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**FCAI Submission to the Senate  
Education and Employment References  
Committee on the Inquiry into General  
Motors Holden Operations in Australia  
(as expanded)**

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## INTRODUCTION

1. This submission is made by the Federal Chamber of Automotive Industries (FCAI), on behalf of itself and its members who distribute passenger motor vehicles, light commercial vehicles and SUVs (new motor vehicles) (Distributors).
2. This submission is in response to a request for submissions from the Senate Education and Employment References Committee on the Inquiry into General Motors Holden Operations in Australia.
3. On 7 October 2020 the Committee resolved 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.

## EXECUTIVE SUMMARY

- Despite what some industry stakeholders try to inaccurately depict, the relationship between dealer and distributors is generally excellent, and there is no evidence of wide-ranging disputation between them or termination of dealer agreements. Excluding the Holden situation (which is an unusual and unprecedented circumstance), there is no evidence of distributors terminating dealer agreements in substantive numbers at all – termination is unusual and rare. Dealerships are very stable across established brands and have been for many years.
- Similarly, catchphrases such as ‘imbalance of power’ may suit the agendas of some industry stakeholders, but they are misleading and result from an unsophisticated analysis of the dealer and distributor participants in the sector. The reality is that many distributors are small to medium in size, and many dealer conglomerates operate on a scale that far outweighs them.
- While dealers sometimes like to present a narrative that they are coerced into, or have little alternative but to agree to make substantial capital investments that are uneconomic because the tenure offered by the distributor is inadequate, this is not true. Distributors cannot compel dealers to make capital investments during the term of their agreements - to do so would be unlawful. Distributors may however offer a new dealer agreement on the basis that the dealer *agrees* to make some capital investments. The dealer is free to agree to this or not.
- Many automotive brand names are extremely valuable, however dealers do not pay the distributor anything to use their brand name. Similar to other franchises systems, the location of dealerships is extremely important. However, the big difference is that dealers control their location, not the distributor. Hence dealers can build up and be rewarded for the goodwill that attaches to their location. If anything, a significant power that dealers hold in their relationship with distributors is their location. This is often overlooked or ignored in the narrative dealers would rather have people believe.
- The ink is only just dry on an extensive legislative review and consultation process on the regulatory arrangements between distributors and dealers, and changes to the Franchising Code that were introduced on 1 June 2020. These changes are yet to have been given sufficient time for their effect to be felt through the distributor / dealer relationship, but nonetheless will result in even more detailed up-front disclosure to dealers before they enter dealer agreements, and more comprehensive obligations on distributors if and when any dealer agreement comes to an end. Further regulatory changes will be introduced shortly in the Government's response to the *Fairness in Franchising* report.
- The current regulatory settings, including allowing for the additional changes to the Franchising Code to be introduced following the *Fairness in Franchising* report and the ACCC's collective bargaining class exemption to commence in 2021, are appropriate, and further regulation would risk tipping the balance towards over-regulation.



## SOME GENERAL COMMENTS

1. Before addressing the specific items raised by the Committee, FCAI suggests that the following general comments will be helpful.

### **Automotive dealers are not really 'franchises'**

2. The relationship between distributors and dealers is not what would normally be considered a 'franchise'. Notwithstanding that vehicle brands may be well established and extremely valuable to distributors<sup>1</sup> and dealers, dealers do not pay anything to the distributors for the use of the brand. 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. All that dealers generally pay distributors for are the vehicles, parts and accessories they purchase from the distributor, as well as special tools for servicing/repairs.
3. The relationship between dealers and distributors is much more like a straight distribution arrangement, rather than a franchise. This is reinforced by the fact that the relationship would not be caught by the general definition of 'franchise agreements' in the Franchising Code of Conduct (**Franchising Code**). Dealer agreements are only caught 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: but for this deeming provision it would not be a franchise agreement.
4. Distributors have not been the subject of any of the recent criticisms levelled at the franchising sector, in the areas of payroll and employment issues, the 'churning and burning' of franchisees, the unfair treatment of small 'mum and dad' franchisees lacking business experience and so on. None of these issues are characteristics of the new motor vehicle industry. For example, dealers do not pay franchise fees, and dealers are commonly sophisticated, experienced business people of high net worth or substantial dealership conglomerates with significant capital and resources.
5. Consequently, there is no sound policy basis to provide dealers with extra protections over and above those afforded to ordinary mum and dad franchisees under the existing provisions of the Franchising Code. The suggestion that such sophisticated, experienced business people as dealers require a greater level of protection than ordinary franchisees is illogical and inaccurate.

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<sup>1</sup> For example, Toyota's brand has been valued at US\$41.5 billion in 2020 by Forbes Magazine <https://www.forbes.com/the-worlds-most-valuable-brands/#74b29019119c>

### **The relationship between dealers and distributors is generally excellent**

6. Too frequently, the relationship between dealers and distributors is portrayed as being continuously adversarial. This is far from the truth. The relationship between dealers and distributors is symbiotic. This is particularly apparent in the Australian market where there are 67 brands and over 450 vehicle models competing for limited sales. Not only does each need the other, they each need the other to be operating as effectively as possible. Sure, a strong dealer network benefits the distributor, but it also benefits the dealers collectively. This is particularly the case for well managed dealers. They collectively draw strength from each other. But the converse is also true. A weak dealership will drag down the better performing dealers in the network. It is therefore in the interests of the dealers that the distributor holds underperforming dealers to account and seeks to maximise the operational and reputational strength of the network overall.
7. It is true that on occasions, and like any other commercial relationship between two parties, there are disputes between a dealer and a distributor but this should be put in perspective. First, in any commercial relationship between a retailer and distributor, there will inevitably be some level of dispute. Second, objective evidence demonstrates that the level of significant dispute between dealers and distributors in the Australian automotive market is negligible. The FCAI's research shows that there have been less than 2.5% of dealer agreements terminated in the five year period to December 2015 (less than 0.5% per annum) and less than 1.5% of dealer agreements (less than 0.33% per annum) terminated in the four and a half years to June 2020<sup>2</sup>.
8. Distributors and dealers recognise the need to work co-operatively to deliver the best value to consumers in a very competitive market. Many distributors have set up Dealer Councils, specifically for this purpose. Generally, Dealer Councils operate independently of distributor control, and are comprised of long standing and very experienced dealers, which creates a strong and highly engaged forum for distributors and dealers to work together to resolve potentially contentious issues before they arise. Dealer Councils also have a role in working with distributors to develop strategies in relation to issues of common concern for their mutual benefit. Distributors engage with their Dealer Councils in a spirit of co-operation and collaboration.

### **We operate in a market economy**

9. One of the inescapable consequences of operating in the market-based Australian economy is that participants have to accept a degree of risk – that is, 'entrepreneurial risk'. Operating a new motor vehicle dealership and distribution arrangement is no different – a dealer and a distributor each has to accept a degree of risk. If these risks happen to materialise the business of either or both will be impacted. If the impact is sufficiently large, the business of either or both might well fail. Dealers, like

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<sup>2</sup> Out of a sample provided by distributors representing 60% of the total Australian new vehicle market

other prudent business people, must factor the various risks associated with operating an automotive dealership into their operations, and this risk can only be assessed at the time of considering entry into the dealer agreement. The automotive sector does not operate in a bubble or cocoon from the rest of the economy and is subject to the prevailing business environment and economic conditions.

10. There may well be circumstances where a dealer is over- optimistic when entering a dealer agreement and underestimates the risks involved, or a dealer may not have the business acumen necessary to run a successful dealership. Further, unforeseen circumstances may arise (of which COVID-19 is a perfect example). This is however, not something that can or should be laid at the feet of the distributor. Over-optimism, bad business decisions or unforeseen circumstances, or a combination of these factors, might lead to the business failing, but this is how the Australian market works. Of course, the converse is also true – a realistic assessment of the prospects of a business coupled with good decisions and practices means that the business has good prospects of success.
11. In short, businesses that sell new vehicles are no different to businesses that sell anything else, and accordingly should be given no greater protections than any other.

#### **Dealer Information**

12. It is important that a dealer, before entering into an agreement, is able to take into account all relevant and available information before making its decision on whether or not to enter into a dealer agreement.
13. The first point to make is that in the automotive industry, it is extremely rare that an individual or entity would approach a distributor as a prospective dealer without any prior knowledge or experience of the automotive industry. On the contrary, potential dealers in the automotive industry often have a better idea of the issues facing the market because they invariably already have experience in the automotive market. This is another area in which the new vehicle automotive sector greatly differs to 'traditional' franchises.
14. The second point is that the Franchising Code requires all prospective dealers be provided with a disclosure document. The information that is required to be set out in a disclosure document is comprehensive. It enables a prospective dealer to consider, among other things:
  - the experience of the distributor
  - details of the existing dealer network and recent changes that have occurred in the network
  - a statement regarding the expected earnings of the dealership
  - any expected capital expenditure requirements
  - a summary of key aspects of the dealer agreement.
15. Not only does the Franchising Code require a significant level of information to be provided it also requires the distributor to advise the prospective dealer to obtain



independent legal, accounting and business advice. Further, it provides the prospective dealer with a minimum fourteen day period to consider the documentation prior to execution.

16. This puts a prospective dealer in a substantially better position than most other prospective purchasers of commercial businesses who have to rely upon their own enquiries and are largely subject to the 'caveat emptor' (buyer beware) principle.

### **No power imbalance**

17. The image of a small independent dealership operated by a couple of battlers, is a compelling image. It is however far from the majority experience. The reality is much more likely to be that the dealership is part of an automotive group or conglomerate that has a number of brands, and/or a multi-franchise dealer which is run by sophisticated, well capitalised and highly experienced business people and high net worth individuals with access to quality internal and external legal, financial and commercial advice.

18. Some facts and observations:

- a. As at 2019, fewer than 16% of all dealerships were owned and operated as a single new motor vehicle dealership, and the FCAI understands that since that time there has been significant further consolidation of dealerships within Australia which will further reduce the percentage of single site operators;
- b. More than 60% of new vehicle sales in Australia are made by dealer conglomerates that own five or more new car dealerships,
- c. The largest automotive dealer conglomerate in Australia is Eagers Automotive Limited. It has approximately 250 motor vehicle dealerships and represents almost 30 car brands, and 10 truck and bus brands. Its underlying operating profit before tax for the 9 months ended 30 September was nearly \$100 million. According to its 2019 annual report<sup>3</sup>, it employs 8,432 employees. This is a larger business than any distributor operating in Australia. Another example is Autosports Group Limited, which has over 40 new vehicle dealerships, used car dealerships and collision repair businesses, and reported gross profit in FY19 of over \$23 million<sup>4</sup>;
- d. Even the so-called 'family businesses' in the automotive industry are often significant and wealthy. For example, the Suttons Group has 42 dealerships representing 30 brands with a turnover in 2017 of more than \$1 billion;
- e. As pointed out by the Motor Trades Association of Australia in its submission to the 2018 Parliamentary Joint Committee Inquiry into the Operation and

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<sup>3</sup> [https://www.apeagers.com.au/wp-content/uploads/2020/04/PPJ016164\\_APE-Annual-Report-2019\\_FA\\_Web-ASX\\_r.pdf](https://www.apeagers.com.au/wp-content/uploads/2020/04/PPJ016164_APE-Annual-Report-2019_FA_Web-ASX_r.pdf)

<sup>4</sup> Autosports Group Limited ABN 54 614 505 261 Annual Report - 30 June 2019

Effectiveness of the Franchising Code of Conduct, a typical, mid-sized metropolitan motor car dealer employs at least 40 people (and as many as 90) and has an annual turnover in the region of \$100 million.

- f. Many of the smaller distributors have turnovers and sell vehicles in volumes that are dwarfed by the larger dealers. For example, of the over 40 brands reporting sales via FCAI's VFACTS in 2019, more than half of them sold less than 5,000 vehicles in 2019, with more than a quarter of them selling less than 1,000 vehicles in 2019. In comparison to many dealer conglomerates, their Australian sales and operations are small. Nonetheless, they are deemed franchisors under the Franchising Code.
- g. Further, not all distributors are wholly owned subsidiaries of an overseas manufacturer. For example, there are approximately six well-known brands and a handful of other brands that are imported and distributed in Australia by independent companies. These independent distributors would be subject to their own 'distribution agreement' contractual arrangements with the overseas manufacturer, under which they trade using the manufacturer's brand under licence. Some of the brands imported and distributed by independent distributors are considered niche brands in the Australian market – they are not 'volume' brands by any stretch of the imagination, and similarly their sales and operations are small in comparison to many of their dealers. Notwithstanding their 'niche' status and size, they are similarly considered franchisors under the Franchising Code.

### **Exploitation of dealers is already unlawful**

- 19. Even if you were to accept that there was a theoretical power imbalance in favour of the distributors, any attempt to exploit this to the detriment of dealers would be unlawful under a range of laws already existing in Australia. For example:
  - a. A failure to act in good faith is a breach of the Franchising Code, subject to a maximum penalty of approximately \$60,000.
  - b. Engaging in unconscionable conduct is a breach of the Australian Consumer Law and is subject to a maximum penalty of \$1.1 million for a corporation and \$220,000 for an individual. In addition, there is a range of remedies available to the affected party, including an action for damages.



### **There has been a recent comprehensive similar enquiry**

20. In December 2018, the Department of Industry, Science, Energy and Resources released a Consultation Regulation Impact Statement (RIS) to explore policy responses to new car dealers' concerns with their franchising relationship with car manufacturers.

The Consultation RIS was:

*'seeking comments on options to address issues raised by new car dealers relating to the imbalance of power in their commercial arrangements with manufacturers, such as end of term arrangements, requirements for capital expenditure, and dispute resolution'.*

21. After an extensive consultation process - including with industry associations, small rural dealerships, larger dealers and car manufacturers - it was determined by the Australian Government that the most appropriate response was to introduce some limited automotive industry specific amendments into the Franchising Code of Conduct. These came into effect on 1 June 2020.

22. The ink is hardly dry on these amendments and a reasonable opportunity should be provided for their effect to be considered before any further changes are recommended. These amendments are to the exclusive benefit of automotive dealers.

### **Any response should not be based on the Holden experience**

23. The Committee has already heard a lot about GM-Holden's withdrawal from the Australian market. The FCAI would like to make the following two brief points:

- a. the complete withdrawal of a major player in the Australian automotive market is unprecedented and there is nothing to suggest that it is the start of a trend; and
- b. GM-Holden Australia's actions arose because of a decision made by its parent, which are outlined in Holden's 25 June 2020 submission to the Committee. The impact of this decision affected the entire GM-Holden dealer network. This is fundamentally different to the relationship between an Australian distributor of an on-going brand and its individual dealers.

## THE SPECIFIC ITEMS IDENTIFIED BY THE COMMITTEE

### **Practices employed by manufacturers in their commercial relations with dealers, with specific focus on:**

#### **• investment required and tenure provided**

24. At times it has been put by dealers that they have little alternative but to agree to make substantial capital investments that are uneconomic because the tenure offered by the distributor is inadequate. The FCAI completely refutes this and makes the following points:
- a. There is no evidence that, as a matter of fact, this is occurring. If anything the opposite is true - dealerships are very stable across established brands and have been for many years;
  - b. Distributors cannot compel dealers to make capital investments (that the dealer has not agreed to) during the term of their agreements. To do so would be unlawful.
  - c. Distributors can offer a new dealer agreement on the basis that the dealer agrees to make some capital investments. The dealer can agree to this or not. 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 strategically significant. Therefore, the dealer has a real opportunity to enter into another dealer agreement with another distributor.
  - d. From 1 June 2020, new 'significant capex' disclosure requirements were introduced among the changes to the Franchising Code that apply only to new motor vehicle dealership agreements, including requiring disclosure of anticipated outcomes and benefits of the capex, and a discussion between the parties about the circumstances under which the expenditure is likely to be recouped, *before* the dealer agreement is entered. 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.

#### **• termination and compensation practices**

25. As mentioned above, the relationship between distributors and dealers is generally excellent. Healthy and profitable dealer networks are core to the success of all motor vehicle brands. As with any commercial arrangement, the parties may not always see eye to eye. If a disagreement between them escalates, the parties can avail themselves of the complaint handling procedure in the dealer agreement that the Franchising Code requires.
26. Distributors are typically reluctant to terminate a dealer agreement. To do so is time consuming and rarely straight forward, and any termination must be carried out in

accordance with detailed conduct requirements under the Franchising Code requiring minimum periods of notice to the dealer. Termination of a dealer agreement is also disruptive to all stakeholders, including the dealer, the distributor and their customers.

27. Excluding the Holden situation (which, as previously mentioned, is an unusual and unprecedented circumstance), there is no evidence of distributors terminating dealer agreements in substantive numbers at all – termination is unusual and rare.
28. Rather than termination, most distributors would prefer to encourage a dealer to sell their dealership, and in doing so would rather assist the dealer to sell their business to a new operator wherever possible. In fact, the sale of a dealership agreement from one dealer to another is a common occurrence in the new motor vehicle industry.
29. If and when there is a termination (or a 'non-renewal') of a dealer agreement, under the changes to Franchising Code introduced on 1 June 2020, distributors are now required to agree with the dealer on wind-down plans in relation to stock. Again, these recent changes to the Franchising Code have not yet filtered through the dealer agreement lifecycle, but should result in a very low risk of dealers retaining substantial stock beyond the end of the dealer agreement. Regardless, many distributors were already engaging with dealers on wind down plans prior to 1 June 2020 and willingly re-purchase unsold motor vehicle stock from dealers, upon termination or non-renewal, as it is clearly in the distributor's best interests to do so.
30. Further, in the case of a non-renewal, this decision must be communicated to the dealer more than 12 months before the end of their dealer agreement and this gives the opportunity for that dealer to dispose of their dealership business in the ensuing 12 months provided the distributor continues to require representation in the area covered by the dealer which will not be renewed.

#### • performance requirements

31. Like most other types of commercial business relationships involving the sale of products, distributors are likely to require their dealers to strive for certain performance requirements across a range of metrics, whether they be for matters such as sales of vehicles and parts, customer care and satisfaction, or showroom facility cleanliness and customer hospitality. These are unique to each distributor and not something that FCAI can, nor should, comment on in detail.
32. However, in setting and enforcing any performance requirements in their dealer networks, 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.

#### • behaviour around warranty claims and Australian Consumer Law

33. The approach of distributors in relation to warranty claims and the Australian Consumer Law has already been the subject of a detailed 'market study' conducted by the ACCC<sup>5</sup> (**Market Study**). Following the Market Study, the ACCC published its

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<sup>5</sup> ACCC's New car retailing industry market study - final report: <https://www.accc.gov.au/publications/new-car-retailing-industry-market-study-final-report>



'Motor vehicle sales & repairs industry guide to the Australian Consumer Law'<sup>6</sup> (**Industry Guide**). FCAI understands that most distributors handle warranty and Australian Consumer Law claims in a manner that is consistent with the Industry Guide, or otherwise have incorporated the Industry Guide into their own claims handling procedures.

34. Dealers are an integral part of distributors' warranty and Australian Consumer Law claims handling processes. Dealers essentially act as the distributor's agent for the purposes of manufacturer's warranty repairs. Similarly, where a distributor provides a remedy to a consumer under the Australian Consumer Law, dealers often act as the distributor's agent in providing remedies to consumers. This requires help from dealers in diagnosing vehicle faults, for which dealers are paid by the distributor for the labour involved, and processing claims.
35. Similarly, dealers assist distributors in the conduct of safety recalls by performing any inspection and repairs required in the recall. Dealers play a critical role in safety recalls, and distributors would have difficulty conducting recalls without the assistance of their dealer networks. Understandably, distributors pay dealers to perform safety recall repair work. FCAI understands this is a profitable area for dealers and that, for instance, dealers have devoted significant resources and made substantial profits from the compulsory Takata recall.
36. Under the Australian Consumer Law, Dealers have the benefit of a statutory indemnity from distributors for costs incurred by them as a result of manufacturing defect claims consumers make against dealers pursuant to the statutory 'consumer guarantees'.
37. 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, within certain authority limits and processes. Dealers then submit an expense claim to the distributor. 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.

• **unfair terms in contracts**

38. The Australian Consumer Law protects small businesses from unfair terms in standard form contracts. Franchise/dealer agreements are considered a 'standard form contract' for the purposes of this law. FCAI understands that this existing legislative regime works as intended insofar as it relates to dealer and distributor relations.

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<sup>6</sup> <https://www.accc.gov.au/publications/motor-vehicle-sales-repairs-an-industry-guide-to-the-australian-consumer-law>

• **goodwill and data ownership;**

39. There are two aspects to 'goodwill' – the goodwill that attaches to a brand and the goodwill that attaches to a location.
40. As has been previously discussed, automotive brand names are extremely valuable. Dealers however, do not pay the distributor anything for the use of their brand. 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.
41. 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.
42. Similar to other franchising systems the location of dealerships is extremely important. However, the big difference is that dealers control their location, not the distributor. Hence dealers can build up and be rewarded for the goodwill that attaches to their location. As dealers typically own or control the showroom and service facilities from which they operate, this also means that if, for example, a distributor asks a dealer to make a capital investment on any upgrade to their showroom facility, it is dealers that benefit from increased asset values resulting from the capital investment. The capital investment isn't wasted, as even if a dealer agreement eventually expires or is terminated for some reason, dealers are able to easily re-purpose their facilities for the sale of used vehicles, or even for another automotive brand. They may continue to use their service facilities to service the vehicles of their existing customers (albeit not as an 'authorised dealer'). FCAI has already observed the re-purposing of some Holden facilities in this fashion.
43. The terms of reference of this inquiry do not make clear the 'data' to which this line of inquiry relates. For the purposes of this submission, FCAI assumes that 'data' means 'customer data' or customer personal information.
44. Distributors rightly require dealers to disclose to them the identity of new vehicle buyers, for the purposes of, among other things:
  - a. Assisting with conducting and maximising safety recall effectiveness;
  - b. Managing claims under the distributor's warranty against defects and any claims that may arise under the ACL;
  - c. Customer support, research and experience; and
  - d. Provision of roadside assistance programs.
45. Given that distributors have a liability under the ACL to provide repair services and conduct recalls long after a vehicle has been sold, it is necessary for the distributors to collect and retain this data for its own lawful purposes. This does not prevent the dealer from also retaining the data for its own lawful use.

• **existing legislative, regulatory and self-regulatory arrangements / current and proposed government policy;**

46. Insofar as the relationship between distributors and dealers is concerned, the key legislative obligations governing their relationship rests within the Competition and Consumer Act 2010 (Cth)(CCA). Within the CCA sits the Franchising Code and the Australian Consumer Law.
47. As mentioned in paragraphs 20 - 22, the ink is only just dry on an extensive legislative review and consultation process on the regulatory arrangements between distributors and dealers, and changes to the Franchising Code that were introduced on 1 June 2020. Arguably, these changes are yet to have been given sufficient time for their effect to be felt through the distributor/dealer relationship, but nonetheless will result in even more detailed up-front disclosure to dealers before they enter dealer agreements, and more comprehensive obligations on distributors if and when any dealer agreement comes to an end.
48. In August 2020, the Australian Government released its response to the Parliamentary Joint Committee Inquiry into the operation and effectiveness of the Franchising Code report, *Fairness in Franchising*. The Government agreed that improvement in fairness and transparency for franchisees generally, including dealers, is required and said it had listened to the Franchising Taskforce which was established to examine the feasibility and implementation of the report's recommendations. The Government's response includes making further changes to the Franchising Code which include:
- a. Doubling the penalties that apply for a breach of the Franchising Code;
  - b. Allowing conciliation and voluntary binding arbitration, in addition to mediation;
  - c. Improved disclosure, especially in relation to supply arrangements, marketing funds, exit arrangements and significant capital expenditure;
  - d. Requirement for franchisors, including distributors, to provide a Key Disclosure Information Fact Sheet which would highlight key information and assist franchisees, including dealers, to make better informed decisions whether or not to enter into a franchise agreement.

Should these further changes to the Franchising Code be implemented, distributors will be required to comply with them and dealers will be the beneficiaries.

49. Furthermore, on 22 October 2020 the ACCC announced that an ACCC class exemption due to commence in early 2021 will allow franchisees to collectively negotiate with their franchisor, without first having to seek ACCC approval. This means that dealers will be able to seek to collectively bargain with distributors in relation to the terms of their dealer agreements. As the ACCC points out in its media release on that date<sup>7</sup>, "There can be many benefits for businesses negotiating as a group rather than individually, including sharing the time and cost of negotiating contracts, and potentially giving group members more of a say on contract terms and conditions".
50. In relation to the Australian legislative and regulatory framework more generally, the FCAI believes that it is critical that it remain proportionate and commensurate with international regimes in order to remain attractive for investment. Changes of the

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<sup>7</sup> <https://www.accc.gov.au/media-release/class-exemption-will-enable-small-businesses-to-collectively-bargain>



nature proposed by the dealer representative bodies would shift commercial risk to the distributors to an unacceptable and unfair extent and make the Australian market less attractive relative to other markets. Such changes therefore potentially threaten investment and ultimately the choices available to Australian consumers.

51. FCAI believes 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.

**• dispute resolution systems and penalties for breaches of the Franchising Code of Conduct;**

52. Since it was introduced in 1999, the Franchising Code has placed an obligation on distributors to include a prescribed dispute resolution mechanism in their dealer agreements. This dispute resolution mechanism focuses on mediation. The amendments to the Franchising Code introduced on 1 June 2020 clarify that two or more dealers may ask for their disputes with a distributor to be dealt with together. Further amendments to the Franchising Code anticipated to be introduced (as explained in paragraph 48) will allow for conciliation and voluntary binding arbitration, in addition to mediation.
53. As also explained in paragraph 8, Dealer Councils create a strong and highly engaged forum for distributors and dealers to work together to resolve potentially contentious issues before they arise. The ACCC class exemption due to commence in early 2021, allowing franchisees to collectively negotiate with their franchisor, without first having to seek ACCC approval, will only add to this.
54. Penalties that apply for a breach of the Franchising Code are anticipated to be doubled in line with the Government's response to the *Fairness in Franchising* report.

**• current and proposed business models in selling vehicles;**

55. It is public knowledge that some distributors are reviewing the business models by which they sell new vehicles in Australia. It is not for FCAI to think of new models, pass judgement on the efficacy of any new models, or predict whether any new models may or may not be introduced or succeed. New models may not necessarily result in distributors and dealers operating outside the Franchising Code. In fact, FCAI thinks this is highly unlikely.
56. That said, FCAI is firmly of the view that all businesses should be positioned to evolve and adapt to an ever-changing business environment and in response to shifting consumer preferences and advances in technologies. This is the heart of innovation: change and improvement in a thriving business environment and society, and should not be discouraged. To discourage this or otherwise entrench a certain business model at the exclusion of others would stifle improvement, closing off that sector to new ways of doing things that could benefit all stakeholders, including consumers. Trying new things is indeed a risk – they may not work at all, or may not work as well as hoped, or they may have different outcomes for different brands. However, it would risk an industry or sector being left behind completely, whilst other areas of the economy are able to operate without such constraints could experiment freely, evolve and thrive, if any one business model were to become entrenched or enshrined, either directly or indirectly. Over-regulation in the automotive sector in favour of dealer business protections carries this risk. A risk that could also adversely impact consumers.

57. The new vehicle sector, like all other sectors of the economy, is not immune from disruption and change. It doesn't exist in its own bubble or cocoon. This applies to distributors and dealers alike. FCAI is not so brave (or foolish) as to predict what the future may hold for new motor vehicle retailing, other than to say it expects change, just like any other sector. If anything, the new motor vehicle retailing sector has so far escaped much of the change and disruption of other sectors caused by the online sales revolution. It arguably lags behind in this regard, perhaps in part because true online sales in this space has a high level of complexity – vehicles require registration, insurance and often finance, may involve a 'trade-in', and are not as easily deliverable to a consumer as a parcel. Additionally, expanding electric vehicle model ranges and the continued development of autonomous vehicles may make alternative ownership and vehicle usage models viable
58. From the FCAI's perspective, the ultimate question has to be whether the regulatory settings in the sector are appropriate for all stakeholders, or whether further regulation is required. FCAI's view is that the current regulatory settings, including allowing for the additional changes to the Franchising Code to be introduced following the *Fairness in Franchising* report, and the ACCC's collective bargaining class exemption to commence in 2021, are more than adequate, but that even further regulation would risk tipping the balance towards over-regulation.
59. As a final point on this particular question it is important to note that the consideration of different business models is not focused on some particular desire to change the current dealer arrangements. 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.

• **the imposition of restraints of trade on car dealers from car manufacturers;**

60. FCAI is not aware that any distributors place restraints of trade on dealers, either during the term of a dealer agreement or after the dealer agreement ends. It is accepted that dealers are typically 'multi-brand', so clearly restraints are unlikely to be agreed to or pursued in the sector.