACCC. Some manufacturers and their representative body suggest such changes along with other reforms to franchising may negatively influence whether a brand continues to participate in the Australian market. MTAA suggests that compliance with

³² Mr Tom Dickson, Assistant Secretary, Corporations Branch, The Treasury, *Committee Hansard*, 5 February 2021, p. 18.

³³ Australian Automotive Dealer Association, *Submission 13.2*, p. 21.

³⁴ Australian Automotive Dealer Association, *Submission 13.2*, p. 21.

a nation's regulatory environment is a cost of doing business and is only a concern if non-compliance is a factor.³⁵

5.38 That said, TMCA argued that:

This is not surprising given the ACCC's scrutiny into the franchising sector, coupled by the decision in *Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd* [2019] FCA 12 (the Ultra Tune case), which was the first case in which the ACCC seriously tested the Franchising Code penalty resulting in a penalty of \$2.6million.

The increase in penalties will further deter manufactures from breaching the Franchising Code. If the Inquiry were to accept that there was a theoretical power imbalance in favour of the manufacturers, any attempt to exploit this to the detriment of dealers would be unlawful under a range of other laws coupled by the hefty penalty regimes already existing in Australia (for example under the ACL which was the basis for the above-mentioned Ultra Tune case penalty).³⁶

5.39 While the ACCC pointed out that it had 'consistently made compliance with, and enforcement of, the Franchising Code a priority', it noted that the ACCC's 'compliance and enforcement model has limitations in addressing all issues in franchising'.³⁷

5.40 The ACCC also highlighted the difficulties in successfully undertaking enforcement action for franchising contraventions:

ACCC investigations into franchising allegations rely on direct evidence from franchisees and often also ex-franchisees. Ex-franchisees that have been involved in disputes with the franchisor can raise credibility issues. The allegations involved might relate to conduct that is a number of years old and/or verbal representations, which can mean that it is difficult for franchisees and ex-franchisees to provide clear, persuasive evidence of the conduct. For example, allegations of a failure to provide certain information, or the provision of misleading information, at the start of the franchise agreement. It is also our experience that existing franchisees are often unwilling to either make a complaint or provide evidence of misconduct, due to fear of reprisal and the need to maintain an ongoing relationship with the franchisor for the viability of their franchise business.³⁸

5.41 Further, the ACCC indicated that:

The legislative bar that's determined by the court for unconscionable conduct is quite high and, as a result of that, the ACCC believes there needs to be an unfair practices standard that may assist in bringing about

³⁵ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 28.

³⁶ Toyota Motor Corporation Australia, *Submission 42*, pp. 11–12.

³⁷ Australian Competition and Consumer Commission, *Submission 1.1*, p. 4.

³⁸ Australian Competition and Consumer Commission, *Submission 1.1*, pp. 4–5.

outcomes for consumers and businesses that doesn't require the high bar that unconscionability has been held to.³⁹

Automotive-specific amendments

5.42 Concerns were raised by submitters about the specific amendments to the Franchising Code relating to new car dealerships. These included changes to end of term obligations, capital expenditure, disclosure requirements, and minimum tenure, as well as multi-franchisee dispute resolution processes.

End of term obligations

5.43 Some submitters raised concerns that the 12-month requirement for non-renewal would potentially result in manufacturers offering shorter terms for dealers. For example, the AADA commented:

Unfortunately, the regulations allow the 12-month requirement to be waived if the agreement is for a period of less than 12-months, in which case the notice period is six months. It also reduces the notice period to one month if the agreement is six months or less. There is a real risk that this element of the regulations will result in OEMs offering shorter terms so that they can provide the shortest notice period possible.⁴⁰

5.44 Mr John Crennan, reflecting on his 50 years of experience in the automotive industry, suggested to the committee that every car company should have to provide 18 months prior notice of quitting the country and that there should be a set working formula in the sales and service agreement or franchise agreement that provides a formula for compensation.⁴¹

5.45 The AADA also expressed its concern that:

...the requirements for the franchisor and franchisee to agree to a 'winding down plan' can be easily frustrated by the franchisor deploying obstructive or delaying tactics to 'run down the clock' in the period leading up to the expiration of a Dealership Agreement.⁴²

5.46 In addition, the AADA argued that:

A major concern for dealers is that the requirement to develop an agreement to reduce stock will encourage those manufacturers that do commit to buying back stock in their Dealer Agreements to revert to the less stringent requirement contained in these draft regulations.⁴³

³⁹ Mr Rami Greiss, Australian Competition and Consumer Commission, *Committee Hansard*, 3 August 2020, p. 43.

⁴⁰ Australian Automotive Dealer Association, *Submission 13.2*, p. 18.

⁴¹ Mr John Crennan, *Committee Hansard*, 3 August 2020, p. 34.

⁴² Australian Automotive Dealer Association, *Submission 13.2*, p. 18.

⁴³ Australian Automotive Dealer Association, *Submission 13.2*, p. 18.

Capital expenditure, disclosure requirements and minimum tenure

5.47 While the AADA welcomed the requirement for discussing how expenses would be recovered under the recent changes, it argued:

...we would contend that a mandatory linkage between the level of demanded capital expenditure and the term offered for the new Dealership Agreement is a superior approach, and one that can be coupled with easily understood, industry standard calculations to ensure that the new car dealer has a realistic opportunity to recoup the expected capital expenditure. Similarly, the regulations require 'discussions about under what circumstances the dealer is likely to recoup the costs of their investment'. Once again, AADA is supportive of the principle that Dealership Agreements should enable dealers to recoup the costs of any capital expenditure.⁴⁴

5.48 The MTAA also called for greater clarity around what should be included:

Unparalleled capital investments, financial exposure of other financial arrangements including the purchase, bailment, sale and constant turnover of stock, training, equipment, tools, refurbishment, marketing and branding, must be better recognised and reflected in agreement terms and conditions, specifically tenure.⁴⁵

5.49 In addition, the AADA argued that 'any significant capital expenditure needs to be the subject of formal agreement by both parties, much like the end of term plan'.⁴⁶

5.50 Manufacturers did not support proposals for minimum tenure in dealer agreements. For example, Ford Australia submitted that:

We would not support any increase to the minimum tenure driven as a result of the need for dealers to obtain a return on capital investment. Any extension would restrict Ford Australia's ability to manage underperforming dealers within our dealer network. A strong performing dealer network is essential. It allows us to strengthen the Ford brand and create new and loyal customers, which benefits all our dealers. It also allows us to achieve an acceptable return on the significant investment we make in the Australian market.⁴⁷

5.51 Mitsubishi Motors Australia Limited (MMAL) indicated that it does 'does not consider that it is appropriate to legislate any minimum tenure or term requirements for dealer agreements'.⁴⁸ MMAL also argued:

OEMs require flexibility to best address market and customer needs, and the term offered to a dealer might be adjusted according to the quality of the dealer's facilities (so for example, an OEM may be willing to offer a shorter-

⁴⁴ Australian Automotive Dealer Association, *Submission 13.2*, p. 18.

⁴⁵ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 13.

⁴⁶ Australian Automotive Dealer Association, *Submission 13.2*, p. 18.

⁴⁷ Ford Australia, *Submission 50*, p. 3.

⁴⁸ Mitsubishi Motors Australia Limited, *Submission 46*, [p. 3].

term agreement where the dealer has not, and is not expected to, undertake significant expenditure on a site). The use of shorter-term dealer agreements may be appropriate to address issues such as temporarily open points in a network, for example where created by a dealer's departure.⁴⁹

- 5.52 The FCAI also noted that the impact of the new disclosure requirements for new vehicle dealership agreements as part of the recent changes to the Franchising Code were unknown:

These changes have not yet filtered all the way through dealer agreement lifecycles, but as it does will result in a more transparent process regarding significant capex/investment requirements. There is no reason why the issue of tenure, in the context of the required capex, would not form part of the discussions the Franchising Code now requires.⁵⁰

Multi-franchisee dispute resolution processes

- 5.53 While noting the recent reforms to the Franchising Code, the AADA argued that:

...the regulations contain no obligation for the franchisor to accede to the franchisees' request. In essence this proposal simply formalises what is currently in place and we hear many reports of dealers requesting multi-party dispute resolution only to be denied by the manufacturer.⁵¹

- 5.54 The MTAA welcomed the ACCC's announcement to allow franchisees to collectively negotiate with their franchisors without first having to seek ACCC approval. However, it noted:

...there are still weaknesses. The first is that the class exemption does not include an ability to collectively refuse to contract with the target business (manufacturer/distributor). The second is there is no requirement that a car manufacturer/distributor franchisor must collectively bargain if it receives a request to do so.⁵²

- 5.55 TMCA pointed out that 'disputes and issues are usually raised individually by dealers, or collectively through the NTDA [National Toyota Dealer Association] and its various sub-committees'.⁵³ TMCA argued:

Multiple dealer disputes can be raised in this forum and communicated back to Toyota via the NTDA. Alternatively, Toyota maintains the presence of regional offices who are available to assist with specific dealer concerns. As a result of the many avenues Toyota provides dealers to raise and resolve concerns informally and quickly described above, Toyota's dispute

⁴⁹ Mitsubishi Motors Australia Limited, *Submission 46*, [p. 3].

⁵⁰ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 10.

⁵¹ Australian Automotive Dealer Association, *Submission 13.2*, p. 19.

⁵² Motor Trades Association of Australia Limited, *Submission 15.1*, p. 25.

⁵³ Toyota Motor Corporation Australia, *Submission 42*, p. 11.

resolution provisions in our dealer agreement have only been used 3 times in the past 10 years.⁵⁴

5.56 Similarly, the FCAI noted:

Dealer Councils create a strong and highly engaged forum for distributors and dealers to work together to resolve potentially contentious issues before they arise.⁵⁵

Strengthening the best practice principles

5.57 Stakeholders were generally supportive of the best practice principles but argued that they needed to be made mandatory and enforceable to drive change and be effective.

5.58 The MTAA noted in its submission:

MTAA has significant reservations that without oversight, regulation or enforcement, there is nothing to deter poor conduct and compel compliance. In short, all can simply agree to any principle, but without compliance and enforcement, then parties can simply walk away from it, irrespective of commitments given.⁵⁶

5.59 At the hearing on 19 November 2020, Mr Voortman indicated that the AADA was generally supportive of their content, but noted that he would prefer it 'to be more specific on what "timely commercial settlement dispute resolution" is so the mechanism is a binding arbitration'. He also emphasised that 'the most important thing is the application of these principles, and that's where we have a very strong view that we need to make these mandatory'.⁵⁷

5.60 Following the government's release of the voluntary principles on 11 December 2020, the AADA submitted that:

The AADA has already engaged with our members who are dealers for every major brand in Australia to understand to what extent existing Dealer Agreements comply with the Government's best practice principles for new car dealership agreements. We have not been able to find an agreement which does comply with these principles.

We have also reached out to our members which are in the process of concluding new Dealer Agreements or are dealing with renewal of existing agreements. Disappointingly, these agreements have not been structured to comply with the voluntary principles and a number of manufacturers have refused to comply telling their dealers that they have no legal obligation to do so.⁵⁸

⁵⁴ Toyota Motor Corporation Australia, *Submission 42*, p. 11.

⁵⁵ Federal Chamber of Automotive Industries, *Submission 5.1*, p. 15

⁵⁶ Motor Trades Association of Australia Limited, *Submission 15.1*, p. 13.

⁵⁷ Mr James Voortman, Chief Executive Officer, Australian Automotive Dealer Association, *Committee Hansard*, 19 November 2020, p. 16.

⁵⁸ Australian Automotive Dealer Association, *Submission 13.3*, p. 2.

5.61 Ms Kate Carnell, Ombudsman, ASBFEO, expressed similar concerns at the hearing on 24 November 2020:

...our experience is in this space that the large operators, or the people with the power, choose not to, shall we say, play or not to comply if it doesn't suit their business requirements. They simply won't comply unless it's mandatory. In fact, we get told that regularly by multinationals – that, if it's not legislation, decisions will be taken in the head office in the US, Europe or whatever. That's what they tell us.⁵⁹

5.62 The NTDA indicated that it was 'generally supportive of measures aimed at levelling the playing field and increasing legislative protections for dealers and franchisees generally'.⁶⁰ It also observed that:

Proposals in relation to additional protections or Codes of Conduct do require legislative teeth in the form of mandatory compliance rather than voluntary compliance'.⁶¹

5.63 In addition, Mr Rami Greiss, Executive General Manager, Enforcement Division, ACCC, told the committee:

...one issue that I would have with them is that you would have to say the devil's in the detail. It would be great to have compensation provisions baked into all agreements, but then it's how they would operate and how they would take into account different circumstances that I think would need some further consideration. In their current form, I think they are a good start, but they perhaps lack some of the precision needed to ensure that the same problems that we've seen previously don't continue to arise.⁶²

Proposed changes to the regulatory regime

5.64 During the course of the inquiry, a number of policy and regulatory changes were announced, including changes to unfair contract term (UCT) protections and the strengthening of the recently announced best practice principles for new car dealership agreements.

Enhancements to unfair contract term protections

5.65 On 6 November 2020, the Commonwealth and state and territory consumer affairs ministers agreed to strengthen the existing protections in the ACL. The key reforms announced included:

- making unfair contract terms unlawful and giving courts the power to impose a civil penalty;

⁵⁹ Ms Kate Carnell, Ombudsman, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 24 November 2020, p. 63.

⁶⁰ National Toyota Dealer Association, *Submission 44*, p. 5.

⁶¹ National Toyota Dealer Association, *Submission 44*, p. 5.

⁶² *Committee Hansard*, 24 November 2020, p. 72.

- increasing eligibility for the protections by expanding the definition of small business and removing the requirement for a contract to be below a certain threshold; and
 - improving clarity on when the protections apply, including on what is a 'standard form contract'.⁶³
- 5.66 These reforms will help reduce the prevalence of unfair contract terms in standard form contracts, and improve consumer and small business confidence when entering into contracts.⁶⁴
- 5.67 The Treasury will develop exposure draft legislation, which it says will provide a further opportunity for stakeholders to comment on the detail of the reforms but provided no indication of a timeframe for implementation.⁶⁵
- 5.68 While welcoming the changes for some new car dealerships, the AADA noted that the increased eligibility criteria for UCT protections would not be available to all dealers.⁶⁶

Penalties and mandatory best practice principles

- 5.69 Following the committee's call for submissions and final public hearing, the Prime Minister announced on 12 March 2021 a new set of reforms to 'protect Australia's family-owned automotive businesses and their employees from the growing power imbalance with multi-national car companies'.⁶⁷
- 5.70 The new measures announced would:
- increase available penalties under the Franchising Code to up to \$10 million;
 - transform the voluntary principles into mandatory obligations under the Franchising Code; and

⁶³ Legislative and Governance Forum on Consumer Affairs, Meeting of Ministers for Consumer Affairs, *Joint Communique*, Friday, 6 November 2020, <https://consumer.gov.au/consumer-affairs-forum/communiques/meeting-12-0> (accessed 13 November 2020).

⁶⁴ Legislative and Governance Forum on Consumer Affairs, Meeting of Ministers for Consumer Affairs, *Joint Communique*, Friday, 6 November 2020, <https://consumer.gov.au/consumer-affairs-forum/communiques/meeting-12-0> (accessed 13 November 2020).

⁶⁵ Legislative and Governance Forum on Consumer Affairs, Meeting of Ministers for Consumer Affairs, *Joint Communique*, Friday, 6 November 2020, <https://consumer.gov.au/consumer-affairs-forum/communiques/meeting-12-0> (accessed 13 November 2020).

⁶⁶ Australian Automotive Dealer Association, 'Changes to the Unfair Contract Term Provisions', *Media Release*, 16 November 2020.

⁶⁷ Prime Minister (The Hon Scott Morrison) and Minister for Employment, Skills, Small and Family Business (Senator the Hon Michaelia Cash), 'Backing Australia's Family-Owned Automotive Industry', *Media Release*, 12 March 2021.

- explicitly recognise that dealers operating as a manufacturer's agent are protected by the Franchising Code.⁶⁸
- 5.71 The government also committed to working further with the automotive franchising sector and it would consult on:
- appropriate protections for automotive dealerships from unfair contract terms;
 - options to achieve mandatory binding arbitration for automotive franchisees to address power imbalance where there is a dispute; and
 - the merits of a standalone automotive franchising code.⁶⁹
- 5.72 No timeframe was set for the implementation of the new measures or the consultation process.
- 5.73 In response to this announcement, the AADA welcomed the reforms and emphasised that:
- These changes will bring a degree of balance to the relationships between new car dealers and the manufacturers to which they are franchised. The reforms are sensible and fair and will bring all manufacturers up to the standard already being employed by ethically-minded car brands operating in Australia.⁷⁰
- 5.74 The AADA went on to add:
- Only manufacturers who ride roughshod over Australian dealers will have anything to fear from what has been announced today.⁷¹

Committee view

- 5.75 The committee is heartened that the government has stepped up and released a dedicated proposal to properly address the power imbalance between car manufacturers and dealers. Indeed, many of the proposals announced on 12 March 2021 would have been recommended by the committee in the absence of the Prime Minister's announcement. That said, the committee is disappointed that the government has not placed a timeframe on the implementation of these reforms and recommends that these reforms are progressed as a matter of priority and are operational by 1 July 2021.

⁶⁸ Prime Minister (The Hon Scott Morrison) and Minister for Employment, Skills, Small and Family Business (Senator the Hon Michaelia Cash), 'Backing Australia's Family-Owned Automotive Industry', *Media Release*, 12 March 2021.

⁶⁹ Prime Minister (The Hon Scott Morrison) and Minister for Employment, Skills, Small and Family Business (Senator the Hon Michaelia Cash), 'Backing Australia's Family-Owned Automotive Industry', *Media Release*, 12 March 2021.

⁷⁰ Australian Automotive Dealer Association, 'Australia's Car Dealers Welcome Landmark Reforms to Automotive Franchising', *Media Release*, 12 March 2021.

⁷¹ Australian Automotive Dealer Association, 'Australia's Car Dealers Welcome Landmark Reforms to Automotive Franchising', *Media Release*, 12 March 2021.

- 5.76 While the committee welcomes the government's commitment to make the best practice principles mandatory, it considers that significant consultation will be required to provide greater detail and clarity on how the principles will work in practice. For example, dealers would benefit from greater clarification of what constitutes 'fair and reasonable compensation' and a better understanding of the metrics underlying this concept.
- 5.77 The committee also considers that the best practice principles should include a provision for reimbursement for all reasonable expenses incurred in relation to warranty and recall work, including expenses associated with diagnosis, administration of claims and claim audits.
- 5.78 Further, the committee is not convinced that new car dealers should be covered by the Franchising Code and urges the government to comprehensively assess whether a stand-alone automotive code of conduct would be a more appropriate approach for regulating the relationship between car manufacturer and dealers.
- 5.79 Another concern of the committee is the lack of a commitment by the government to deliver a timely solution to address dispute resolution issues in the first tranche of reforms. Evidence to the committee has outlined many circumstances where a clear and binding dispute resolution mechanism would readily benefit dealers and consumers, particularly in relation to GM Holden's withdrawal. To this end, the committee sees merit in the ASBFEO being given a role in investigating and resolving disputes, particularly where they involve warranty claims, between manufacturers and dealers. Such a mechanism would not limit the ability of the ACCC to undertake enforcement action in relation to alleged contraventions of the Franchising Code and ACL.
- 5.80 The committee also considers that there appears to be a strong case for the introduction of mandatory binding arbitration when other dispute resolution mechanisms fail to produce an outcome. The recently enacted News Media and Digital Platforms Mandatory Bargaining Code shows that the government can deliver mandatory binding arbitration during contract negotiations and the committee sees no reason why a similar solution could not be implemented for the automotive industry to address the significant power imbalance.
- 5.81 While the committee welcomes the commitment to increase the available penalties under the Franchising Code, it is concerned by the ACCC's own admission that it is difficult to prosecute matters relating to the Franchising Code and more broadly under the *Competition and Consumer Act 2010* (for example, unconscionable conduct). To this end, the committee recommends that the government should instigate a review, possibly by the Australian Law Reform Commission, into the current limitations to effectively enforcing alleged contraventions of the Franchising Code and the *Competition and Consumer Act 2010* more broadly.

Recommendation 3

5.82 The committee recommends that the Australian Government prioritise the new automotive reforms announced on 12 March 2021 and implement the increased fines, mandatory principles and protection of dealers operating as a manufacturer's agent by 1 July 2021.

Recommendation 4

5.83 The committee recommends that the mandatory best practice principles include a provision for the reimbursement for all reasonable expenses incurred in relation to warranty and recall work, including expenses associated with diagnosis, administration of claims and claim audits.

Recommendation 5

5.84 The committee recommends that the Australian Government introduce mandatory binding arbitration to resolve disputes during contracted negotiation in the automotive industry which are not able to be resolved by other dispute resolution mechanisms.

Recommendation 6

5.85 The committee recommends that the Australian Government appoint a senior officer in the Office of the Australian Small Business and Family Enterprise Ombudsman to investigate and coordinate dispute resolution investigations and facilitate mediation and arbitration arising from the transformation of the voluntary best practice principles into mandatory obligations.

Recommendation 7

5.86 The committee recommends that the Australian Government undertake a review into effectively enforcing alleged contraventions of the *Competition and Consumer Act 2010* as it relates to the regulation of the relationship between car manufacturers and car dealers.

Senator Louise Pratt
Chair

Senator the Hon James McGrath
Deputy Chair

Senator Deborah O'Neill
Member

Senator the Hon Don Farrell
Member

Senator Matt O'Sullivan
Member

Appendix 1

Submissions and additional information

- 1 Australian Competition and Consumer Commission
 - 1.1 Supplementary to submission 1
- 2 Motor Trade Association SA/NT
- 3 Professionals Australia
- 4 Australian Automotive Aftermarket Association
- 5 Federal Chamber of Automotive Industries
 - 5.1 Supplementary to submission 5
- 6 Dispute Resolvers
- 7 *Confidential*
- 8 *Confidential*
 - 8.1 Confidential
- 9 *Confidential*
- 10 *Confidential*
 - 10.1 Confidential
- 11 *Confidential*
- 12 *Name Withheld*
- 13 Australian Automotive Dealer Association
 - 13.1 Supplementary to submission 13
 - 13.2 Supplementary to submission 13
 - 13.3 Supplementary to submission 13
- 14 GM Holden
 - 14.1 Supplementary to submission 14
 - 14.2 Supplementary to submission 14
 - 14.3 Supplementary to submission 14
 - 14.4 Supplementary to submission 14
- 15 Motor Trades Association of Australia
 - 15.1 Supplementary to submission 15
- 16 Department of Industry, Science, Energy and Resources and Department of Education, Skills and Employment
 - 16.1 Supplementary to submission 16
- 17 Mr Mark Palmer
 - Attachment 1
- 18 Australian Manufacturing Workers' Union
 - Attachment 1
 - Attachment 2

- Attachment 3
- 19 Mr John Crennan
- 20 *Confidential*
- 21 *Confidential*
- 21.1 *Confidential*
- 22 *Confidential*
- 23 *Name Withheld*
- 24 *Confidential*
- 25 *Confidential*
- 26 *Confidential*
- 27 *Confidential*
- 28 *Confidential*
- 29 *Confidential*
- 30 *Confidential*
- 31 *Confidential*
- 32 *Confidential*
- 33 *Confidential*
- 34 *Confidential*
- 35 Northam Holden
- 36 *Confidential*
- 37 *Confidential*
- 38 *Confidential*
- 39 *Confidential*
- 40 Autopolis
- 40.1 Supplementary to submission 40
- 41 Australian Small Business and Family Enterprise Ombudsman
- 42 Toyota Australia
- 43 Mercedes-Benz Australia/Pacific Pty Ltd
- 44 National Toyota Dealers Association
- 45 Porsche Cars Australia
- 46 Mitsubishi Motors Australia Limited
- 47 Volvo Car Australia
- 48 Nissan Motor Co. (Australia)
- 49 Mazda Australia
- 50 Ford Australia
- 51 Astoria Honda Brighton
- 52 Ferrari Australasia Pty Ltd
- 53 *Confidential*
- 54 *Confidential*
- 55 *Confidential*
- 56 *Confidential*
- 57 *Confidential*

- 58 *Confidential*
- 59 *Confidential*
- 60 *Confidential*
- 61 *Confidential*
- 62 *Confidential*
- 63 *Confidential*
- 64 *Confidential*
- 65 *Confidential*
- 66 *Confidential*
- 67 *Confidential*
- 68 *Confidential*
- 69 *Confidential*
- 70 *Confidential*
- 71 *Confidential*
- 72 *Confidential*
- 73 *Confidential*
- 74 *Confidential*
- 75 *Confidential*
- 76 *Confidential*
 - 76.1 *Confidential*
- 77 FCA Australia

Additional Information

- 1 Correspondence from GM Holden, received 20 May 2020.
- 2 Additional information from Professionals Australia relating to 3 August 2020 hearing, received 2 September 2020.
- 3 Letter received on behalf of Honda Australia, received 16 November 2020.
- 4 Additional information from Mr Mark Avis, Director/General Manager of Astoria Brighton Honda, received 24 February 2021.
- 5 Additional information regarding updates to business and dealer networks from Honda Australia, received 16 February 2021.

Answer to Question on Notice

- 1 Department of Industry, Science, Energy and Resources, answer to written question on notice from Senator Pratt (3 of 3), 28 July 2020 (received 30 July 2020).
- 2 Department of Industry, Science, Energy and Resources, answer to written question on notice from Senator Pratt (1 of 3), 28 July 2020 (received 31 July 2020).
- 3 Department of Industry, Science, Energy and Resources, answer to written question on notice from Senator Pratt (2 of 3), 28 July 2020 (received 31 July 2020).

- 4 Department of Education, Skills and Employment, answer to question on notice from Senator Farrell, 3 August 2020 (received 25 August 2020).
- 5 Federal Chamber of Automotive Industries, answers to questions on notice from Senator McGrath and Senator Pratt, 3, 6, 8 August 2020 (received 28 August 2020).
- 6 GM Holden, answers to written questions on notice from Senator Pratt, 6 August 2020 (received 28 August 2020).
- 7 GM Holden, answers to written questions on notice from Senator Faruqi, 6 August 2020 (received 28 August 2020).
- 8 Department of Industry, Science, Energy and Resources, answer to written question on notice from Senator Pratt, 6 August 2020 (received 28 August 2020).
- 9 Department of Industry, Science, Energy and Resources, answer to written questions on notice from Senator Faruqi, 6 August 2020 (received 28 August 2020).
- 10 Department of Industry, Science, Energy and Resources, answer to question on notice from Senator McGrath, 3 August 2020 (received 28 August 2020).
- 11 Department of Industry, Science, Energy and Resources, answer to question on notice from Senator Faruqi, 3 August 2020 (received 28 August 2020).
- 12 Department of Industry, Science, Energy and Resources, answer to question on notice from Senator Farrell, 3 August 2020 (received 28 August 2020).
- 13 Department of Industry, Science, Energy and Resources, answer to question on notice from Senator O'Neill, 3 August 2020 (received 28 August 2020).
- 14 Australian Small Business and Family Enterprise Ombudsman, answer to question on notice from Senator O'Neill, 24 November 2020 (received 30 November 2020).
- 15 Federal Chamber of Automotive Industries, answers to questions on notice from Senator O'Neill, 19 November 2020 (received 1 December 2020).
- 16 Honda Australia, answers to questions on notice from Senator O'Neill, 24 November 2020 (received 1 December 2020).
- 17 Toyota Australia, answers to questions on notice from Senator O'Neill, 24 November 2020 (received 1 December 2020).
- 18 Department of Industry, Science, Energy and Resources, answer to question on notice from Senator O'Neill, 24 November 2020 (received 1 December 2020).
- 19 Mitsubishi Motors Australia Limited, answers to questions on notice from Senator McGrath and Senator O'Neill, 24 November 2020 (received 1 December 2020)
- 20 Mercedes-Benz Australia/Pacific, answers to questions on notice from Senator O'Neill, 24 November 2020 (received 3 December 2020).
- 21 Honda Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 8 December 2020).
- 22 Jaguar Land Rover, answers to questions on notice from Senator Pratt, 7 December 2020 (received 10 December 2020).

- 23 Kia Motors Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 10 December 2020).
- 24 Volvo Car Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 15 December 2020).
- 25 Mazda Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 15 December 2020).
- 26 Australian Competition and Consumer Commission, answers to questions on notice from Senator O'Neill, 03 December 2020 (received 17 December 2020).
- 27 Subaru Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 17 December 2020).
- 28 GM Holden, answers to questions on notice from Senator Pratt, 7 December 2020 (received 17 December 2020).
- 29 Toyota Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 17 December 2020).
- 30 Lexus Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 17 December 2020).
- 31 Peugeot Citroen Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 17 December 2020).
- 32 Mitsubishi Motors Australia Limited, answers to questions on notice from Senator Pratt, 7 December 2020 (received 17 December 2020).
- 33 Nissan Motor Co. Australia, answers to questions on notice from Senator Pratt, 7 December 2020 (received 17 December 2020).
- 34 Mercedes-Benz Australia/Pacific, answers to questions on notice from Senator Pratt and Senator O'Neill, 7 December 2020 (received 17 December 2020).
- 35 Ferrari, answers to questions on notice from Senator Pratt, 7 December 2020 (received 18 December 2020).
- 36 Hyundai, answers to questions on notice from Senator Pratt, 7 December 2020 (received 21 December 2020).
- 37 BMW Group, answers to questions on notice from Senator Pratt, 7 December 2020 (received 22 December 2020).
- 38 Mitsubishi Motors Australia Limited, answers to questions on notice from Senator O'Neill, 7 December 2020 (received 17 December 2020).
- 39 Treasury, answer to question on notice from Senator O'Neill, 5 February 2021 (received 25 February 2021).
- 40 Department of Industry, Science, Energy and Resources, answers to questions on notice from Senator O'Neill, 5 February 2021 (received 25 February 2021).
- 41 Australian Automotive Dealers Association, answers to written questions on notice from Senator Faruqi, 6 August 2020 (received 17 March 2021).

Tabled Documents

- 1 Letter from Renault Australia to Mr Richard Bennett, tabled by Senator Deborah O'Neill at a public hearing in Canberra on 5 February 2021.

Appendix 2

Public hearings and witnesses

Monday, 3 August 2020

Committee Room 2S3, Parliament House

Australian Automotive Dealer Association

- Mr James Voortman, CEO

Department of Industry, Science, Energy and Resources and Department of Education, Skills and Employment

- Mr Bruce Wilson, Head of Division, Industry Growth
- Mr Peter Cully, Head of Division, Small & Family Business
- Mr Alistair Beasley, Assistant Secretary, Industry, Regional & International Strategies Branch, Labour Market Strategy Division
- Mr Stephen Stoddart, Manager – Manufacturing and Advanced Technologies
- Mr Darren Atkinson, Manager, Advanced Manufacturing
- Ms Benedikte Jensen, First Assistant Secretary, Labour Market Strategy Division
- Dr Stephen Arnott, First Assistant Secretary, Office for the Arts
- Ms Ann Campton, Assistant Secretary, Collections and Cultural Heritage Branch, Office for the Arts
- Mr Matthew Forno, Assistant General Manager, Policy and Governance Group

GM Holden

- Mr Kristian Aquilina, Interim Chairman and Managing Director
- Mr David Magill, Director - Government Relations and Public
- Mr Michael Jackson, Director - Sales
- Mr Russell Dmytrenko, Chief Financial Officer

Mr John Crennan, Private capacity

Mr Mark Palmer, Private capacity

Motor Trades Association of Australia

- Mr Richard Dudley, CEO

Australian Competition and Consumer Commission

- Mr Rami Griess, Executive General Manager Enforcement
- Mr Nicholas Heys, Deputy General Manager Enforcement Coordination

Professionals Australia

- Ms Melissa Cadwell, Organiser
- Ms Michelle Anthony, Acting Director - Industry Relations
- Dr David Johnson, Member

Australian Manufacturing Workers' Union

- Mr David Smith, Assistant National Secretary

Australian Automotive Aftermarket Association (AAAA)

- Mr Stuart Charity, CEO
- Ms Lesley Yates, Director - Government Relations and Advocacy

Federal Chamber of Automotive Industries

- Mr Tony Weber, CEO
- Mr Tony McDonald, Director - Industry Operations

Thursday, 19 November 2020

Main Committee Room

Parliament House

Canberra

National Automobile Dealers Association

- Mr Andrew Koblenz, Executive Vice President, Legal & Regulatory Affairs
- Mrs Lauren Bailey, Director, Franchising and State Law

Australian Automotive Dealer Association

- Mr James Voortman, Chief Executive Officer
- Mr Brian Savage, Chief Operations Officer

Astoria Honda Brighton

- Mr Mark Avis, Director
- Mr Ron Klein, Dealer Principal

Federal Chamber of Automotive Industries

- Mr Tony Weber, Chief Executive
- Mr Tony McDonald, Director, Industry Operations
- Mr Peter George, Legal advisor

Motor Trades Association of Australia

- Mr Richard Dudley, Chief Executive Officer

Tuesday, 24 November 2020

Main Committee Room

Parliament House

Canberra

National Toyota Dealers Association

- Mr David Hayes, Chairman
- Mr Brett Mills, incoming Chairman

Toyota Australia

- Mr Matthew Callachor, President & Chief Executive Officer
- Ms Simone Zerial, General Counsel
- Mr Andrew Willis, Manager, External Affairs

Mitsubishi Motors Australia Limited

- Mr Tim Hore, Director of Sales
- Ms Catherine Humphreys-Scott, Public Relations Manager

Honda Australia

- Mr Stephen Collins, Director

Mr David Blackhall, Private capacity

Mercedes-Benz Australia/Pacific Pty Ltd

- Mr Horst von Sanden, Managing Director Mercedes-Benz Cars & CEO Mercedes-Benz Australia/Pacific Pty Ltd
- Mr Jason Nomikos, Director of Customer Management & Network Development

Department of Industry, Science, Energy and Resources

- Mr Peter Cully, Head of Division, Small & Family Business
- Mr Bruce Wilson, Head of Division, Industry Growth

The Treasury

- Ms Kate Lynch, Principal Adviser, Market Conduct Division
- Mr Toby Robinson, Manager Consumer Policy Unit, Market Conduct Division

Australian Small Business and Family Enterprise Ombudsman

- Ms Kate Carnell, Ombudsman
- Ms Alexandra Hordern, Director of Advocacy

Australian Competition and Consumer Commission

- Mr Rami Greiss, Executive General Manager, Enforcement Division
- Mr Nick Heys, Deputy General Manager Enforcement Coordination and Strategy, Enforcement Division

Friday, 5 February 2021

Committee Room 2S1

Parliament House

Canberra

Mr Richard Bennett, Private capacity

Dr Nick Gangemi, Private capacity

Department of Industry, Science, Energy and Resources

- Mr Bruce Wilson, Head of Division, Industry Growth
- Dr Gino Grassia, A/g Head of Division, Small & Family Business
- Mr Simon Arnold, Manager, Small & Family Business

Treasury

- Mr Adrian Russell, Senior Adviser, Competition Unit, Market Conduct Division
- Mr Tom Dickson, Assistant Secretary, Corporations Branch
- Mr Paul Palisi, Director, Competition Unit, Market Conduct Division
- Ms Megan Trudgian, Senior Adviser, Consumer Unit, Market Conduct Division