



**SUBMISSION TO
THE SENATE EDUCATION AND EMPLOYMENT
REFERENCES COMMITTEE'S INQUIRY INTO GENERAL
MOTORS' HOLDEN OPERATIONS IN AUSTRALIA**

25 JUNE 2020



CONTENT

Section 1: Foreword	4
Section 2: Australia's Holden Dealer Network	5
Section 3: Background	8
Section 4: GM's Conduct in the lead up to its closure of Holden	10
Section 5: GM's Conduct since the announced closure of Holden	13
Section 6: The need to better protect franchised new car Dealers	18
Section 7: Conclusion	19

FOREWORD

The Australian Automotive Dealer Association (AADA) is the peak industry advocacy body exclusively representing franchised new car Dealers in Australia. We appreciate the opportunity to provide this submission to the Senate Education and Employment References Committee's Inquiry Into General Motors' Holden Operations in Australia.

There are around 1,500 new car Dealers in Australia that operate more than 3,000 Dealerships. We are proud that each and every Holden Dealer are one of our members and we are fully supportive of the Australian Holden Dealer Council in their struggle to reach a fair and reasonable settlement from General Motors (GM).

Holden is an Australian icon and the role Dealers have played in creating that icon should not be underestimated. The fact that a decision was made in Detroit that Holdens will cease to be sold in Australia is a reflection of the globalised world we live in. As the owner of the Holden brand, General Motors had every right to pull out of Australia on the basis of its commercial interests. That is not in question. However, it is essential that the 185 Dealers it has used to fund and build its extensive network should be compensated fairly.

The way in which GM is allowed to withdraw from Australia will set a benchmark for other Manufacturers who are considering leaving, reducing the number of Dealers or changing their distribution model.

Our submission is primarily concerned with the impact GM's decision to withdraw from Australia will have on the Holden Dealers. It is clear that Holden Dealers, their employees and the businesses they support in the many communities they operate in, will suffer financially from this decision.

The extent of that suffering will be determined by the as yet unresolved issue of compensation for Dealers.

The AADA has serious concerns with the conduct of GM in the lead up to this announcement and in the months since. This inquiry should hold GM to account and address concerns around unconscionable conduct and failure to act in good faith.

The AADA also believes this Inquiry needs to explore the unique and massive power imbalance which exists generally in commercial relations between new car Dealers and car Manufacturers. Poor treatment of Dealers is not isolated to GM and other brands also exploit the power imbalance. In countries like the United States specific automotive laws regulate this relationship between Dealer and Manufacturer. Australia has recently introduced such laws, but they fall well short of what is required to make a difference.

We urge the Committee to consider the points we have made and would welcome the opportunity to elaborate on our submission and/or appear before a hearing of the committee.



James Voortman
Chief Executive Officer



Australia

203 Holden Dealerships



60

New South Wales



50

Victoria



39

Queensland



25

Western Australia



21

South Australia



4

Tasmania



2

Australian Capital Territory



2

Northern Territory

AUSTRALIA'S HOLDEN DEALER NETWORK

The network of Holden Dealers in Australia is as old as the brand, and once permeated Australian society to the extent that every town, regardless of how big or small, seemed to have their own Holden Dealer.

Today, there are around 185 Holden Dealers operating some 203 facilities across Australia. According to the Holden Dealer Council they employ up to 9,000 people including many apprentices. Many of these businesses have had a long-term association with the brand – some for over 80 years.

Like all franchised new car Dealerships in Australia, Holden Dealers have entered into a franchise agreement (Dealer Agreement) with a multinational car Manufacturer and are given the right to market and sell new vehicles and associated spare parts, accessories and services. The terms of these agreements are very much skewed in favour of the Manufacturer who sets the terms of the Dealer Agreement (DA) and there is a clear power imbalance which can open the door for unethical behaviour by the Manufacturer.

Under the terms of their DA, Holden Dealers are obligated to invest significant amounts of capital in facilities, leases, equipment, tools and training. The overwhelming majority of the investment in the Holden Dealer network has been undertaken by the Dealers and collectively the quantum of their investment dwarfs that of GM. These are capital- and labour-intensive businesses which operate on very thin profit margins (all new car Dealerships averaged less than 1 per cent in 2019).

The Holden Dealers were constantly required to meet strict performance targets set by GM.

Many of the decisions which drive the success of a vehicle brand are beyond the control of the Dealers. Manufacturers design the products, decide on the product mix and develop marketing campaigns, which Dealers also help fund. Dealers are enterprising and entrepreneurial by nature and accept this risk. However, for several years, Holden Dealers have been frustrated with the dramatic reduction in sales that has occurred with the product, which has consistently failed to appeal to the Australian market. The transition from local Manufacturer to Importer has not been managed well by GM, especially when compared to Ford, Mitsubishi and market leader Toyota, who faced similar challenges. The declining sales also led to reduced profitability for Dealers and it is particularly alarming that the compensation offer made by GM is based on a set of figures taken from a time when the brand was in a free-fall caused by poor product and planning decisions made by GM and its management team.

Nevertheless, many Dealers stuck with the brand. Some out of loyalty in the hope that sales would pick up and the GM management assured them that the brand was committed to Australia for the long haul with promises of future models. Based on this message, many Dealers invested in new or updated facilities while some Dealers who did not already have a Holden franchise chose to buy one. It is natural for these Dealers to feel like they have been misled.

Section 2

The news that their Dealer Agreements were being ripped up some two and a half years early was compounded by the offer of compensation described by the Dealers as insulting.

The initial compensation offer was made some four months ago and to date not one of the 185 Holden Dealers has accepted GM's offer. At a time when so many Dealers are struggling to cope with a once in a lifetime contraction in sales caused by the COVID-19 pandemic, it appears GM are simply waiting for some Dealers to accept this offer out of desperation.

The Holden brand deserves to be retired with the dignity its long association with Australia deserves. Furthermore, the Holden Dealers who did so much for so long to build up the brand, deserve to be compensated fairly.

It is important that this inquiry examines GM's actions towards its Dealers both before its withdrawal announcement and after. Dealers have concerns that GM has not acted in good faith, has misled them and treated them in an unconscionable manner. This Senate Inquiry should address these questions and examine ways to prevent large offshore multinational car Manufacturers from strongarming Australian Dealers.

BACKGROUND

To truly understand the effect GM’s withdrawal from Australia has had on Dealers it is important to examine the timeline of events that has occurred across the last decade. It seems GM has operated in Australia for a lifetime, but as Holden sales started to decline in the mid-2000s, Australian Dealers, the Australian Government and the Australian buying public have been subjected to a series of disappointing decisions by the Detroit-based multinational.

October 2008

During the GFC, Dealers are left without wholesale floor plan financing as GM withdraws its finance arm, General Motors Acceptance Corporation (GMAC), from the Australian market. The Government steps in with a Special Purpose Vehicle providing security and liquidity.

August 2013

After 12 months in Australia GM withdraws Opel from the market, leaving Dealers with massive losses from their investments in the brand.

December 2013

GM announces cessation of local manufacturing by 2017.

GM received well over \$2 billion in Government assistance.

June 2017

GM provides 30 Dealers with 6 months’ notice that they will not be renewing their Dealer Agreements.

17 February 2020

GM announces it is dumping the Holden brand in Australia, effectively terminating 185 Dealers.

January 2020

GM’s mismanagement of the transition from a locally made brand leads to 2019 being Holden’s worst year since 1954.

December 2019

Dave Buttner steps down as MD. Kristian Aquilina becomes GMH’s 9th boss in 15 years.

March 2020

KPMG report shows fair compensation to be four times what GM are offering.

June 2020

After two days of mediation GM makes no change to its compensation offer.

February 2020

GM’s compensation offer to Dealers is described as “insulting” and not accepted by any of the 185 Dealers.

April 2020

GM writes to Dealers giving them until end of May to accept the compensation on offer.

May 2020

ACCC pressures GM to enter into good faith mediation with Dealers.

June 2020

The interim MD of GMH explains publicly that terminated Holden Dealers in New Zealand deserve compensation which is \$1,000 per car better than that offered to Australian Dealers.

GM'S CONDUCT IN THE LEAD UP TO ITS CLOSURE OF HOLDEN

For years before the announcement, GM was adamant both privately with its Dealers and publicly through the media, that it was in Australia for the long haul. A company statement from 2017 states that *"GM remains committed to the Holden Brand in Australia and we don't expect any changes to Holden's vehicle portfolio"*. Similarly, PSA/ Opel was quoted as confirming that *"existing supply agreements for Holden and certain Buick models will continue"*.¹ Most recently in February 2019, David Buttner, then GMH MD told his Dealers - *"I'm looking directly at you. Believe me, it's not going to happen. There is no plan (to change distribution). I did not join the company to close Holden"*.²

On the basis of the statements made by the company and the fact they still had 2.5 years to run on their agreements, Holden Dealers had a clear expectation that the brand would remain in Australia.

This inquiry needs to question whether General Motors Corporation, headquartered in Detroit, made the strategic decisions to exit the right-hand-drive car market globally some years in the past. Operationally, the announcement of the sale of the plant in Thailand where Australia's top selling Holden vehicle, the Colorado ute, was manufactured was announced at the same time as the closure of Holden.

Common sense dictates that the minute the decision was made to sell the GM Rayong plant in Thailand is the exact moment that serious questions would have emerged about Holden's future in Australia.

One would expect that the purchase of a vehicle assembly plant would facilitate a lengthy process of probity and due diligence by the purchaser, in this case Great Wall. It is not unreasonable to suggest that the sale process was likely a year in the making, yet Holden Dealers were left unaware.

It is important to know when exactly GM decided to withdraw from Australia. Why were Dealers misled and required and/or allowed to make significant investments at a time when Holden's future had been decided?

This question is particularly important in the context of GM's recent requests for Dealers to undertake capital investment; its approval of Dealership transfers; and its restriction placed on Dealers which prevented them from taking on other franchises.

¹ [The breakdown: Holden beyond 2017](#), David McCowen, Drive.com.au, 21 July 2021

² [Holden boss Dave Buttner steps down after the company posts its lowest sales since 1948](#), Joshua Dowling, CarAdvice, 02 December 2019

Section 4

REQUESTS FOR CAPITAL INVESTMENT

One of the biggest expenses a new car Dealer undertakes is the investment in facilities prescribed by the Manufacturer. Undertaking these investments is commonly a condition of a Dealer being offered a new franchise agreement. These facilities are bespoke expensive state of the art buildings and the requirements are incredibly prescriptive.

Because these facilities are extremely difficult and expensive to repurpose (even for a rival car brand) it is unlikely that any Dealer would undertake a significant investment if it had the knowledge that a Manufacturer was not committed to selling cars in Australia for at least a decade or more.

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

APPROVING TRANSFER OF DEALERSHIPS

A common feature of Dealership Agreements in the Australian context is that they include provisions requiring the franchisor's approval before a Dealership can be sold to any specific party. Indeed, the franchisor can decide who the business will be sold to, even if that party is not the highest bidder. In one example, a regional Holden Dealership sale was completed barely three weeks before the announcement that Holden Dealerships would no longer exist.

Further, the applications for consent to transfer Holden Dealerships have been approved by GM knowing that the purchaser was relying on the usual industry practice of rolling over Dealership Agreements. Had the purchasers known of GM's intentions, they would most likely not have proceeded or would not have paid as much goodwill for the Holden Dealerships.³

RESTRICTIONS ON MULTI-FRANCHISING

One standard approach for Dealer Groups to manage the risk of one brand or other becoming less popular, or even closing its distribution, is to seek franchises across multiple brands. It is common for franchise agreements to require the approval of the primary brand, but GM has been notorious by the frequency with which they barred their Dealers from taking on additional franchises. Even as sales figures continued to decline and many Dealers had been discontinued, Holden continually refused to allow Dealers to take on other franchises. Indeed, the Holden Dealer Council has stated that "Dealers can prove that Holden has consistently disallowed applications for multi-franchise arrangements and caused immense loss through their unconscionable acts over the past 15 years".⁴

³ [GM's decision to kill off Holden brand has family businesses across SA on tenterhooks](#), Cameron England, The Advertiser, 18 February 2020

⁴ [Dealers claim Holden refuses to negotiate over 'unfair' compensation that will kill businesses, cost 8000 jobs](#), Philip King, The Australian, 20 March 2020

GM'S CONDUCT SINCE THE ANNOUNCED CLOSURE OF HOLDEN

GROSSLY INADEQUATE COMPENSATION

The Holden Dealership Agreements were, in the main, all due to continue until 2022, with most Dealers having a reasonable expectation that their agreements would be renewed. The agreements were for five years in duration and were signed in 2017. Those agreements would have been used by most, if not all, Holden Dealers as security for financiers and as basis for entering in to commercial leases for premises and other similar purposes. By reneging on those agreements GM has caused Holden Dealers unforeseeable and substantial financial costs that should be considered in any discussion of compensation.

There is no doubt that GM understood that its actions were in breach of the agreements the company had made, and that massive losses would be caused by their actions. Nevertheless, GM sought to minimise their culpability by labelling the offers of compensation as "Transition Payments" rather than the more correct 'Anticipated Damages' and then proceeded to tell Dealers what this loss would be with no negotiation allowed. It is difficult to conceive of a greater exercise of impertinence.

The compensation offered by GM has been described by almost every Dealer as grossly inadequate. The company offer for compensation is calculated based on each Dealer's average net profit from all Holden vehicles sold over three years from 2017 to 2019, but based on the number of vehicles sold in 2019, and forecast over the remaining term of their franchise agreements, which were due to expire in 2022.

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

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

While Holden will seek to apportion their poor sales performance to the Dealer network, Dealers by their very nature want to be profitable and the best way of achieving this is to sell as many cars as they can. Unfortunately, Dealers can only sell what is supplied to them by their franchisor and in this case the product was far below consumer expectation, a factor Dealers could not control. Despite the excuses Holden will make to defend their demise, it should be remembered that no Dealer sets out to sell less cars this year than they did the year before.

The offer makes no provision for staff redundancies, length of service or goodwill and lease commitments, which can be as long as 20 years.

Section 5

SERVICE AND PARTS AGENCY

The AADA understands that Holden Dealers have been offered the opportunity to become ‘servicing agents’ for Holden vehicles after the demise of the brand. But that offer has been made conditional on the Dealers accepting the compensation offer. It is our view that this attempt at coercion by GM is a de facto admission that the compensation offer is completely unfair and insufficient. By this ruse, GM is seeking to preclude legal action to seek a more adequate compensation package for Holden Dealers. Once again, we believe that GM’s behaviour falls very short of the ‘good faith’ requirements written into the Franchising Code.

Most of those Dealers will reluctantly take up a role as Service and Parts agents in what was meant to be a ten-year support transition for the fleet of Holden vehicles currently on the road. However, even this undertaking by GM proved disingenuous, as a proposal sent to Dealers offered servicing contracts for only five years.⁵

⁵ [Exclusive: Holden offering five years car servicing back-up, not 10 years as promised to the public](#), Joshua Dowling, CarAdvice, 19 March 2020

Section 5

HAS GM ACTED IN GOOD FAITH?

GM's actions leading into the decision to close down Holden as well as its actions after the decision beg the question as to whether it has acted in good faith.

There is no dispute that motor vehicle Dealerships are franchises and that legislation and obligations such as the Franchising Code of Conduct and the Consumer and Competition legislation govern the relationships between GM and the Holden Dealers. One of the key requirements written into the Code is that Franchisors should behave in good faith.

While the Franchise Code does not define what it means by an obligation to act in good faith, the ACCC notes that Australian courts have found business dealings to be not in good faith when they involve one party acting for some ulterior motive, or in a way that undermines or denies the other party the benefits of a contract.

It is telling that the ACCC needed to pressure GM to engage in good faith mediation after it gave Dealers a deadline until the end of May to accept the compensation offer. Disappointingly, GM chose the morning of the first day of mediation to attack the Holden Dealer Council's legal representative via the media while also suggesting publicly that it could easily use an independent repair network to conduct the service and repair work in the event that Dealers did not accept their compensation offer.

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

6 <https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct/acting-in-good-faith>, ACCC, accessed 14 April 2020

THE NEED TO BETTER PROTECT FRANCHISED NEW CAR DEALERS

STRONGER AUTOMOTIVE SPECIFIC FRANCHISING PROTECTIONS

Well before the collapse of the Holden brand the AADA has been advocating for a remedy to the power imbalance between Dealers and Manufacturers. We believe that the solution to this issue requires industry specific regulations which take account of the major differences between new car Dealers and typical franchises. The AADA's main points have been covered in [our submission](#) to the Parliamentary Joint Committee on Corporations and Financial Services for its inquiry into the operation and effectiveness of the Franchising Code of Conduct.

The AADA's call for automotive specific regulations has been supported in statements by the [Franchising Council of Australia](#) and [Australian Small Business and Family Enterprise Ombudsman](#). It has the backing of other groups within the Automotive industry including the Australian Automotive Aftermarket Association (AAAA) and the Motor Trades Association of Australia (MTAA). The ACCC has also expressed concern over the power imbalance and suggested possible reforms.

On 1 June 2020, Automotive-specific protections for new car Dealers were introduced by the Government. While the AADA has welcomed the regulations, unfortunately they fall well short of what is required to remedy the power imbalance that exists between offshore Manufacturers and Australian franchised new car Dealers.

The position that Holden Dealers now find themselves in is a direct consequence of that power imbalance. The AADA has made a list of recommendations to strengthen these regulations.

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

AADA KEY RECOMMENDATIONS

- 1 Security of Tenure: A minimum five year-term for Dealer Agreements or a link between capital investment and the term of the agreement (which will allow Dealers to recover their mandated investments).
- 2 Obligation on Manufacturers to buy back stock in the event of non-renewal.
- 3 Protections for Dealers against unfair warranty clawbacks.
- 4 A principles-based Industry Standard for Compensation for OEM's looking to withdraw from Australia, rationalise their networks or change their distribution models.
- 5 A definition of vehicle distribution in the regulations which capture future distribution models, including agency models.
- 6 New end of term obligations (12-month notice and provision of reason for non-renewal) to apply to all agreements – not just those of 12 months and over.
- 7 Obligation for the franchisor to accede to the franchisees' request for multi-party dispute resolution. The issue of breaching confidentiality clauses in Dealer Agreements by pursuing multi-party dispute resolution needs to be addressed.
- 8 Appropriate penalties for breaches of the regulations.

A PRINCIPLES-BASED NATIONAL BENCHMARK FOR COMPENSATIONS

The AADA understands that the offer of compensation by GM to Holden Dealers was presented unilaterally by the company on a 'take it or leave it' basis, with no scope for co-development to allow for individual circumstances or even real negotiation as to the specifics.

The AADA believes that the demise of Holden is only the forerunner to other brands leaving Australia, and that the arrangements with respect to Holden will be a de facto benchmark for future compensation agreements. At the time of writing Honda is in the process of negotiating compensation with a number of Dealers it has terminated.

We believe that there is an obligation to ensure that when a powerful Manufacturer withdraws from the market, rationalises its network or changes its distribution model Dealers should be fully and properly compensated.

That compensation should be demonstrably fair and reasonable and consider both the circumstances of individual Dealers, and their long-term commitment to the Brand. The AADA submits that the Committee should consider recommending a principles-based approach to the development of an Industry Standard for Compensation.

The Committee should also recognise that there will always be a power imbalance between franchised new car Dealers and the large offshore OEM's they are franchised to. While this imbalance is impossible to correct, its effect can be addressed through the provision of strong regulations which prevent OEM's from exploiting it. In practical terms, this can be achieved by enshrining the aforementioned compensation principles, prescribing a minimum tenure of at least five years in Dealer Agreements and allowing better access to justice for dealers through a system of binding arbitration.

CONCLUSION

We look forward to the opportunity to provide verbal evidence to the Inquiry in support of our submission. If you have any questions, please contact me on:

James Voortman

Chief Executive Officer

M: +61 452 535 696

E: jvoortman@aada.asn.au



CANBERRA OFFICE

Level 3, 10 National Circuit, Barton ACT 2600
PO Box 4409 Kingston ACT 2604

E info@aada.asn.au

aada.asn.au