

EXECUTIVE OFFICE



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Committee Secretary
Senate Education and Employment References Committee
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Dear Secretary

Education and Employment References Committee – inquiry into General Motor Holden Operations in Australia

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

The ACCC notes that the resolution of the Committee on 7 October 2020 to investigate more broadly the relationship between car manufacturers and car dealership models in Australia expands beyond the original terms of reference of the inquiry, which focused on the decision by General Motors Holden to withdraw its operations from the Australian market.

The ACCC's submission sets out the issues that the ACCC has observed in our role as an independent statutory authority responsible for the administration and enforcement of the *Competition and Consumer Act 2010* (CCA), which includes the Australian Consumer Law (ACL) and the Franchising Code of Conduct (Franchising Code). The objective of the CCA is to promote competition in the market, facilitate fair trading and provide for consumer protection.

Complaints in relation to motor vehicles continues to be the highest category of consumer complaints received by the ACCC. Predominantly the main concerns relate to allegations that the motor vehicle dealer and/or the motor vehicle manufacturer has failed to provide a consumer with an appropriate remedy under the consumer guarantee regime as set out in the ACL.

The ACCC is supportive of any closer examination of the wider motor vehicle market and we note that there is already work underway within Government to address some of the issues within the market, which will help promote competition for the benefit of consumers and other market participants.

ACCC New Car Retailing Market Study

In 2017 the ACCC released a final report into the new car retailing industry, following a self-initiated market study.¹

¹ https://www.accc.gov.au/system/files/New%20car%20retailing%20industry%20final%20report_0.pdf

The ACCC's final report into the sector includes three key observations:

- car manufacturers need to update their complaint handling systems and improve their approach to the handling of consumer guarantee claims
- a mandatory scheme should be introduced for car manufacturers to share technical information with independent repairers
- new car buyers need more accurate information about their cars' fuel consumption and emissions.

Following the ACCC's market study there has been significant consultation and engagement on how to address some the practices and structures that may be inhibiting competition and preventing fair trading in the industry.

We are aware that the Government is in advanced stages of progressing the design of the proposed mandatory scheme for independent repairers to access motor vehicle service and repair information, and is consulting with key stakeholders in the process. Further information about the ACCC's position in relation to the reform proposal can be accessed via our submission to the Government's public consultation on the proposed scheme.²

As noted in our market study report, the ACCC continues to have concerns in relation to consumer guarantee claims under the ACL and related motor vehicle warranty issues. Consumers face significant difficulties in enforcing their rights under the ACL consumer guarantees when problems occur with new cars, and a significant body of evidence suggests this is systemic across the new car retailing industry.

Our study identified five key issues contributing to the difficulties experienced by consumers in enforcing their consumer rights:

- 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.

Consumer Guarantees

Expanding further on the above, the ACCC is 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.

The ACCC has undertaken a number of successful enforcement actions in relation to the manner in which various car manufacturers have approached consumer guarantee claims, including:

- proceedings instituted against Ford Motor Company of Australia Ltd for unconscionable conduct in the way it dealt with consumers experiencing a systemic problem with certain Ford vehicles, in which penalties of \$10 million were imposed,³ and

² <https://treasury.gov.au/sites/default/files/2019-11/c2019-t358022v2-ACCC.pdf>

³ <https://www.accc.gov.au/media-release/court-orders-ford-to-pay-10-million-penalty-for-unconscionable-conduct>

- accepting court enforceable undertakings also from Ford,⁴ as well as other manufacturers including GM Holden,⁵ Volkswagen,⁶ and Hyundai,⁷ in which the manufacturers undertook to improve compliance with the ACL consumer guarantees and conduct reviews of certain past consumer complaints

The ACCC currently has proceedings before the Federal Court involving allegations that Mazda Australia Pty Ltd engaged in unconscionable conduct and made false and misleading representations in relation to its dealings with consumers who purchased certain models of new Mazda vehicles between 2013 and 2017 which experienced significant faults within a year or two of purchase.⁸

Enforcement action by the ACCC can go some way to helping address the difficulties that consumers face when enforcing their ACL consumer guarantee rights. However, as noted in our market study, there also needs to be law reform strengthening the consumer guarantee provisions under the ACL, as well as a cultural shift within the wider industry. A significant reform in this regard is the decision in October 2018 of Commonwealth and state and territory ministers responsible for fair trading and consumer protection to amend the ACL to clarify that multiple non-major consumer guarantee failures can amount to a major failure.⁹ The ACCC understands that the Government is currently preparing a draft bill to give effect to this.

Agency Model

The ACCC is aware of reports that some manufacturers have announced their intentions to move away from a franchising motor vehicle dealer model to an agency business model. We are cognisant of the impact that such structural changes can have on individual dealerships, and will continue to monitor these developments as they progress.

There is nothing in the Franchising Code, or the CCA, that prevents a manufacturer from changing its business model or commercial arrangements in this way. However, the CCA, through the Franchising Code and the ACL, 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.

To date, the ACCC has 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.

We note that, depending on their circumstances, an agency model could be beneficial to some individual motor vehicle dealers. It could also have a positive impact on consumer guarantee issues. 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.

⁴ See note 3.

⁵ <https://www.accc.gov.au/media-release/holden-undertakes-to-comply-with-consumer-guarantees>

⁶ <https://www.accc.gov.au/media-release/volkswagen-undertakes-to-fix-consumer-guarantees-approach>

⁷ <https://www.accc.gov.au/media-release/hyundai-to-improve-consumer-guarantees-approach>

⁸ <https://www.accc.gov.au/media-release/mazda-in-court-for-alleged-unconscionable-conduct-and-false-or-misleading-representations>

⁹ <https://consumerlaw.gov.au/consumer-affairs-forum/communiques/meeting-10-0>

Franchising and Unfair Contract Terms

The ACCC is aware of concerns by motor vehicle dealers about the regulatory regime and appropriate protections afforded to dealers under the Franchising Code. Many of these issues were canvassed extensively through the Parliamentary Joint Committee on Corporations and Financial Services Fairness in Franchising Report (the PJC Report).¹⁰

On 20 August 2020 the Government released its response to the PJC Report, proposing a range of reforms including increasing penalties for non-compliance with the Franchising Code, enhancing dispute resolution processes and improving information for prospective franchisees.¹¹

The use of unfair contract terms in franchising was also reported on extensively in the PJC Report. The ACCC is aware that the Government is in advanced stages of its consideration of law reforms to enhance the unfair contract terms provisions.

The ACCC has 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.¹² We understand that the Ministerial Consumer Affairs Forum will be considering these potential unfair contract terms reforms at a meeting next month.

We also note that amendments to the Franchising Code commenced in June 2020 with respect to new motor vehicle dealership agreements. These changes relate to increasing the notice period of end of term notification obligations, improving capital expenditure disclosure, and allowing multi-franchisee dispute resolution.

Whilst the ACCC welcomes the reforms proposed by the Government and the strengthening of the Franchising Code, the ACCC continues to have concerns about the appropriate level and form of regulation of franchising. The ACCC made a submission to the Franchising Taskforce Regulatory Impact Statement consultation process in this regard.¹³

The ACCC has consistently made compliance with, and enforcement of, the Franchising Code a priority and commits a significant level of resources to enforcement and compliance initiatives in relation to franchising matters than other sectors. However the ACCC's compliance and enforcement model has limitations in addressing all issues in franchising.

Enforcement action, particularly litigation, for franchising contraventions can be difficult. 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,

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising/Report

¹¹ <https://www.industry.gov.au/data-and-publications/government-response-to-the-fairness-in-franchising-report>

¹²

<https://www.accc.gov.au/system/files/ACCC%20Submission%20to%20the%20Review%20of%20Unfair%20Contract%20Term%20Protections%20for%20Small%20Business.pdf>

¹³

https://www.accc.gov.au/system/files/ACCC%20submission%20to%20the%20Franchising%20sector%20reforms%20-%20consultation%20on%20Regulation%20Impact%20Statement%20-%2010%20December%202019_0.pdf

due to fear of reprisal and the need to maintain an ongoing relationship with the franchisor for the viability of their franchise business.

Existing franchisees may also be concerned that public ACCC enforcement action may damage the franchise system's brand, and hence the value of the franchisee's capital. Further, as any enforcement proceeding taken by the ACCC is required to be disclosed to prospective franchisees in the disclosure document, this can be a deterrent preventing prospective franchisees from purchasing into the system. This can consequently devalue franchises in that system, and hinder existing franchisees' ability to sell their franchise.

ACCC enforcement action for non-compliance with the Franchising Code is an ex-post regulatory model which seeks to deal with misconduct after it has occurred, but has limited utility in preventing misconduct occurring. In the ACCC's opinion this regulatory gap leads to significant detriment to some franchisees.

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 regulatory model that would allow effective and binding dispute resolution.

If you wish to discuss any aspect of this submission please feel free to contact Rami Greiss
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Yours sincerely

Rod Sims
Chair