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Mr Alan Raine
Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

Electronic

Dear Secretary

**Education and Employment References Committee
Inquiry into General Motors Holden Operations in Australia**

We refer to your letter dated 12 October 2020 in relation to the above inquiry (**Inquiry**).

Mitsubishi Motors Australia Limited (**MMAL**) is grateful for the opportunity to provide its submissions in relation to the Inquiry's terms of reference below.

At the outset, MMAL notes that the decision by General Motors to retire the 'Holden' brand and withdraw from operations in Australia (**Holden Exit**) to be highly unusual for the industry, and not reflective of the approach taken by other established importers and distributors of motor vehicle brands (**OEMs**) in Australia (or the approach taken by MMAL when it ceased manufacturing in Australia).

MMAL is not aware of any other established OEMs who, following a decision to cease manufacturing in Australia, have engaged in conduct similar to the Holden Exit.

In light of the above, while MMAL has addressed the Inquiry's terms of reference below, MMAL wishes to emphasise that it does not consider that the Holden Exit is indicative of any systemic issues that require specific legislative redress.

1 Introduction

MMAL is a subsidiary of Mitsubishi Motors Corporation, a global manufacturer of passenger and commercial vehicles.

MMAL is one of the top five motor vehicle brands in Australia and, through its network of franchised dealers, accounted for about 83,250 sales of new motor vehicles in the 2019 calendar year. MMAL's network of dealers are a critical part of its success, and MMAL works closely with them in marketing its vehicles in Australia.

The 'Mitsubishi Motors' group of companies has a long and proud history in Australia, dating back to 1965, when the Mitsubishi Colt was introduced in Australia. Between 1980 and 2008, MMAL manufactured vehicles in Australia at its factory in Tonsley, South Australia in addition to importing vehicles from overseas.

MMAL ceased its Australian manufacturing operations in 2008, but is committed to the Australian market and continues to make substantial investments in its Australian future. At the time that MMAL ceased its Australian manufacturing operations, it never considered exiting the market. Indeed, since 2008, MMAL has only increased its commitment to Australia.

As evidence of this commitment, MMAL has recently entered into a long-term lease to act as an anchor tenant in a new multimillion-dollar headquarters being constructed in the Adelaide Airport business precinct. The construction of this headquarters, and MMAL's long-term commitment to South Australia, will provide significant job creation opportunities for the State.

Additionally, as of 1 October 2020, MMAL has introduced an industry-leading 10-year warranty and capped price-servicing program, further demonstrating its ongoing commitment to Australia.

Having regard to the above, MMAL considers that its conduct following its cessation of manufacturing in 2008 can be taken as a case study of typical OEM behaviour in the industry (with the Holden Exit being an outlier).

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

(a) Investment required and tenure provided

Many dealers are sophisticated business operators, and are increasingly large corporate operators running multi-franchised operations.

Today, some dealer groups are larger than the OEM they represent and/or are publicly listed ASX companies (MMAL is a public company but is not a listed entity). These dealers are well aware of the levels of investment required to operate a viable and sustainable business in this industry.

Where dealers are small or medium sized businesses and family enterprises, in MMAL's experience they are nevertheless often also sophisticated operators of motor vehicle dealership businesses.

While it is a hallmark of some other franchise sectors that franchisees can readily enter a franchised network with no or very little prior experience of the relevant industry, or of operating an independent business at all, that is not a typical feature of the automotive sales and service industry. Many smaller or family business enterprises are multi-generational in their history of operating these kinds of dealerships, and have built up significant experience and goodwill in the market. They are familiar with the investment (both in terms of funding and other commitments) needed to successfully operate a business in this sector, and have operated historically in this environment.

MMAL does not consider that investment requirements for the automotive sector have increased disproportionately to other sectors. For example, in retail, increasing levels of investment to meet higher standards of presentation, quality and service levels are being required. This is being driven by several factors, including increased regulatory controls (e.g., safety and compliance regulation), the demands of large shopping centre lessors, competition in the market, and consumer expectations.

Similarly, factors such as consumer expectations and increasing safety and compliance standards are driving a need for greater investment by dealers, such as in their facilities, specialised equipment such as diagnostic and servicing tools, etc.

Where a dealer requires loan funding to meet the investment requirements of a dealership, generally it is available on attractive terms from commercial lenders.

The new "significant capex" disclosure requirements under the Franchising Code that were introduced from 1 June 2020 prohibit OEMs unilaterally imposing significant capital expenditure on dealers unless it has been disclosed to them (together with as much information as possible about the expenditure including the rationale, anticipated outcomes, benefits and risk) prior to their commitment to the dealer agreement. There is then required to be a discussion between the parties about the circumstances where the franchisee believes it is likely to recoup the expenditure.

These conditions are already more restrictive than the requirements that apply in franchise industries outside the automotive sector, which are subject to more lenient requirements.

All brand identity/corporate identification upgrades by MMAL's dealers are implemented based on agreement reached between MMAL and its dealers. MMAL does not seek to unilaterally impose significant capex requirements on its dealers. Therefore, MMAL would not intend to rely on any provisions recently changed in the Code to implement dealership capex upgrades, but would instead utilise section 50(2)(d) of the Code:

"For the purposes of subclause (1), significant capital expenditure excludes the following: ... (d) expenditure agreed by the franchisee".

MMAL is always prepared to discuss concerns about capex with its dealers. Under the latest changes to the Code, this appears to be mandated even if dealers do not want to have such discussions. MMAL believes this may increase its legal and administrative burden since MMAL will need to specifically enquire and then obtain waivers or other signed paperwork to evidence that these discussions have occurred (and their content), or that they were not wanted.

It is MMAL's opinion that there is no further adjustment to the Code required in this respect. MMAL is apprehensive about unintended outcomes, cost consequences or additional risks caused by further adjustments to the Code, even if they are well intended (as shown by the example above).

The duration of a dealer agreement is typically negotiated between the OEM and dealer taking into account the investment required and the time likely needed to recoup that investment. MMAL does not consider that it is appropriate to legislate any minimum tenure or term requirements for dealer agreements. 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-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.

Global factors such as mergers and acquisitions between OEMs is another example of how high regulation in one small market like Australia may cause broader concerns and conflict with larger processes at a macro level.

Dealers also seek flexibility regarding tenure and may be unwilling to commit to a particular brand for a minimum period. The automotive industry is a dynamic one and the popularity of products offered in the market can change rapidly. MMAL does not consider that the interests of dealers would be well served by prescriptive rules about tenure.

MMAL typically offers dealer agreements for a 5 year term and an additional 5 year renewal right exercisable by the dealer where there has been significant capital expenditure (provided minimum conditions are met). This provides dealers with the confidence of long-term tenure and supports their commitment to undertake investment in their facilities.

MMAL considers that competitive factors in the industry, rather than Government intervention, should drive investment and tenure requirements.

(b) Termination and compensation practices

OEMs are motivated to attract and retain high performing dealers, and maintain network coverage in order to achieve their goals. In many areas there is competition for valuable sites and limited space to represent brands, which favours dealers and creates competition between OEMs in retaining them. Termination of dealers is usually a last resort, and in MMAL's experience, it is not a frequent occurrence. When it does occur, it is usually for reasons that are supported by sound policy such as where there has been misconduct by a dealer or failure to meet KPIs following intensive performance management by MMAL.

MMAL has never terminated any dealer simply for convenience or "at will".

When dealers exit the network, often they will do so by transferring their franchise to a new operator (subject to OEM approvals). This can apply to dealers exiting by choice, and it can also apply in the case of underperforming dealers where the OEM is willing to allow the dealer to recoup its investment by selling to another dealer in lieu of terminating the franchise agreement.

The Franchising Code already prevents OEMs unreasonably withholding consent to the transfer of franchised businesses, and defines circumstances where consent can be withheld. MMAL considers that these (long-standing) Code provisions already provide adequate protection for dealers choosing to terminate their involvement in a franchise via business sale.

The Franchising Code contains terms regulating the termination of franchise agreements. Therefore, franchise agreements are already treated differently from many other forms of agreements or contracts in this regard, where the parties are free to choose and agree on termination rights. As a general observation, it seems undesirable to apply specific regulation to specific kinds of contracts, as this creates fragmented legal regulation. While it might be queried whether franchise agreements should be treated differently from other contracts such as licensing or distribution agreements, the franchising industry is of course already subject to bespoke regulation. MMAL would however question whether that regulation should be extended any further than it currently applies. Many other countries do not regulate franchising specifically.

If a franchisor fails (becomes insolvent), termination of franchise agreements may be necessary in those circumstances. This is an unavoidable risk for franchisees. MMAL's view however is that this is generally less of a risk in the automotive industry, where most OEMs are sizeable organisations often with shareholding by international groups. Therefore, franchisor cessation for business failure or insolvency reasons, and corresponding termination of franchise agreements, is inherently less likely.

Recent changes to the Code (now in effect) require the parties to agree on post-termination wind-down plans, including in relation to stock.

MMAL's approach in these circumstances is to seek to agree on reasonable wind-down and transition-out arrangements with a ceasing dealer. MMAL's standard Franchise Agreement contains provisions designed to facilitate these arrangements, including prescribed **buy-back terms for stock** and mandatory purchase by MMAL of diagnostic equipment.

However, MMAL queries the effectiveness of the recently-introduced wind-down provisions of the Code as a regulatory tool, since they would seem to amount to an obligation (which is in effect unenforceable) on the parties to agree on something. How might MMAL approach this obligation given an uncooperative dealer? Again, this is likely to increase MMAL's administrative burden, e.g. to implement practical controls to guard against allegations of breach of the Franchising Code

MMAL therefore has clear reservations about the potential for the introduction of further regulation in this area.

MMAL does not consider that further changes are required to the Code, and would be concerned at unintended side effects of any such changes made to the Code here.

(c) **Performance requirements**

MMAL considers that performance requirements for automotive dealers are usually well defined and reasonable, and are typically based on the available market within the dealer's allotted territory and compare the dealer's performance relative to other comparable dealers.

The performance criteria used by MMAL are incorporated into the Franchise Agreement, which sets out fixed formulas that define how certain KPIs will be calculated. Because these formulas are incorporated into the Franchise Agreement, they are not readily amenable to significant unilateral alteration by MMAL. These formulas set out a clear methodology for assessing the relevant performance criteria.

Since these formulas compare dealers' performance against the performance of other dealers, a level of fairness and objectivity is built in. External factors affecting all comparable dealers (such as economic conditions) would generally be recognised in the calculations.

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.

MMAL cannot envisage an effective way to legislate or regulate performance management of dealers beyond the current controls that already exist, which already include protections for dealers under unfair contract terms regulation, the prohibition against unconscionable conduct, and the duty to act in good faith. MMAL notes that OEMs that contravene these protections may be exposed to significant penalties. For example, the maximum penalty for engaging in unconscionable conduct is the greater of:

- (i) \$10 million;
- (ii) three times the value of the benefit gained; or
- (iii) (if that value cannot be calculated) 10% of an OEM's annual turnover.

MMAL's view is that more granular regulation of this aspect of the OEM-dealer relationship is neither warranted nor practically achievable.

(d) **Behaviour around warranty claims and Australian Consumer Law**

The *Australian Consumer Law (ACL)* provides consumers with a range of statutory guarantees, including (but not limited to) guarantees that:

- (i) vehicles supplied by MMAL or its dealers will be of acceptable quality;
- (ii) vehicles will be fit for any purpose for which the vehicles are being acquired that is made known to MMAL or its dealers;
- (iii) vehicles will comply with any express warranties given by MMAL or its dealers;
- (iv) MMAL will take reasonable action to ensure that facilities for the repair of vehicles that it supplies, and parts for those vehicles, will be reasonably available for a reasonable period after the vehicles have been supplied.

Where there has been a failure to comply with the consumer guarantees, a consumer is entitled to various remedies (including, in some circumstances, a refund of the purchase price paid for their vehicle).

These remedies are additional to any remedies the consumer may have under a contractual warranty, and suppliers and manufacturers cannot avoid their obligations under the ACL by relying on the terms of their contractual warranties.

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.

MMAL notes that the Australian Competition and Consumer Commission (**ACCC**) has expressed concerns that GM Holden's commitment to provide servicing and spare parts for at least 10 years may not be sufficient to comply with the guarantee as to repair facilities and spare parts identified above.¹

When MMAL ceased its manufacturing operations in Australia, it continued to maintain a significant network of dealers and authorised service centres, able to repair and service Mitsubishi vehicles.

In addition to the above, MMAL also invested significant resources into ensuring that spare parts for the vehicles it manufactured locally would continue to be available. By way of example, at the time that MMAL ceased manufacturing in Australia, the only vehicle it manufactured was the '380' sedan. MMAL stockpiled such a large quantity of spare parts for its 380 sedan that such parts continue to be readily available (even though the last 380 was manufactured on 27 March 2008).

MMAL is not aware of any instance in which an Australian manufacturer has failed to make appropriate repair facilities or spare parts available for vehicles for a reasonable period following their exit from the Australian market.

MMAL also notes that, to the extent that there are concerns about the availability of spare parts and repair facilities for GM Holden vehicles, these can largely be addressed by the competitive independent repair and aftermarket industry that exists within Australia (see section 2(f) below).

(e) **Unfair terms in contracts**

The Government is taking action in relation to unfair contract terms as part of a separate reform process.²

MMAL understands from the above response that the Government has effectively declined to consider unique treatment for franchise agreements under the unfair contracts regime. MMAL considers that this is an appropriate policy decision. MMAL does not see that there are unique factors affecting franchise agreements that would justify them being singled out for special treatment or different regulation to other kinds of contracts for the purposes of unfair contract terms laws.

(f) **Goodwill and data ownership**

(i) **Goodwill and data ownership for dealers**

MMAL does not charge any franchising fee or charge for the use of its trademarks. The rights to the trademarks therefore remain with MMAL at the conclusion of a franchise agreement. Dealers are entitled to assign the franchise within the term, subject to MMAL approvals. When a dealer transfers the franchise in this way, it has the ability to recover an amount for goodwill from the buyer

¹ Australian Competition and Consumer Commission, Submission No 1 to Senate Standing Committees on Education and Employment, General Motors Holden Operations in Australia (23 March 2020) 2.

² Australian Government, *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).

MMAL requires dealers to provide customer data in order to fulfil its obligations to those customers. For example, MMAL provide ongoing services which may be delivered independently from the selling dealer such as: roadside assistance; capped price servicing; and warranty repairs (including recalls).

(ii) **Sharing of technical information with independent repairers and service centres**

MMAL believes in the value of competition.

Independent repairs and aftermarket suppliers provide a useful role in ensuring that the market remains competitive in relation to both price and quality. They also ensure that consumers continue to have access to aftermarket repair facilities and spare parts, potentially long after vehicles have ceased being manufactured or imported.

In line with the above, MMAL provides workshop service manuals for each model of vehicle that it imports, which can be purchased through any MMAL dealer. MMAL also publishes periodic maintenance and inspection tables for each model of vehicle that it supplies without charge on its website.

These manuals and tables mean that independent repairers are able to service MMAL vehicles, and ensure that consumers will benefit from a competitive aftermarket and having a choice of providers to repair and service their vehicles.

3 Existing legislative, regulatory, and self-regulatory arrangements

A general review of the Franchising Code of Conduct was completed as recently as 2017. Automotive industry-specific changes to the Franchising Code came into effect on 1 June 2020. The Government also foreshadowed a raft of further changes in August 2020.

The Code has been amended 7 times since its introduction in 1998 (including a complete Code replacement in 2014), with several of these revisions bringing substantial changes to the obligations on franchisors. On an averaged basis the Code might be said to have been updated roughly each 3 years. MMAL considers that this is too frequent, particularly for a mature sector that was effectively self-regulating prior to the legislated Code. With MMAL's franchise agreements often granted on a 5-year-term basis, the Code on average has been amended more than once during the currency of these agreements.

MMAL considers that the franchising industry is already heavily regulated relative to global standards. Frequent amendment to the Code only serve to add to the administrative and cost burden on OEMs to update policies, practices, documents (disclosure documents, franchise agreements, information statements etc.) and processes to remain abreast of and compliant with changes to the law.

MMAL considers the regulatory requirements to be adequate, and that the penalties for non-compliance are adequate.

MMAL considers that further review of the legislative and regulatory arrangements is not warranted by Holden's exit from the Australian market.

4 Current and proposed government policy

Unnecessary regulation adds to the cost of doing business. Ultimately, such costs will likely be borne by consumers.

As a broad observation, over regulation may impact on OEMs' ability to innovate in the delivery of goods and services to Australian consumers. An OEM operating in multiple international markets may choose to decline to offer certain products or services in a market where the regulatory risk is higher. Again, consumers are most likely to bear the consequences such as reduced choice and competition.

At an extreme, over regulation may inhibit new entrants to the Australian market, and even factor in to a decision for an OEM to exit the market (or dramatically alter its distribution model).

5 Dispute resolution systems and penalties for breaches of the Franchising Code of Conduct

The Franchising Code provides for mediation of franchising disputes, and requires that OEMs incorporate a mediation process into their franchise agreements. MMAL's Franchise Agreement includes such a process. That contractual mediation process has never been used, nor has the one set out in the Franchising Code ever been invoked by MMAL or its dealers.

MMAL considers that the fact the mandated mediation process has not been applied to resolve disputes with its dealers is indicative that there is a low practical need for it. However, MMAL does not disagree that mediation is a potentially valuable feature of franchising regulation, and may be useful in other OEM networks. MMAL understands that mediation is generally considered to be an effective process for resolving dealer disputes, however MMAL cannot speak from its own prior experience given the comments above.

Based on this low need for dispute resolution processes, MMAL does however consider that there is even less need to augment the current regulation with additional forms of dispute resolution such as conciliation and arbitration. MMAL expects that this will introduce unnecessary complication to an area that is already sufficiently regulated.

Civil penalties for breaches of the Code were introduced in 2017. The Government has proposed doubling those penalties in its response to the recent Franchising Code enquiry. MMAL notes that civil penalties almost universally apply only to OEMs and other franchisors, even where the same obligations apply to franchisees. For example, clause 47 of the Code sets out four instances of penalties imposed on OEMs, while clause 48 of the Code contains effectively the same obligations for dealers, with no penalties prescribed.

The result is that OEMs must comply with these requirements or face punishment, while dealers might choose whether or not to comply with the same obligations with no risk of penalties. MMAL queries whether this is fair and reasonable and whether it sends the correct message to the industry and public. It is worth remembering in this context that some dealer groups are larger than some OEMs, and that OEMs may be equally adversely affected by a dealer's failure to comply with the Code, for example clause 48.

Perhaps one-sided and increased penalties may demonstrate to constituents that the Government is "tough on OEMs". But OEMs are contributors to employment and the economy, and without them the brands and products they represent and entire networks of independent dealership businesses would be absent from the Australian market.

MMAL also notes that minor or administrative oversights can potentially attract penalties. For example, if an OEM misses the deadline to notify a dealer of its intention whether to renew a dealer agreement, that can attract a civil penalty. Where there is a common expiry date for multiple dealer agreements (as is the case for MMAL), these penalties will be multiplied. An OEM might face a potentially significant fine for simply missing a due date (perhaps by just one day). Similarly, as noted earlier in this submission, particularly egregious conduct is already addressed by the prohibition against unconscionable conduct, which carries a maximum penalty (per contravention) of the greater of:

- (a) \$10 million;
- (b) three times the value of the benefit gained; or
- (c) (if that value cannot be calculated) 10% of an OEM's annual turnover.

MMAL submits that any proposal to increase or expand the scope for penalties must take into careful consideration the circumstances in which they will apply, the potential for multiplication across multiple dealers, the additional administrative burden they will create for OEMs, whether they are fair, reasonable and even necessary. MMAL's view is that the deterrent effect of significant penalties will in many cases be overshadowed by the practical or commercial deterrent, e.g.

adverse media or public relations impact where there has been breach of an OEM's legal obligations, and by the existing penalty regime that applies to OEMs.

MMAL considers that the current provisions of the Franchising Code to be adequate without the complication of further dispute resolution processes and penalties.

6 Current and proposed business models in selling vehicles

The automotive industry has an established history of retailing motor vehicles through third-party dealers appointed by OEMs.

However, changes in consumer needs and demands may dictate changes to this business model over time. Like all industries, the automotive sector must be prepared to adapt and respond to changing conditions and the commercial environment. MMAL considers that OEMs should not be bound (including by Government regulation) to adhere to out-dated business models or to apply old sales techniques. Rather, OEMs and dealers must be free to innovate and develop improved ways of delivering products and services to their customers.

MMAL understands that several OEMs are studying e-commerce models for the sale of motor vehicles, including sale transactions online completed. MMAL is also aware that some OEMs are considering an agency model for distribution of their products in Australia.

There are likely to be pros and cons involved in any assessment of new or alternative business models for the industry. MMAL considers that OEMs must retain the freedom to adapt to changing circumstances and modify their business approach. The Australian market must also be responsive to global trends. Unique regulation of this market may prompt some OEMs to reconsider the costs of participating in it and whether doing so is even worthwhile.

MMAL recognises that alternative business models should not be used to circumvent legitimate regulation of the industry (where the objectives underpinning the regulation are equally applicable to the alternative model). So if, for example, the Franchising Code ought to apply to regulate particular OEM conduct, but an alternative business model might serve to avoid that regulation (e.g., due to a formality, technicality or definitional issue), MMAL considers that the Franchising Code should be amended to apply to that conduct to achieve the relevant regulatory outcome, rather than the alternative being to curtail or prohibit that particular business model.

7 The imposition of restraints of trade on car dealers from car manufacturers

MMAL is not aware that restraints of trade are a particular concern in the automotive industry.

To MMAL's knowledge, dealers are typically free to operate motor vehicle dealership businesses with other OEMs/brands/franchises after expiry or termination of a dealership agreement. MMAL does not prevent former dealers from doing so.

As for during the term of a dealership agreement, multi-franchise dealerships are commonplace in the automotive industry, and MMAL considers that there is widespread acceptance by OEMs of dealers operating concurrent vehicle dealership franchises for complementary brands.

MMAL does acknowledge that an OEM might typically expect that other brands a dealer represents through its dealership be a "good fit" with the OEM's own brand(s). This might be seen to operate as a restraint on a dealer's ability to operate competitive businesses.

In practice however, MMAL considers that OEM and dealer expectations would typically be aligned in this regard. In other words, multi-franchise dealers would also expect the brands they represent to be broadly compatible in terms of their market positioning. Generally, dealers would not reasonably seek to represent brands that present to significantly different audiences or different market segments at the same dealership, as that would entail an incongruous customer experience. For example, a dealer representing prestige brands would have limited interest in also representing low-cost or mass-market passenger vehicles at the same dealership.

In addition, restraints of trade (if any), or OEM approvals which effectively operate as restraints of trade, are unlikely to limit a dealer's ability to operate other brands at different locations, therefore if a dealer group does have an interest in representing differently-positioned vehicle brands, there is typically the option for the dealer to do so across different sites. All of the above also aligns with typical customer expectations as well.

If you wish to discuss any aspect of this submission, please do not hesitate to contact Mr Shaun Westcott, Chief Executive Officer.

Yours faithfully

MITSUBISHI MOTORS AUSTRALIA LIMITED