



**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST**

Case: S ECI 2020 04789
S ECI 2020 04789
Filed on: 31/05/2022 02:39 PM

BETWEEN

BEECHAM MOTORS PTY LTD (ACN 010 580 551)

Plaintiff

-and-

GENERAL MOTORS HOLDEN AUSTRALIA NSC PTY LTD (ACN 603 486 933)

Defendant

**THIRD FURTHER AMENDED STATEMENT OF CLAIM
(Filed Pursuant to Orders of Justice Nichols dated 30 May 2022)**

Date of document: 31 May 2022
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The Plaintiff and Group Members

1. This proceeding is commenced as a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) by the Plaintiff on its own behalf and on behalf of the persons who entered into a Dealer Agreement with the Defendant commencing on 1 January 2018 for a five year term listed in Schedule 1 (**Group Members**).
2. At the commencement of this proceeding there are more than seven Group Members who make the claims set out in this Statement of Claim against the Defendant.
3. The Plaintiff:
 - (a) is and at all material times was a corporation incorporated under the *Corporations Act 2001* (Cth); and
 - (b) is and has been since 1989 an authorised dealer of Holden vehicles and parts.

The Defendant and the Holden brand

4. The Defendant:
 - (a) is and has been since 2015 a corporation incorporated under the *Corporations Act 2001 (Cth)*;
 - (b) on 19 July 2019 converted from a public company to a proprietary company;
 - (c) established a network of around 180 authorised dealers to sell and service new Holden vehicles and used Holden and General Motors vehicles, by entry into dealer agreements commencing on 1 January 2018 with a term of five years;
 - (d) took over the network of authorised dealers selling and servicing new Holden vehicles and used Holden and General Motors vehicles established by GM Holden Pty Ltd; and
 - (e) is, and always has been, an indirect wholly owned subsidiary of General Motors Company.

5. General Motors Company, or one of its subsidiaries:
 - (a) owns and has owned the Holden brand since 1931;
 - (b) manufactured motor vehicles in Australia under the brand name Holden between 1948 and 2017;
 - (c) manufactured motor vehicles outside Australia under the brand name Holden until 2017;
 - (d) had contracts in place with PSA Groupe or a subsidiary thereof for the manufacture and supply of motor vehicles under the brand name Holden to the Defendant between 2017 and 2020;
 - (e) unsuccessfully sought to sell the Holden brand in 2016;
 - (f) (not used);
 - (g) retired the Holden brand in 2020; and
 - (h) sold new motor vehicles under the brand name Holden between 1931 and 2020.

Agreement

6. The Defendant entered into an agreement dated 1 January 2018 with the Plaintiff, pursuant to which the Defendant appointed the Plaintiff to its network of authorised

dealers to sell and services new motor vehicles and sell authorised parts under the Holden brand under the terms of the agreement for the period 1 January 2018 to 31 December 2022 (the **Agreement**).

Particulars

The Agreement is partly written and partly to be implied.

Insofar as it is written, it is contained in:

- A. a document titled 'Holden Dealer Agreement', dated 1 January 2018;
- B. a document titled 'Holden Dealer Policies & Procedures Manual', dated November 2017, as amended in November 2019 (the **Manual**); and
- C. a document titled 'Particular Terms'.

Copies of these documents are available for inspection.

Insofar as it is implied, it contains the implied terms at paragraphs 11 to 11C and 11E.

7. (not used).

8. The Recitals to the Agreement provide:

- 'A. [The Defendant] has established a network of authorised Dealers to sell and service its Products and sell the Parts.
- B. [The Defendant] has agreed to appoint the [Plaintiff], and the [Plaintiff] has agreed to be appointed by the [Defendant], to its network of authorised Dealers to sell and service the Products and sell the Parts under the terms of this agreement.'

9. There are terms of the Agreement, among others, as follows:

'1 Objectives

The parties wish to establish or continue a mutually beneficial business relationship for the Term that will provide the [Plaintiff] with a high quality range of motor vehicles and associated products, and access to best practice commercial and marketing plans. [The Defendant] expects the [Plaintiff] to:

- (a) achieve optimum penetration of the market for the Products and the Parts within the APR and deliver First Class customer satisfaction and customer experience standards;

(b) achieve continuous improvement in customer satisfaction and customer experience in respect of the sale, service and support of the Products and Parts by the [Plaintiff];

(c) adopt industry best practice on a continuous basis throughout the Term to win and retain customers;

...

2.1 Appointment

(a) [The Defendant] appoints the [Plaintiff] to actively promote, sell and service the Products and to promote and sell the Parts under the terms of this agreement ...

...

2.3 Renewal

(a) If [the Defendant] gives written notice to the [Plaintiff] that this clause 2.3 is to apply to the [Plaintiff], prior to the final year of the Term, the [Plaintiff] must provide to [the Defendant] a Strategic Business Plan in the template provided by [the Defendant].

(b) [The Defendant] and the [Plaintiff] will undertake a review of the Strategic Business Plan.

(c) Not later than 6 months before the end of the Term, [the Defendant] will notify the [Plaintiff] in writing of its intention either to offer the [Plaintiff] a further term of appointment and the period of, and any conditions (including, but not limited to, conditions precedent) attaching to, that term of appointment or not to offer the [Plaintiff] a further term of appointment. [The Defendant] has full discretion in making that decision. The [Plaintiff] has no recourse against Holden arising from any decision of [the Defendant] under this clause 2.3.

...

5.1 Allocation of [Area of Primary Responsibility]

The [Plaintiff] is allocated the [Area of Primary Responsibility] as the geographical area in which the [Plaintiff] is to focus its efforts in promoting, selling and servicing the Products and promoting and selling the Parts.

...

7.1 Dealership Premises

- (a) The [Plaintiff] must establish and maintain First Class Dealership Premises (including with respect to location, appearance, function and franchise delineation) in accordance with the Manual.

...

- (c) The [Plaintiff] may only sell and service the Products and sell the Parts at the Dealership Premises and may not use the Dealership Premises for any purpose not expressly listed in the Particular Terms unless otherwise permitted by this agreement or otherwise approved in writing by [the Defendant].

...

7.3 Display requirements

- (a) The [Plaintiff] agrees that:
 - (i) [the Defendant] has the right throughout the Term to give directions to the [Plaintiff] in respect of the New Vehicles and Demonstrator Vehicles (including a representative range of New Vehicles and Demonstrator Vehicles) and Parts to be displayed by the [Plaintiff] from time to time; and
 - (ii) such New Vehicles and Demonstrator Vehicles and Parts directed by [the Defendant] must be displayed for sale in the Display Area.

...

8.2 Sales & Operations

The [Plaintiff] agrees to:

- (a) use its best endeavours to promote and maximise sales of the Products and Parts and provide effective servicing of the Products in the [Area of Primary Responsibility];
- (b) display the Products and Parts and maintain the Dealership Premises in First Class condition and in accordance with the Manual and clause 7.1(a);
- (c) ensure that a representative range of New Vehicles and Demonstrator Vehicles in each segment relevant to the [Plaintiff's] [Area of Primary Responsibility] and market are displayed at the Dealership Premises;

- (d) manage and order stock on a consistent basis in accordance with the Manual;

...

9.1 [The Defendant's] Obligations

[The Defendant] agrees to:

...

- (b) consult with:

- (i) the [Plaintiff] on a regular basis regarding short and long term plans for the [Plaintiff] within the Term; ...

...

- (g) comply with Holden's Wholesale Standards as contained in the Manual;

...

10.4 Purchase Orders

- (a) The [Plaintiff] must place purchase orders with [the Defendant] for New Vehicles in accordance with the Manual.

...

- (c) Purchase orders received by [the Defendant] will be considered to be bona fide and are non-cancellable, other than in the manner specified in the Manual.

- (d) All purchase orders are subject to acceptance by [the Defendant]. [The Defendant] is not bound to accept any purchase order.

...

13.1 Dealer Performance and Performance Criteria

- (a) The [Plaintiff] must operate the Holden Dealership Business to meet or exceed the Performance Criteria specified in the Manual for each of the following items:

...

- (iii) promoting and selling the Products and Parts;

...

(c) [The Defendant] will establish SEG Objectives for the [Plaintiff] collectively or by model in relation to the [Plaintiff's] expected sales performance.

...

28.1 Definitions

...

Dealership Premises means the place (or places) of business of the [Plaintiff] identified in the Particular Terms, ...

...

Demonstrator Vehicle means any Holden motor vehicle which has been registered by the [Plaintiff] and used for the purpose of demonstrating the Holden vehicle to customers displayed for sale and sold by the [Plaintiff] from the Dealership Premises.

...

Display Area means the area of the Dealership Premises which is identified as such in the Particular Terms.

First Class means, according to the context in which the expression is used in this agreement, a standard of presentation, appearance, operation, service, performance, customer experience, representation or conduct that satisfies and is consistent with, on a continuous basis throughout the Term all relevant standards, guidelines, measures, policies or other requirements as specified in this agreement or the Manual.

...

Manual means the manual(s) provided by Holden to the [Plaintiff] (including by online access) containing the policies, procedures and guidelines relevant to the performance of this agreement as varied by [the Defendant] from time to time.

...

New Vehicles means the lines of Holden motor vehicles in the Particular Terms, displayed for sale and sold by the [Plaintiff] from the Dealership Premises.

...

Particular Terms means the particular terms attached to this agreement.

Parts means the parts, accessories and components (including merchandise) supplied by [the Defendant] or its authorised distributors applicable to the Products.

...

Performance Criteria means the performance criteria specified in the Manual from time to time during the Term.

...

Products means any of the following:

- (a) New Vehicles (including Unused Products);
- (b) Used Vehicles; and
- (c) Demonstrator Vehicles,

displayed for sale and sold by the Dealer from the Dealership Premises.

...

SEG Objectives means the Sales Evaluation Guide objectives established by Holden in accordance with clause 13.1(c).

...

Strategic Business Plan means a plan prepared by the Dealer in a format specified by Holden as part of the renewal process in clause 2.3.

...

Term means the term of the [Plaintiff's] appointment under this agreement as specified in the Particular Terms.

...

Unused Products means any current series Product which has never been registered and has an odometer reading of 100 kilometres or less.

...

Used Vehicles means any used Holden and General Motors motor vehicles sold by the [Plaintiff] through its used car sales operation, located within the Dealership Premises.'

10. Holden's Wholesale Standards as contained in the Manual provides as follows:

7.17.14 [The Defendant's] Product and Supply

7.17.14.1 [The Defendant] provides a broad range of world class products.

7.17.14.2 [The Defendant] will endeavour to distribute New Vehicles among Holden dealers in a fair and equitable manner.

7.17.14.3 [The Defendant] will endeavour to supply dealers with a sufficient quantity of vehicles that will allow achievement of Sales Evaluation Guide (SEG) or meet reasonably anticipated demand.

7.17.14.4 [The Defendant] delivers New Vehicles to dealerships in a time scale which satisfies both dealers and customers subject to capacity and logistic constraints.

11. Further, it was a term of the Agreement that the Defendant would ensure the availability for supply of new Holden brand motor vehicles or a substitute thereto for the Term (the **Business Efficacy Implied Term**).

Particulars

The term is implied, and is to be implied:

A. on the basis that it is necessary to give business efficacy to the contract

11A. At all material times in Australia, persons dealing with and engaged in the:

(a) wholesale supply of new passenger vehicles (including sports utility vehicles (**SUVs**) and utes); and

(b) retailing of new passenger vehicles (including SUVs and utes),

pursuant to fixed term passenger vehicle dealership agreements (the **Australian new motor vehicle retailing industry**), recognised and observed the custom and usage that there was an obligation of the wholesale supplier to ensure the availability for supply of new passenger vehicles to the retailer for the term of their motor vehicle dealership agreements.

11B. At all material times, the Plaintiff, each group member and the Defendant was (and remains) a person engaged in the Australian new motor vehicle retailing industry.

- 11C. In the premises, by reason of the custom and usage in the Australian new motor vehicle retailing industry, the Defendant was and remains obliged to ensure the availability for supply of new passenger vehicles to the Plaintiff for the Term of the Agreement (the **Custom Implied Term**).
- 11D Under the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Franchising Code)*:
- (a) the Franchising Code is a prescribed and mandatory industry code for the purposes of s 51AE of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
 - (b) the Dealer Agreements were franchise agreements under s 5 of the Franchising Code;
 - (c) the Defendant was obligated by s 6(1) of the Franchising Code (**Statutory Good Faith Obligation**) to act towards the Plaintiff and each Group Member with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to the Dealer Agreements (as defined below at paragraph 13) or the Franchising Code.
- 11E. Furthermore, it was a term of the Agreement that the Defendant would act towards the Plaintiff in good faith (**Implied Good Faith Term**) including that it would:
- a. act with fidelity to the bargain represented by the Agreement;
 - b. not act to undermine the bargain entered into or the substance of the contractual benefit bargained for;
 - c. act reasonably and with fair dealing having regard to the interests of the parties and to the provisions, aims and purposes of the Agreement.

Particulars

The Implied Good Faith Term is implied by the common law into franchise contracts and/or commercial contracts, and by reason of s 6(1), (4) and (5) of the Franchising Code.

12. The Particular Terms provide that:
- (a) the Dealership Premises is the premises located at 29 Bribie Island Road, Caboolture QLD 4510;
 - (b) the Display Area for New Motor Vehicle Display is 29 Bribie Island Road, Caboolture QLD 4510; and
 - (c) the New Vehicles marketed by Holden which the Dealer may order from Holden are:

- (i) Acadia;
- (ii) Astra;
- (iii) Barina;
- (iv) Captiva;
- (v) Colorado;
- (vi) Commodore;
- (vii) Equinox;
- (viii) Spark;
- (ix) Trailblazer;
- (x) Trax.

The Group Member Agreements

13. The Defendant entered into agreements dated 1 January 2018 with each Group Member, pursuant to which the Defendant appointed each Group Member to its network of authorised dealers to sell and service new motor vehicles under the Holden brand and sell authorised parts under the terms of the agreement for the period 1 January 2018 to 31 December 2022 (the **Group Member Agreements**) (the Agreement and the Group Members Agreements are together the **Dealer Agreements**).

Particulars

The Group Member Agreements are partly written and partly to be implied.

Insofar as they are written, they are contained in:

- A. documents in the form of the documents referred to in paragraphs A and B of the particulars to paragraph 6 above; and
- B. a document in the form of, or a form substantially similar to, the document referred to in paragraph C of the particulars to paragraph 6 above, which defines *inter alia* the Products, the Area of Primary Responsibility, and the Dealership Premises.

Copies of these documents are available for inspection.

Insofar as they are implied, they contain the Business Efficacy Implied Term, the Custom Implied Term and the Good Faith Implied Term at paragraphs 11 to 11C and 11E.

14. (not used).

15. Each Group Member Agreement is substantially the same as the Agreement and each contains the same recitals and terms as set out in paragraphs 8 to 11C and 11E above.

Breach

16. On 17 February 2020, General Motors Company released a media statement announcing that it would wind down sales, design and engineering operations in Australia and New Zealand and retire the Holden brand by 2021.

Particulars

The media statement is in writing and a copy is available for inspection.

17. On 26 February 2020, the Defendant issued notification to its network of authorised dealers that, based on the announcement by General Motors Company to retire the Holden brand in Australia, it would:

- (a) cancel and remove any existing un-preferenced orders for new Holden brand motor vehicles in the Defendant's electronic ordering system;
- (b) not accept any orders for additional vehicles after close of business on 3 March 2020; and
- (c) commence an equitable share of build activity for the remaining stock and pipeline to the Holden Dealer Network.

Particulars

The notification is in writing and is contained in Distribution 2020-04. A copy is available for inspection.

- 17A. On or about 26 February 2020, the Defendant:

- (a) cancelled all un-preferenced orders for new Holden vehicles in its electronic ordering system as at 17 February 2020;
- (b) commenced to offer an equitable share of build activity for the remaining stock and pipeline to its network of authorised dealers.

Particulars

This process is set out in the document titled 'Holden Go To Market March 2020' sent by Michael Jackson on behalf of the Defendant to its network of authorised dealers.

- 17B. By 26 February 2020, the Defendant had notified its network of authorised dealers as to each dealer's share of build activity for the remaining stock and pipeline.
- 17C. By 6 March 2020, any vehicles not accepted by dealers in the initial notification were offered to the network of authorised dealers in a second and final round of the share of build.
18. In or about March 2020, the last motor vehicle under the Holden brand was manufactured.
19. On 23 April 2020, the Defendant stated to its network of authorised dealers that it:
- (a) was not able to order for production any further new Holden brand motor vehicles; and
 - (b) would transition to an aftersales organisation, without the capacity to import and distribute vehicles.

Particulars

The statement is in writing and is contained in a letter dated 23 April 2020 from Michael Jackson, on behalf of the Defendant, to David Nicholson, for the Australian Holden Dealer Council. A copy is available for inspection.

20. Between March and July 2020, the Defendant:
- (a) allocated all remaining stock of Holden brand motor vehicles to its network of authorised dealers; and
 - (b) ran an aggressive clearance campaign to liquidate that remaining stock.
21. Since 3 March 2020:
- (a) the Plaintiff and each Group Member have been unable to place purchase orders for new Holden brand motor vehicles;

Particulars

The Plaintiff and Group Members refer to and repeat paragraphs 17 to 19.

- (b) the Defendant has allocated 'packs' of vehicles to Dealers unilaterally determined by the Defendant based upon stock availability rather than the Dealers' customer demand.

22. In the premises, from 4 March 2020, or shortly thereafter, the Defendant's supply of New Vehicles to the Plaintiff and each Group Member has been inadequate.

Particulars

The amounts by which the Defendant's delivery of New Vehicles to the Plaintiff and each Group Member has been, and will be, inadequate, in the periods 4 March 2020 to 31 December 2020, 1 January 2021 to 31 December 2021, and 1 January 2022 to 31 December 2022, are set out at Schedule 2.

The amounts may be subject to change following the filing of expert evidence.

23. By August 2020, the Defendant had ceased to supply any new vehicles to the Plaintiff and each Group Member.
24. In breach of cl 9.1(g) of the Dealer Agreements, the Defendant has failed to comply with its obligations under Holden's Wholesale Standards (as contained in the Manual) by failing to:
- (a) provide a broad range of motor vehicle products, or indeed to provide any motor vehicle products, in contravention of cl 7.17.14.1;
 - (b) endeavour to distribute New Vehicles among Holden dealers in a fair and equitable manner, or indeed to distribute any New Vehicles, in contravention of cl 7.17.14.2;
 - (c) endeavour to supply dealers with a sufficient quantity of vehicles that will allow achievement of Sales Evaluation Guide or meet reasonable anticipated demand, or indeed to supply any vehicles, in contravention of cl 7.17.14.3;
 - (d) deliver New Vehicles to dealerships in a time scale which satisfies both dealers and customers subject to capacity and logistic constraints, or indeed deliver any New Vehicles, in contravention of cl 7.17.14.4.
25. Further, in breach of cl 10.4(a) and (c) of the Dealer Agreements, the Defendant refuses to accept or consider purchase orders for New Vehicles from the Plaintiff and each Group Member.

Particulars

The Plaintiff and Group Members refer to and repeat paragraphs 17 to 19.

26. Further, in breach of the Custom Implied Term and/or the Business Efficacy Implied Term, and/or the Implied Good Faith Term, the Defendant has failed to ensure the availability for supply of new Holden brand motor vehicles or a substitute thereto for the Term.

26A. Further, in breach of the Statutory Good Faith Obligation, the Defendant:

- (a) refuses to accept or consider purchase orders for New Vehicles from the Plaintiff and each Group Member; and
- (b) has failed to ensure the availability for supply of new Holden brand motor vehicles or a substitute thereto for the Term, and has thereby contravened s 51ACB of the CCA.

Particulars

The Plaintiff and Group Members refer to and repeat paragraphs 17 to 19 and say further that:

- i. the core purpose of a fixed term agreement for 5 years is to ensure security of supply and commercial certainty for the parties;
- ii. under the Dealer Agreements and the Manual, the Plaintiff and each Group Member were required to maintain and invest significant funds in specialised premises specific to the Holden brand that could not be readily or cheaply converted to an alternative use;
- iii. under the Dealer Agreements during the Term the Plaintiff and each Group Member were not permitted to sell another manufacturer's vehicles without the Defendant's consent;
- iv. the mature nature of the Australian motor vehicle industry is such that (even were the Defendant to have consented) alternative brands to Holden such as Toyota or Ford are ordinarily allocated to existing and competing dealerships in the prime market areas of the Plaintiff and each Group Member. This prevented or impeded the ability of the Plaintiff and each Group Member to enter into an alternative dealership agreement with another manufacturer or importer comparable to the Defendant and the Holden brand;

- v. any interruption or cessation of the supply of new vehicles during the Term would and did have significant adverse consequences for the Plaintiff and Group Members;
- vi. the Defendant's supply agreements with other General Motors entities pleaded at 28(a) of the Defence were for an automatically renewing 1-year term which could be terminated at any time by mutual consent or unilaterally at the expiry of each 1-year term;
- vii. the ability of the Defendant to have alternative and longer-term supply arrangements other than those pleaded at 28(a) of the Defence is evidenced by the Defendant's contracts for the supply of new Holden vehicles with General Motors UK Ltd and Opel Automobile GmbH dated 31 July 2017. The Defendant assigned away these supply contracts to another General Motors entity in or about 1 November 2017. These agreements relevantly included:
 - A. Vehicle Supply Contract for the 'Astra' (D2JH) between the Defendant and Opel Automobile GmbH dated July 31, 2017 and with a production period end date for the vehicle of 31 August 2022;
 - B. Vehicle Supply Contract for the 'Astra' (D2WH) between the Defendant and General Motors UK Ltd dated July 31, 2017 and with a production period end date for the vehicle of 31 January 2023;
 - C. Vehicle Supply Contract for the 'Commodore' (E2JH/E2WH) between the Defendant and Opel Automobile GmbH dated July 31, 2017 and with a production period end date for the vehicle of 30 November 2024;
- viii. the Defendant failed to have in place sufficient contractual arrangements for the security of supply of new Holden brand vehicles for the Term, and/or failed to enforce its contractual arrangements for the supply of new Holden brand vehicles, and/or failed to negotiate arrangements for the continued supply of new Holden brand vehicles for the Term;

- ix. accordingly, the Defendant did not act with fidelity to the bargain represented by the Dealership Agreements, undermined the bargain entered into and/or the substance of the contractual benefit bargained for by the Plaintiff and each Group Member, and did not act reasonably and with fair dealing having regard to the interests of the Plaintiff and the Group Members and the provisions, aims and purposes of the Dealer Agreements.

Damages

- 27. As a result of the Defendant's breaches of the Dealer Agreements, the Plaintiff and each Group Member has suffered loss and damage.

Particulars

Particulars will be provided following the filing of expert evidence.

- 28. Further, as a result of the Defendant's breaches of the Dealer Agreements, the Plaintiff and each Group Member has suffered loss of the commercial opportunity to enter into Holden services and parts agreements for a term of at least 10 years, as follows:
 - (a) had the Defendant not breached the Dealer Agreements, it would have supplied the Plaintiff and Group Members with New Vehicles until the end of the Term;
 - (b) the Defendant would have been subject to obligations, under s 58 of the *Australian Consumer Law*, to take reasonable action to ensure that facilities for the repair of Holden vehicles, and parts for Holden vehicles, would be reasonably available for a reasonable period after Holden vehicles are supplied;
 - (c) in accordance with those obligations, the Defendant would have provided servicing and spare parts for Holden vehicles for at least 10 years after the end of the Term through a national aftersales network in Australia;
 - (d) the Defendant would have offered all members of its dealer network, including the Plaintiff and each Group Member, a Holden parts and service agreement to become part of its national aftersales network for a term of at least 10 years; and

- (e) the Plaintiff and each Group Member would have entered into said parts and service agreement to become part of Holden's national aftersales network for a term of at least 10 years.

Particulars

Further particulars will be provided following the filing of expert evidence.

29. By reason of the breach of s 51ACB of the CCA at paragraph 26A above, the Plaintiff and each Group Member is entitled to damages under s 82 and or 87 of the CCA, for the loss and damages suffered, including the loss of the valuable commercial opportunity to obtain a Holden services and parts agreement for a term of at least 10 years.

Particulars

The loss of the valuable commercial opportunity derives from the following:

- i. had the Defendant not breached the Statutory Good Faith Obligation, it would have supplied the Plaintiff and Group Members with New Vehicles until the end of the Term; and
- ii. the Plaintiff repeats and refers to subparagraphs 28(b) to (e) above.

Particulars of loss will be provided prior to trial.

Non-Renewal

30. Further, on or about 22 December 2021, the Plaintiff and Group Members each received a notice (**Non-Renewal Notices**) in accordance with the Dealer Agreements from the Defendant stating that:
- (a) the Defendant did not consider it to be commercially viable to offer a further term of appointment;
 - (b) the Defendant intends to not offer a new Dealer Agreement or renew the Dealer Agreement when it expires on 31 December 2022.
31. Prior to the issue of the Non-Renewal Notices, the Defendant did not request a Strategic Business Plan from the Plaintiff or any Group Member, and did not consult with the Plaintiff or any Group Member on a new Dealer Agreement (including in

relation to a Holden parts and servicing agreement), or a renewal of the Dealer Agreement (as amended to reflect the non-supply of New Vehicles).

32. In the premises, the Defendant breached:

- (a) cl 2.3(a) of the Dealer Agreements by issuing the Non-Renewal Notices without requesting from the Plaintiff or any Group Member a Strategic Business Plan;
- (b) cl 2.3(b) of the Dealer Agreements by failing to engage in a review of any Strategic Business Plan;
- (c) cl 9.1(b)(i) of the Dealer Agreements by failing to consult prior to the making of the non-renewal decision with the Plaintiff or any Group Member on a new Dealer Agreement (including in relation to a Holden parts and servicing agreement), or a renewal of the Dealer Agreement (as amended to reflect the non-supply of New Vehicles);
- (d) the Statutory Good Faith Obligation by failing to consult with the Plaintiff or any Group Member on a new Dealer Agreement (including in relation to a Holden parts and servicing agreement), or a renewal of the Dealer Agreement (as amended to reflect the non-supply of New Vehicles), and hence contravened s 51ACB of the CCA.

33. In the alternative, if the Defendant had a discretion whether to request a Strategic Business Plan and engage in a review of it under cll 2.3(a) and (b) of the Dealer Agreements, the decision to dispense with requesting and reviewing Strategic Business Plans was made:

- (a) as a collective decision without having regard to the individual circumstances of the Plaintiff and each Group Member; and
- (b) to retaliate against the Plaintiff and Group Members for having commenced this litigation.

Particulars

That the Defendant's decision was made collectively and to retaliate against the Plaintiff and each Group Member is to be inferred from the following:

- i. Under the Australian Consumer Law, the Defendant is a 'manufacturer' under s 7.

- ii. Under s 58 of the Australian Consumer Law, the Defendant is subject to a guarantee that it would and will take reasonable action to ensure that facilitates for the repair of Holden vehicles, and parts for Holden vehicles, would be reasonably available for a reasonable period after Holden vehicles are supplied.
- iii. On 17 February 2020, the Defendant announced that it would provide servicing and spare parts for Holden vehicles for at least 10 years, through a national aftersales network in Australia.
- iv. In or around February 2020, the Defendant sought to establish a franchised national aftersales network throughout Australia in substantially similar form to its pre-2020 dealership network.
- v. As pleaded at paragraph 16(b) of its Defence, the Defendant announced on 17 February 2020 that all current Holden dealers would be offered the opportunity to transition to new franchise agreements as Holden authorised service outlets, 'as was the fact'.
- vi. As pleaded at paragraph 27(a) of the Defence, the Defendant made offers of compensation to the Plaintiff and Group Members (**Transition Support Package**).
- vii. Under the Transition Support Package, the Plaintiff and Group Members were offered the opportunity to terminate their Dealership Agreements and to enter into a new 5-year service and parts agreement with the Defendant, but conditional upon settlement of all claims against the Defendant.
- viii. The Plaintiff, Group Members and two other Holden dealers were the only Holden dealers to reject the Transition Support Package, in circumstances where the Plaintiff, Group Members and at least one of the other Holden dealers who rejected the Transition Support Package commenced litigation against the Defendant seeking fair compensation for losses caused by the cessation of supply of New Vehicles.
- ix. As existing providers of Holden parts and servicing within their Areas of Primary Responsibility, the Plaintiff and Group Members are best positioned, resourced, and qualified to provide Holden servicing and parts for the longer-term within their Areas of Primary Responsibility.

- x. The Defendant has not appointed any other Holden authorised service outlets to the Plaintiff's and Group Members' Areas of Primary Responsibility for the period commencing after 1 January 2023.
 - xi. The commercial viability of the Plaintiff and Group Members being appointed Holden authorised service outlets for the period after 1 January 2023 is unchanged.
 - xii. The only circumstance of material difference between the date of the offer of the Transition Support Package and the date of the Non-Renewal Notices is that the Plaintiff and Group Members have commenced this litigation.
34. If the Defendant had a discretion whether to consult with the Plaintiff and Group Members on a new Dealer Agreement (including in relation to a Holden parts and servicing agreement), or a renewal of the Dealer Agreement (as amended to reflect the non-supply of New Vehicles), the decision not to consult was made,
- (a) as a collective decision without having regard to the individual circumstances of the Plaintiff and each Group Member; and
 - (b) to retaliate against the Plaintiff and Group Members for having commenced this litigation.

Particulars

The particulars subjoined to paragraph 33 above are repeated.

35. In the premises, the Defendant's decision to dispense with requesting and reviewing Strategic Business Plans and not to consult with the Plaintiff and Group Members on a new Dealer Agreement (including in relation to a Holden parts and servicing agreement), or a renewal of the Dealer Agreement (as amended to reflect the non-supply of New Vehicles) was made:
- (a) for an improper purpose contrary to the power under cl 2.3(a) and (b) of the Dealer Agreements;
 - (b) in breach of the Implied Good Faith Term; and
 - (c) in breach of the Statutory Good Faith Obligation and hence in contravention of s 51ACB of the CCA.
36. Further or alternatively, the Defendant's decision to issue the Non-Renewal Notices under cl 2.3(c) of the Dealer Agreement was made,

- (a) as a collective decision without having regard to the individual circumstances of the Plaintiff and each Group Member; and
- (b) to retaliate against the Plaintiff and Group Members for having commenced this litigation.

Particulars

The particulars subjoined to paragraph 33 above are repeated.

37. In the premises, the Defendant's decision to issue the Non-Renewal Notices was made:
- (a) for an improper purpose contrary to the power under cl 2.3(c) of the Dealer Agreements;
 - (b) in breach of the Implied Good Faith Term; and
 - (c) in breach of the Statutory Good Faith Obligation and hence in contravention of s 51ACB of the CCA.
38. By reason of the breaches at paragraphs 32(a) to (c), 35(a) and (b) and 37(a) and (b) above, the Plaintiff and each Group Member have suffered loss and damage, in the form of loss of the valuable commercial opportunity to obtain a new Dealer Agreement (including in relation to a Holden parts and servicing agreement), or a renewal of the Dealer Agreement (as amended to reflect the non-supply of New Vehicles) for a term of at least three years, and a further opportunity of a second term of at least five years.

Particulars

Particulars of loss will be provided prior to trial.

39. By reason of the breaches of s 51ACB of the CCA at paragraphs 32(d), 35(c) and 37(c) above, the Plaintiff and each Group Member is entitled to damages under s 82 and or s 87 of the CCA, for the loss of the valuable commercial opportunity to obtain a new Dealer Agreement (including in relation to a Holden parts and servicing agreement), or a renewal of the Dealer Agreement (as amended to reflect the non-supply of New Vehicles) for a term of at least three years, and a further opportunity of a second term of at least five years.

Particulars

Particulars of loss will be provided prior to trial.

Common Questions of Law or Fact

The questions of law or fact common to the claims of the Plaintiff and each of the Group Members are:

1. Do the Dealer Agreements contain:
 - (a) the Business Efficacy Implied Term; and/or
 - (b) the Custom Implied Term; and/or
 - (c) the Implied Good Faith Term?

2. In relation to the supply of new Holden brand motor vehicles or a substitute thereto, has the Defendant breached any or all of:
 - (a) cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.1 of the Manual?
 - (b) cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.2 of the Manual?
 - (c) cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.3 of the Manual?
 - (d) cl 9.1(g) of the Dealer Agreements, by failing to comply with cl 7.17.14.4 of the Manual?
 - (e) cl 10.4(a) and (c) of the Dealer Agreements?
 - (f) the implied terms in question 1?
 - (g) the Statutory Good Faith Obligation?

3. In relation to the issue of the Non-Renewal Notices, has the Defendant:
 - (a) breached any or all of cll 2.3(a), 2.3(b) or 9.1(b)(i) of the Dealer Agreements?
 - (b) acted for an improper purpose contrary to the power under cl 2.3 of the Dealer Agreements?
 - (c) breached the Implied Good Faith Term?
 - (d) breached the Statutory Good Faith Obligation?

AND THE PLAINTIFF CLAIMS on its own behalf and on behalf of the Group Members:

- A. Damages.

B. Damages pursuant to sections 82 and 87 of the *Competition and Consumer Act 2010* (Cth).

C. Interest pursuant to statute.

D. Costs.

Dated: 31 May 2022

**C Parkinson SC
H Hill-Smith**

HWL Ebsworth

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HWL Ebsworth Lawyers
Solicitors for the Plaintiff

1. Place of trial - Melbourne
2. Mode of trial - Judge alone
3. This writ was filed for the Plaintiffs by HWL Ebsworth of Level 26, 530 Collins Street, Melbourne, Victoria 3000.
4. The address of the Plaintiff is Cnr Bribie Island & Aerodrome Road Caboolture, Queensland 4510
5. The address for service of the Plaintiff is Level 26, 530 Collins Street, Melbourne, Victoria 3000.
6. The email address for service of the Plaintiff is estents@hwle.com.au
7. The address of the Defendant is 191 Salmon Street Port Melbourne, Victoria 3207

Schedule 1

	Company	Trading as
1.	Beecham Motors Pty Ltd (ACN 010 580 551)	Beecham Holden
2.	Gaukroger Sales Pty Ltd (ACN 001 601 565)	Gaukroger Sales Holden
3.	ERNBRO Pty Ltd (ACN 092 274 238)	Island Coast Holden
4.	Nobes Motor Company Pty Ltd (ACN 609 550 576)	Swan Hill Holden
5.	Heartland Motors Pty Ltd (ACN 096 561 385)	Heartland Holden Blacktown
6.	Heartland Motors Pty Ltd (ACN 096 561 385)	Heartland Holden Penrith
7.	Mid North Motor Company Pty Ltd (ACN 008 193 753)	Mid North Motor Company
8.	Spencer Motors Pty Ltd (ACN 007 783 593)	Spencer Holden
9.	City Motors (Port Lincoln) Pty Ltd (ACN 008 017 052)	City Motors
10.	Silver City Motors Pty Ltd (ACN 127 505 855)	Silver City Holden
11.	Augusta Motor Company Pty Ltd (ACN 008 172 629)	Port Augusta Holden

Schedule 2: The amounts by which the Defendant's delivery of New Vehicles to the Plaintiff and each Group Member has been, and will be, inadequate, in the periods 4 March 2020 to 31 December 2020, 1 January 2021 to 31 December 2021, and 1 January 2022 to 31 December 2022

1. Beecham Motors Pty Ltd (ACN 010 580 551) trading as Beecham Holden

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	50	4	2	50	50
Equinox	42	6	1	50	72
Acadia	45	2		45	65
Trailblazer	75	7	1	100	100
Colorado	174	8		180	180
Totals	386	27	4	425	467

2. Gaukroger Sales Pty Ltd (ACN 001 601 565) trading as Gaukroger Sales Holden

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	11	2		15	15
Equinox	5	2	1		
Acadia	8	2		13	10
Trailblazer	16	6		22	25
Colorado	36	4		55	55
Totals	76	16	1	105	105

3. ERNBRO Pty Ltd (ACN 092 274 238) trading as Island Coast Holden

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	11		0	15	14
Equinox	18	1	0	10	10
Acadia	10	1	0	10	10
Trailblazer	18	4	0	24	22
Colorado	48	3	0	48	50
			0		
Totals	105	9	0	107	106

4. Nobes Motor Company Pty Ltd (ACN 609 550 576) trading as Swan Hill Holden

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	10	1	0	12	12
Equinox	10	1	1	12	12
Acadia	8	1	0	10	10
Trailblazer	0	0	0	0	0
Colorado	47	1	0	56	56
Totals	75	4	1	90	90

5. Heartland Motors Pty Ltd (ACN 096 561 385) trading as Heartland Holden Blacktown

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	152	4	1	182	182
Equinox	51	6	1	61	61
Acadia	33	4	0	39	39
Trailblazer	57	4	0	68	68
Colorado	94	0	0	113	113
Totals	386	18	2	463	463

6. Heartland Motors Pty Ltd (ACN 096 561 385) trading as Heartland Holden Penrith

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	129	3		155	155
Equinox	93	5	1	112	112
Acadia	43	2		51	51
Trailblazer	58	1		69	69
Colorado	311	8		373	373
Totals	633	19	1	760	760

7. Mid North Motor Company Pty Ltd (ACN 008 193 753) trading as Mid North Motor Company

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	6			10	11
Equinox	2			2	2
Acadia	1			1	1
Trailblazer	4	4		9	10
Colorado	19	1		36	40
Totals	32	5	0	58	64

8. Spencer Motors Pty Ltd (ACN 007 783 593) trading as Spencer Holden

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	18			20	20
Equinox	7	2	1	10	11
Acadia	8			11	12
Trailblazer	5			6	7
Colorado	34	1		39	41
Totals	72	3	1	86	91

9. City Motors (Port Lincoln) Pty Ltd (ACN 008 017 052) trading as City Motors

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	5			9	10
Equinox	2	1		5	6
Acadia	3			7	8
Trailblazer	3	1		14	15
Colorado	26	4		55	60
Totals	39	6	0	90	99

10. Silver City Motors Pty Ltd (ACN 127 505 855) trading as Silver City Holden

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	7			10	11
Equinox	4	1		8	9
Acadia	3	2		5	6
Trailblazer	4	2		9	10
Colorado	13	4		25	28
Totals	31	9	0	57	64

11. Augusta Motor Company Pty Ltd (ACN 008 172 629) trading as Port Augusta Holden

	04.03.20 to 31.12.2020 Reasonably anticipated demand	Share of Build (first round)	Share of Build (second and final round)	2021 Reasonably anticipated demand	2022 Reasonably anticipated demand
Trax	8			10	12
Equinox	5	1		8	9
Acadia	5			9	10
Trailblazer	6			12	14
Colorado	32	2		42	44
Totals	56	3	0	81	89