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23rd March 2020

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

By email: eec.sen@aph.gov.au

Dear Secretary

Education and Employment References Committee – General Motors Holden Operations in Australia

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Education and Employment References Committee's inquiry into General Motors Holden Operations in Australia.

The ACCC is an independent statutory authority responsible for administering and enforcing the *Competition and Consumer Act 2010* (CCA), which includes the Australian Consumer Law (ACL) and the Franchising Code of Conduct (Franchising Code). Through doing so, we promote fair trading, consumer and small business protection, and competition for the benefit of all Australians.

The ACCC's submission has set out the issues that the ACCC is considering in relation to the announced withdrawal by General Motors (GM) of the Holden brand from the Australian market. Our comments are limited to the current laws which apply and we have not considered the matter in light of current policy considerations by Government relating to franchising.

The ACCC annually sets out its enforcement and compliance priorities in its Compliance and Enforcement Policy. This policy is reviewed and amended following external consultation and an assessment of existing or emerging issues. Priorities for 2020 include improving motor vehicle industry compliance with consumer guarantees and ensuring that small businesses receive the protections of the Franchising Code.

Since GM's announcement that it would be withdrawing the Holden brand from the Australian market, the ACCC has been considering the potential impact on consumers, Holden dealerships, and competition within the motor vehicle industry as a whole. The ACCC has identified a number of issues that may raise concerns under the CCA, depending on how the withdrawal is implemented.

Issues affecting consumers

Consumer guarantees

The ACL provides consumers with a range of automatic consumer guarantees. These guarantees include that:

- repair facilities and spare parts will be reasonably available for a reasonable period of time;
- goods are of acceptable quality; and
- goods are fit for any advertised purpose.

When a guarantee is not complied with, the consumer is entitled to a remedy.

GM has stated publically that it will provide servicing and spare parts for at least 10 years. However, 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. The ACCC will be closely monitoring any consumer reports about access to spare parts and repairs in the immediate future.

In the event of a 'major failure' to comply with a consumer guarantee, the ACL provides consumers with the right to choose a refund, replacement or repair of their vehicle. The ACCC would note 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.

The ACCC has previously taken enforcement action against a number of motor vehicle companies, including GM, for unconscionable conduct and misrepresenting the availability of consumer guarantee rights to consumers. Despite this, the ACCC continues to receive reports from consumers regarding the failure of motor vehicle suppliers and manufacturers to provide appropriate remedies where there is a breach of a consumer guarantee. The ACCC will continue to monitor reports from consumers having problems enforcing their consumer guarantees rights and, where appropriate, undertake further enforcement and compliance initiatives.

Misleading conduct or representations

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.

The ACCC is aware of reports that some consumers who purchased a vehicle prior to GM's announcement are concerned that:

- factors which were important to them and influenced their decision to purchase a Holden vehicle have changed, for example free servicing for seven years; and/or
- the value of their vehicle has been significantly reduced.

If GM fails to provide any of the services represented to consumers, it may have breached the ACL. The ACCC will continue to monitor consumer reports on this issue.

Issues affecting dealerships

The most pressing issue currently facing dealers is negotiating the end of their Holden dealership arrangements, including any compensation, and negotiating any future business relationship with GM. The ACCC understands these negotiations are currently underway.

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.

The ACCC is prepared to investigate allegations of breaches of the ACL and/or Franchising Code in relation to GM's conduct during the negotiation process. At this stage, the ACCC has heard concerns that the current compensation package offered by GM is inadequate, but that if dealers do not accept it they will be ineligible to:

- become an authorised Holden Repair and Service Provider;
- receive the re-brand GM product, the Holden Special Vehicle; or
- receive any other compensation.

The ACCC has 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.

However, the ACCC has 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. It was highlighted by the Parliamentary Joint Committee Inquiry into the Franchising Sector that the fear of retribution, repercussion or retaliation from some franchisors is a constant and ongoing concern of automotive sector franchisees. Even where there is no overt retaliation, we recognise that individual franchisees may be unwilling to approach the ACCC for fear of damaging their ongoing commercial relationship with their franchisor.

These issues also highlight some of the deficiencies associated with the franchising business model. The regulatory environment in relation to franchising is currently being considered by the Franchising Taskforce. The ACCC would encourage the Committee to consider any policy developments when formulating its report.

Part 5-4 of the ACL provides Holden dealers with a continuing right of indemnification against costs or damages that may arise through ACL breaches. This includes costs incurred by dealers for providing remedies to consumers due to breaches of the consumer guarantees. Following GM's withdrawal of the Holden brand, there are some concerns that dealers may have no avenue for indemnification from the manufacturer when providing a remedy to consumers.

Access to data and technical information

The ACCC has previously identified competition and fair trading concerns about the effect of limited access to the data and technical information required to repair and service new cars. The ACCC considers that consumers benefit from competitive aftermarkets and having a choice of providers to repair and service new cars.

The Commonwealth Treasury is currently considering the design of a mandatory scheme for sharing motor vehicle service and repair information, which may address some of the

ACCC's competition concerns. Treasury is currently seeking advice from key stakeholders to further develop the scheme, and will be seeking to conduct public consultation on draft legislative provisions.

The ACCC's approach

The ACCC is monitoring the impact of GM's withdrawal from the Australian market on competition, consumers and Holden dealerships. The ACCC is also seeking further information and clarification from GM regarding its withdrawal and any measures it will be implementing to reduce the impact on consumers and dealerships. This includes in relation to consumer guarantee rights, misleading or deceptive conduct, and product safety concerns.

The ACCC will investigate alleged breaches of the ACL and Franchising Code by GM in relation to the withdrawal of the Holden brand from the Australian market. We therefore encourage those affected by the withdrawal to raise issues with the ACCC to assist in our assessment.

The ACCC is committed to treating confidential information responsibly and in accordance with the law. The ACCC's general policy on the collection, use and disclosure of information is set out in the [ACCC/AER Information Policy](#). In addition, the ACCC is able to take steps to assist with preserving the confidentiality of information provided by dealerships to the extent reasonably possible.

If you wish to discuss any aspect of this submission, please feel free to contact Rami Greiss, Executive General Manager Enforcement

Yours sincerely

Rod Sims
Chair