

20 December 2019

By email: [product.regulation@asic.gov.au](mailto:product.regulation@asic.gov.au)

Product Regulation  
Australian Securities and Investments Commission (ASIC)

Dear Product Regulation Team

## Product intervention: The sale of add-on financial products through caryard intermediaries

Consumer Action Law Centre and Financial Rights Legal Centre welcome the opportunity to comment on:

- ASIC Consultation Paper 324: *Product Intervention: The sale of add-on financial products through caryard intermediaries*, October 2019 (CP324); and
- *ASIC Corporations (Product Intervention—Add-on Insurance and Extended Warranties) Instrument 2019/XX (Draft Instrument)*.<sup>1</sup>

ASIC has undertaken exemplary work in relation to the sale of add-ons in caryards over recent years and is to be commended for its proposed use of the Product Intervention Power. This is a necessary intervention in a failing market that continues to cause significant consumer harm.

This is a critical moment to fix and prevent any repetition of the widespread, systemic mis-selling of junk insurance and warranties through caryards. Insurance is a complex—and sometimes worthless—product. People need time and meaningful information to assess their need for insurance, compare deals, understand complex policy terms, confirm existing coverage and make their own decision, free from the high-pressure sales environment fuelled by commissions and targets. Known behavioural biases inherent in the add-on sales process have been long exploited by the insurance industry—and their retailing partners—that has prioritised making a quick buck over selling suitable, valuable insurance products that people want and need.

Put simply: insurance and warranties cannot be safely sold in caryards.

This submission includes updated data from Consumer Action's free tool [DemandaRefund.com](https://demandarefund.com) evidencing the recent and ongoing significant consumer detriment. Since 2016, DemandaRefund has helped people to make over 9,000 demands totalling an estimated \$17 million in refunds for junk consumer credit insurance (CCI), guaranteed asset protection (GAP) insurance and extended warranties sold by caryards, insurers, lenders and warranty providers. Of this, a minimum \$6.8 million relates to the car dealership distribution channel, and likely much more.

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<sup>1</sup> Information about this consultation is available at: <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-324-product-intervention-the-sale-of-add-on-financial-products-through-caryard-intermediaries/>.

The results from the updated data are shocking but unsurprising given the inherent problems in the dynamics of caryards and the add-on sales process:

- 97 per cent of users did not think that the salesperson had explained all the important exclusions and limitations;
- 90 per cent did not think that the sales process was fair;
- 39 per cent didn't even know they had bought the insurance or warranty; and
- most damning of all, not a single person responded that they would have bought the insurance or warranty, knowing what they know now.<sup>2</sup>

DemandaRefund continues to be used by people mis-sold insurance and warranties bought in 2019. This is not a legacy problem – the consumer detriment is ongoing.

Due to the harm, we continue to recommend a complete ban on the sale of all add-on insurance and extended warranties in caryards.

We strongly support many elements of ASIC's proposed intervention. A deferred sales model for add-on insurance, along with complementary obligations and a ban on certain mechanical risk products will dramatically reduce the ongoing significant consumer detriment.

We are, however, strongly opposed to ASIC's proposal that the deferral period begins by the consumer merely making an application for finance. In most cases, the consumer will need to re-engage with the dealer to accept delivery of the car or sign the loan contract, which may be after the deferral period has ended, presenting another opportunity for a pressure-sale of junk insurance and warranties. ASIC acknowledged the defect with its own model in CP324:

There is merit in starting the deferral period at vehicle delivery or shortly thereafter. If the deferral period was, for example, 30 days from the date of delivery, they would be able to consider their need for add-on products in light of owning and using the vehicle during this time. However, we accept that starting the deferral period at this point would be too disruptive and significantly restrict the ability of intermediaries to sell add-on products.<sup>3</sup>

The product intervention order *should* significantly restrict the ability of intermediaries to sell junk insurance in add-ons. The junk add-on insurance scandal has been one of the worst rorts in our financial services history, causing high detriment and requiring a multi-year, \$130 million remediation clean-up bill and counting.

Our primary recommendation is, therefore, that the deferral period start after the car is purchased, finance approved, and most importantly, delivery of the car. Without this change to ASIC's model, pressure sales will remain – defeating the very purpose of this intervention.

This submission also recommends and comments on:

- risks of the online consumer roadmap backfiring, particularly if the start of the deferral period is not aligned with delivery – the portal must incorporate consent concepts from the Consumer Data Right and

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<sup>2</sup> For more analysis, see our response to C7Q1 and E3Q1 below.

<sup>3</sup> ASIC CP324 at para 120-1.

insights from ASIC's October 2019 joint report, *Disclosure: Why it shouldn't be the default*,<sup>4</sup> on the limited effectiveness and potential backfiring of mandatory warnings and other forms of disclosure;

- extending the deferral period from 4 to 30 days;
- applying the intervention to add-ons that are 'free' or the result of an extended loan or lease;
- measures to prevent avoidance of this product intervention;
- reducing discretion given to intermediaries in setting and applying 'knock-out' questions;
- extending the ban on mechanical risk products to one month (not 12 months) before expiry of the manufacturer's warranty; and
- amendments needed to the Draft Instrument to achieve the policy intent, including to the definitions of add-on products and extended warranty, the 'unsuitable class', and banning pressure selling techniques.

A full list of recommendations is available below.

This submission should be read in conjunction with:

- a joint submission from consumer organisations to The Treasury's Proposals Paper on *Reforms to the sale of add on insurance*, 9 September 2019;<sup>5</sup>
- a joint submission from consumer organisations to ASIC's *Consultation Paper 294: The sale of add-on insurance through caryard intermediaries (CP294)*.<sup>6</sup>

Information about the contributors to this submission is available at **Appendix A**.

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<sup>4</sup> ASIC and Dutch Authority for the Financial Markets (AFM), *Disclosure: Why it shouldn't be the default*, 14 October 2019, page 42: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

<sup>5</sup> Available at: <https://consumeraction.org.au/20191008-insurance-sales-practices/>.

<sup>6</sup> Available at: <https://consumeraction.org.au/joint-submission-options-to-reform-the-sale-of-add-on-insurance-and-warranties-in-car-yards-2/>.

## Summary of Recommendations

**RECOMMENDATION 1.** The sale of add-on insurance by motor dealers should be banned. Alternatively, an effective deferred sales model (with our proposed modifications) should be introduced.

**RECOMMENDATION 2.** The obligations proposed in CP324 should not only apply to 'low value' products.

**RECOMMENDATION 3.** Amend the Draft Instrument to clarify that the sale of add-ons is banned except in accordance with the deferred sales model and obligations in Section C.

**RECOMMENDATION 4.** The deferral period should not start until after the car has been purchased, financed, and delivered to the consumer.

**RECOMMENDATION 5.** Extend the deferral period to 30 days; alternatively, a minimum of seven days.

**RECOMMENDATION 6.** The online portal should adopt the Consumer Data Right principles that consent be voluntary, express, informed, specific as to purpose, time limited, and easily withdrawn.

**RECOMMENDATION 7.** Apply the intervention to add-ons extended when a car loan or loan is extended.

**RECOMMENDATION 8.** Amend the Draft Instrument to so that add-ons cannot be offered to people who will not receive a significant benefit, and remove intermediaries' discretion in relation to the unsuitable class.

**RECOMMENDATION 9.** Knock-out questions should be set through a transparent process with oversight from ASIC and input from consumer advocates.

**RECOMMENDATION 10.** Amend the Draft Instrument to explicitly ban intermediaries from engaging in pressure-selling and other unfair tactics.

**RECOMMENDATION 11.** Ban the financing of premiums.

**RECOMMENDATION 12.** Restrict the sale of add-ons that do not achieve a high claims ratio.

**RECOMMENDATION 13.** Ban conflicted remuneration for all add-on insurance and warranties, as foreshadowed by FSRC Recommendation 2.6.

**RECOMMENDATION 14.** Remove exemptions for point-of-sale credit (FSRC Recommendation 1.7).

**RECOMMENDATION 15.** Introduce anti-avoidance obligations in the Intervention Order.

**RECOMMENDATION 16.** Amend the definition of 'add-on insurance product' to cover any add-on insurance sold through a caryard, rather than a defined list of products.

**RECOMMENDATION 17.** Review the definitions and terms in the Draft Instrument for avoidance risks and to capture all products.

**RECOMMENDATION 18.** The intervention should ban bridging insurance during the deferral period.

**RECOMMENDATION 19.** The ban on the sale of mechanical risk products on new cars should continue until one month (not 12 months as proposed) before the expiration of the manufacturer's warranty.

**RECOMMENDATION 20.** Amend section 10(b) of the Draft Instrument to capture low-value item or sub-limits.

**RECOMMENDATION 21.** Introduce an additional intervention that mechanical risk products must not have a maximum individual (or effective) claim amounts of not less than 5 times the premium or a similar relative value measure.

**RECOMMENDATION 22.** Remediation schemes should be designed at the same time as monitoring and compliance systems.

## Proposed intervention: Add-on insurance

**C7Q1: Do you consider that there is significant consumer detriment from the sale of add-on financial products by caryard intermediaries? Please provide evidence in support of your response**

Yes. There is overwhelming evidence of significant consumer detriment.

This detriment has occurred for decades, is ongoing and, unless ASIC makes an effective product intervention, will continue in future. Many of these junk products should be withdrawn from sale altogether. It is abundantly clear that the caryard add-on insurance market is failing consumers, producing significant harm and in dire need for oversight and reform.

We endorse ASIC's summary of the significant consumer detriment at para 42-76 of CP324, which is consistent with our casework and the experience of users of DemandaRefund. There is overwhelming, incontrovertible evidence of the need for a product intervention, including:

- The 3,424 demands for a refund on caryard CCI, GAP and extended warranties made through DemandaRefund, totalling an estimated \$6.8 million;
- ASIC Reports 470, 471, 492, and as summarised in CP294 and CP324 and the Productivity Commission's inquiry into Competition in the Australian Financial System;
- evidence to and findings of the Financial Services Royal Commission (FSRC);<sup>7</sup>
- sector-wide remediation schemes for mis-selling, with refunds estimated to exceed \$130 million for over 245,000 people;
- importantly, the countless stories of people affected by this scandal over many decades, whether shared directly or via consumer organisations through our casework, case studies, policy reports<sup>8</sup> and DemandARefund.

The profits of insurers and car dealers—not customer need—are the rationale for the car yard add-on insurance market. 'Reverse competition' through insurers paying commissions and incentives to dealers has driven this market. IAG gave evidence to the Commission that it viewed motor dealers as its customers, and that its focus was on maintaining its caryard distribution network.<sup>9</sup> Because motor dealers rely on products such as add-on insurance for their profits, IAG admitted under cross-examination that in some cases incentivising dealers to sell add-on insurance was 'more likely to result in inappropriate sales'.<sup>10</sup> This perverse market rationale and structure has led to significant consumer detriment, including high commissions, pressure selling of unsuitable and poor-value products. This has caused the following problems for consumers:

- Insurers having paid dealers four times more in commissions than they paid to consumers in benefits. These commissions have been as high as 79 per cent.<sup>11</sup>
- The sale of very poor-value products, with appalling claims ratios persisting even after extensive scrutiny on the sector: an average claims ratio of 7.9 per cent for CCI and 9.3 per cent for GAP insurance in FY2018-19;

<sup>7</sup> Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Final Report, Vol 1: <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>.

<sup>8</sup> Consumer Action Law Centre, *Junk Merchants*, December 2015: <https://consumeraction.org.au/junk-merchants-report-how-australians-are-being-sold-rubbish-insurance-and-what-we-can-do-about-it/>.

<sup>9</sup> FSRC, Transcript, Benjamin Bessell, 18 September 2018, 6097-8.

<sup>10</sup> FSRC, Transcript, Benjamin Bessell, 18 September 2018, 6105-6.

<sup>11</sup> ASIC, *A market that is failing consumers: The sale of add-on insurance through car dealers*, Report No 492 (2016), 7 [20].

- The sale of insurance that is unsuitable or of no value to the consumer because, for example, it duplicates cover they already hold elsewhere, or they are ineligible to claim on the policy. IAG, which was at one time a significant player in this market, admitted at the Royal Commission that a 'significant number' of its add-on insurance products 'were of questionable or little value to the consumer.'<sup>12</sup>

### Case Study – Bob

Bob (name changed) bought a new car. It was his dream car and he was shocked that he and his wife had been approved for finance. The car dealer sold him two insurance policies (consumer credit and gap insurance) totalling almost \$20,000. He did not realise he had agreed to buy optional insurance because he wasn't asked about it. The insurance took his loan amount from around \$60,000 to \$80,000 and represented 24% of the loan amount. Bob would have paid interest on the premium as well. Bob did not receive Product Disclosure Statements for the insurance policies and did not know what they covered and what they did not cover.

*Case study provided by Consumer Action Law Centre*

### Evidence from DemandaRefund

Consumer Action's DemandaRefund website continues to see high traffic from people aggrieved by the mis-selling of junk CCI, GAP and extended warranties typically added onto the purchase of a car, loan, credit card or home loan. An empirical analysis of letters of demand generated through the website as at 9 December 2019 reveals a damning picture of the mis-selling of junk add-on insurance.

#### About this data

This data is up to date as at 9 December 2019. The following analysis involves claims made across distribution channels, including banks and credit unions. To assist in interpreting the data, we have included a breakdown of the seller type. Some of the demands made against the seller types other than 'car/motor dealership' may also relate to add-ons sold through car yards, but where the user has sent their demand to another party (e.g. the insurer directly).

Seller type	Letters of demand generated			Total demands recorded (\$)
	CCI	GAP	Warranties	
Car/Motor Dealership	1,016	1,735	673	6,838,465
Bank	2,374	142	4	4,237,884
Credit Union	49	16	0	157,414
Financial Institution	1,086	1,023	166	4,228,622
Insurer	342	52	60	858,204
Other	54	26	8	122,506
Retailer	12			10,699
Unknown	129	36	238	608,402
<b>Total</b>	<b>5,062</b>	<b>3,030</b>	<b>1,149</b>	<b>\$17,062,198</b>
		<b>9,161</b>		

<sup>12</sup> FSRC, Transcript, Benjamin Bessell, 19 September 2018, 6140.

In summary:

- Total number of demands: 9,161
- Total number of cases with refund amount specified: 8,232
- Excluded from refund amount analysis: 929 cases with no / unknown dollar amount of insurance allocated
- Assumptions: where a payment was specified as weekly, fortnightly or monthly, one year has been calculated as an approximate
- Mean amount demanded: \$2,073
- Median amount demanded: \$1,399
- Approximate total dollar value in refunds demanded: \$17,062,198

User response to questions

The following analysis of responses to questions asked through the process of generating a letter of demand on DemandaRefund confirms the rampant mis-selling and significant consumer detriment from the sale of add-on insurance across all distribution channels.

<b>Consumer Credit Insurance (CCI)</b>	<b>No</b>		<b>Yes</b>		<b>I don't know</b>	<b>Total</b>	
Were your premiums added to your loan or credit card?	387	7%	4416	84%	446	8%	5249
Were you self-employed when you took out the insurance?	4493	94%	301	6%			4795
Were you unemployed when you took out the insurance?	4853	95%	245	5%			5100
Were you working part-time when you took out the insurance?	4132	86%	661	14%			4795
Were you working on a casual/temporary/seasonal/non-renewable basis when you took out the insurance?	4190	87%	602	13%			4795
Were you retired when you took out the insurance?	5081	99%	16	1%			5100
Did you have a pre-existing health condition when you took out the policy?	4572	95%	229	5%			4804
Did you know you had bought the insurance?	2208	42%	3040	58%			5249
Did the salesperson tell you that you had to buy the insurance?	2347	45%	2901	55%			5249
Were you given an opportunity to go through the documents before agreeing to buy the insurance?	4021	77%	1227	23%			5249
Do you think the salesperson explained all the important exclusions and limitations?	5129	98%	119	2%			5249
Did the salesperson explain your 'cooling off' rights?	4684	89%	564	11%			5249
Did the salesperson pressure you into buying the insurance?	2314	44%	2934	56%			5249
Did the salesperson use other unfair sales tactics?	3100	59%	2148	41%			5249
Did the salesperson give you information that was misleading?	2686	51%	2563	49%			5249
Did the salesperson recommend the insurance to you personally based on something he or she knew about you, such as your age, state of health or employment status?	1835	35%	825	16%	2589	49%	5249

<b>Consumer Credit Insurance (CCI)</b>	<b>No</b>		<b>Yes</b>		<b>I don't know</b>	<b>Total</b>
Did you receive a product disclosure statement (PDS)?	2962	<b>56%</b>	2287	<b>44%</b>		5249
Overall, do you think the sales process was fair?	4702	<b>90%</b>	547	<b>10%</b>		5249
Important question: Please read and answer carefully. If you had known what you know now, would you have decided to buy the insurance?	5249	<b>100%</b>	0	<b>0%</b>		5249

<b>GAP Insurance</b>	<b>No</b>		<b>Yes</b>		<b>I don't know</b>	<b>Total</b>
Were your premiums added to your loan or credit card?	231	<b>7%</b>	2970	<b>93%</b>		3201
Is there any reason why the policy was NOT suitable to you?	138	<b>4%</b>	2247	<b>70%</b>	826 <b>25%</b>	3201
Did you know you had bought the insurance?	1386	<b>43%</b>	1815	<b>57%</b>		3201
Did the salesperson tell you that you had to buy the insurance?	1242	<b>39%</b>	1959	<b>61%</b>		3201
Were you given an opportunity to go through the documents before agreeing to the purchase?	2030	<b>63%</b>	1171	<b>37%</b>		3201
Do you think the salesperson explained all the important exclusions and limitations?	3116	<b>97%</b>	85	<b>3%</b>		3201
Did the salesperson explain the full cost of the insurance?	2665	<b>83%</b>	536	<b>17%</b>		3201
Did the salesperson explain your 'cooling off' rights?	2744	<b>86%</b>	457	<b>14%</b>		3201
Did the salesperson pressure you into buying the insurance?	1311	<b>41%</b>	1890	<b>59%</b>		3201
Did the salesperson use other unfair sales tactics?	1624	<b>51%</b>	1577	<b>49%</b>		3201
Did the salesperson give you information that was misleading?	1338	<b>42%</b>	1863	<b>58%</b>		3201
Did you receive a product disclosure statement (PDS)?	1776	<b>55%</b>	1425	<b>45%</b>		3201
Overall, do you think the process was fair?	2949	<b>92%</b>	252	<b>8%</b>		3201
If you had known what you know now, would you have decided to buy the insurance?	3201	<b>100%</b>	0	<b>0%</b>		3201

These responses to questions by consumers of add-ons confirms the ongoing and historical failures in the car yard sale of add-ons have resulted in significant consumer detriment, including by intermediaries:

- 'hiding' add-on insurance in lengthy documentation, without the consumer realising they are being sold the insurance – 42 and 43 per cent of DemandaRefund users did not know they had bought CCI or GAP insurance, respectively;
- telling consumers that they must take out add-on insurance to get a car loan, or that they will have a better chance of being approved for a loan if they take out the insurance – 54 and 61 per cent of users reported that the salesperson told them they had to buy CCI or GAP, respectively;
- creating buyer and decision fatigue, with consumers reporting that they will often be held for lengthy periods of time to discuss add-on products, or making consumers feel rushed into making a decision to buy a complex insurance product, when the consumer is focused on buying a car – 63 per cent of GAP users were not given the opportunity to go through paperwork; and
- not a single user of DemandaRefund stated that would have decided to buy the CCI or GAP insurance knowing what they now know.



Feedback from successful DemandaRefund users confirms the above analysis and reveals the staggering size of mis-selling add-ons in car yards. One person contacted Consumer Action to say:

*"I wanted to share the results of my demand letter with you guys and thank you for your excellent work. I bought a car with finance from the dealer (never, ever again) and ended up with gap insurance (which I was told was mandatory), loan protection (which I didn't need as I have income protection insurance) and an extended warranty. I used your service to generate a refund demand letter for the gap insurance and was immediately successful in obtaining a full refund. I then enquired as to the other policies with the complaints rep I was dealing with and have ended up being **fully refunded for all 3 policies, totalling nearly \$12,000**. I'm delighted with the outcome and consider it a lucky escape."*

### Continuing detriment

It is clear that the significant consumer detriment continues, even after action by ASIC. An analysis of demands made through DemandaRefund.com in October 2019 reveals that 37 demands for GAP insurance and 45 demands for CCI add-on products that were taken out in 2019. This shows that even after action by ASIC, remediation schemes and class actions, people continue to make demands on junk products recently sold to them.

Year taken out <sup>13</sup>	2019	2018	2017	2016 and earlier	Total
CCI	45	73	186	1,989	2,275
GAP	37	65	160	1,450	1,712

Although many insurers have exited the market in anticipation of ASIC's intervention, without a permanent intervention, insurers and warranty providers could re-enter if there was the sense that the 'heat was off'.

### **Impact on Victorian Aboriginal<sup>14</sup> communities**

The Victorian Aboriginal Legal Service (**VALS**) and Consumer Action are currently running an integrated practice project to address some of the unmet consumer, credit and debt legal needs in Victorian Aboriginal communities. The project, which commenced around March 2019, involves work of various forms including regular community outreach and engagement sessions across Victoria.<sup>15</sup>

The work of the project suggests that the sale of unsuitable or junk add-on insurance is significantly impacting Victorian Aboriginal communities. Preliminary analysis of the legal enquiries being made through the community engagement sessions, conducted as part of the integrated practice project, indicates that add-on insurance or junk car warranties represents the third most common legal issue enquired about. All of these enquiries involve insurance added on to the purchase of a used car, while one of the cases involved the sale of a junk warranty (as opposed to CCI or GAP insurance). In many of these cases, the person has not specifically sought assistance of VALS or Consumer Action about the add-on insurance product but, rather, has sought assistance about unaffordable loans or the sale of poor-quality used cars. It is through the legal advice process, that these clients have found out that, unbeknownst to them, they have also been sold add-on car insurance along with their used car and/or unaffordable loan.

<sup>13</sup> Note: Consumer Action only has available data on the year that the GAP insurance or CCI was taken out for demands generated through DemandaRefund from 1-31 October 2019.

<sup>14</sup> When we refer to Aboriginal communities, we include all Aboriginal and/or Torres Strait Islander peoples living within those communities. Consumer Action is located on the land of the Kulin Nations. We acknowledge all Traditional Owners of Country throughout Australia and recognise the continuing connection to lands, waters and communities. We pay our respect to cultures; and to Elders past, present and emerging.

<sup>15</sup> For more information on the project, see <https://consumeraction.org.au/20191010-ip-project-midyear-report/>.

For stories of the rip-offs caused by this mis-selling, see Allan's story and Joe's story in Consumer Action's recent submission to ASIC's consultation on responsible lending,<sup>16</sup> and Cooper's story at page 26 below.

A final report detailing insights from the project will be available in the early 2020.

**C7Q2: If you consider there is significant consumer detriment, do you think that it should be addressed by the proposal in this section, or by some other intervention or action by ASIC? For example, could product providers be given incentives to offer better products if some or all of the proposed obligations only applied to low-value products? Please give the reasons why you think a particular approach will be more effective.**

Given the above evidence of ongoing consumer detriment, our primary position remains that the sale of add-on insurance by motor dealers should be banned. Car dealers cannot be trusted to sell complex financial products.

The profits of insurers and car dealers—not customer need—are the rationale for the car yard add-on insurance market. Even after extensive action by ASIC, claims ratios are still rock-bottom 7.9 per cent for CCI, 9.3 per cent for GAP and 24.6 per cent for mechanical breakdown insurance.<sup>17</sup> The short point is that insurance is complex—people need time to consider their insurance needs, free from the high-pressure sales dynamics of a car dealership. Dealerships have become reliant on commissions and bonuses paid for the sale of junk insurance, so the incentive to pressure-sell insurance to people who don't want or need it will remain. Cars and life insurance, for example, are fundamentally different goods, and the skills and knowledge to sell each are fundamentally different. Until there is a ban on the sale of insurance in car yards, ASIC will continue to be caught in a game of "whack-a-mole" with car dealers, insurers and warranty providers.

Short of a ban, we support the proposed intervention with the modifications recommended in our response to C7Q3.

On our reading, there is nothing in Part 2 and 3 of the Draft Instrument that explicitly bans the sale of add-ons without a deferred sales period. This may be implied from section 5 together with section 7(3), however clearer drafting may assist.

We are strongly opposed to the proposed obligations only applying to "low value" products. The pressure sale dynamics of the dealership remain, regardless of the value for the product, meaning some people will end up with an insurance product they don't want. This would be complex to monitor and explain. The value of products may change over time, and claims ratios involve a lag time. Further, mis-selling can take years to uncover, as the current scandal proves. DemandaRefund continues to generate demands for add-ons that were bought prior to 2016.

It is unclear from CP324 what would constitute "low value" but in our view, it would be any product with a claims ratio under 90 cents in the dollar. This is equivalent to comprehensive car insurance, which Commissioner Hayne identified as a benchmark for good value for consumers for an exemption from the economy-wide deferred sales model (FSRC Recommendation 4.3).

Even with a mandated claims ratio, people's insurance needs are different, and what may be high value to one consumer may be low value to another. Two people with similar characteristics may have different needs, where they already have cover through a superannuation policy, or where they have tyre and rim insurance included under their comprehensive car insurance.

<sup>16</sup> Consumer Action Law Centre, Submission to ASIC, *Response to CP 309: Update to RG 209: Credit licensing: Responsible lending conduct*, May 2019, Case Study 4 (Allan's story), page 25 and Case Study 6 (Joe's story), page 36: <https://consumeraction.org.au/wp-content/uploads/2019/05/190520-Consumer-Action-Submission-ASIC-RG-209-Final.pdf>.

<sup>17</sup> ASIC CP324 para 23.

**RECOMMENDATION 1.** The sale of add-on insurance by motor dealers should be banned. Alternatively, an effective deferred sales model (with our proposed modifications) should be introduced.

**RECOMMENDATION 2.** The obligations proposed in CP324 should not only apply to 'low value' products.

**RECOMMENDATION 3.** Amend the Draft Instrument to clarify that the sale of add-ons is banned except in accordance with the deferred sales model and obligations in Section C.

**C7Q3: Please summarise your views on the proposal for a deferred sales model in this section (e.g. whether it should apply across all sales channels where intermediaries regularly arrange finance for cars). Please explain the reasons for your position.**

We reiterate that add-on insurance should not be sold in motor dealerships. However, if the products continue to be sold, they should only be sold under a deferred sales model in which the customer proactively opts-in to buying the insurance. We comment below on areas of concern with the model. Otherwise, we are very supportive of the proposed intervention.

Feature of proposed intervention	Summary of our position
Deferred sales model	Prefer a ban on sale of all add-ons in caryards
All sales channels	Strong support
All classes of product	Strong support
All consumers (no opt-out)	Strong support
Start of deferral period (commitment to buy or application for finance)	<b>Do not support</b> – should be after sale, finance approval and delivery
Length of the deferral period (4 days)	<b>Do not support</b> – should be 30 days or minimum of 7 days
Intermediary cannot initiate contact	Strong support
Format of online consumer roadmap	<b>Do not support</b> – significant risk of avoidance
Use of knock-out questions	Strong support
Prohibit written materials pressuring consumers	Strong support
Monitoring by ASIC of consumer outcomes	Strong support
Intervention not applying to 'free' products	<b>Do not support</b> – significant risk of avoidance
Intervention not applying to add-ons extended as part of a car loan/lease extension	<b>Do not support</b> – Consumers circumstances have changes, may not be suitable
Specific reforms for mechanical risk products	See answer to C7Q4
No specific avoidance obligations	<b>Do not support</b> – significant risk of avoidance

### Start of deferral period

We strongly recommend that the deferral period only begin once the car has been purchased, financed, *and* delivered to the consumer, and access to the tailored roadmap provided. Unfortunately, ASIC has proposed that the deferral period would start after:

- the consumer has made a 'financial commitment' in relation to a particular car, which would include becoming liable to make payments on the car as a result of entering a car sale contract or submitting an application for finance; and
- the consumer has been given online access to the tailored consumer roadmap.<sup>18</sup>

<sup>18</sup> CP324 at paras 111 and 115.

## Financial commitment

Our joint consumer submission to ASIC CP294 identified principles should inform the trigger event under an effective deferred sales model. ASIC's proposed model fails to meet the following principles:

1. **The car should be purchased before the add-on insurance sale:** As ASIC found in the car yard context, if add-on products are offered before the purchase, a consumer cannot make an informed decision about the add-ons, and is more likely to experience decision fatigue.<sup>19</sup>
2. **Finance should be approved before the add-on insurance sale:** Similarly, the finance process must be clearly separated from the add-on sales process. Consumers must not be led to believe that purchasing add-on insurance will improve their chances of finance approval or the terms on which finance is offered. While this may lead to an additional financing approval process being required, if the add-on insurance is ultimately financed, this is an important financial decision for both the financier and the purchaser to consider separately. This provides a significant opportunity to inform and engage the mind of the consumer on the consequences of the decision to purchase an add-on insurance product on finance. Our services have seen car finance contracts where the add-on products are equal or greater in value to the cost of the car – this is a substantial purchase with significant financial implications, particularly when attracting interest, which in some cases is very high (e.g. 48% per annum).
3. **The car should be delivered before the add-on insurance sale:** Consumers need to be in possession of the car before true consideration of the distinct add-on products can be undertaken. This model wholly removes the add-on insurance sales process from the point of sale and the high-pressure techniques that being on the salesperson territory can entail. A consumer would no longer have to worry about having to please a salesperson in order to ensure a smooth transition to final possession of the good or service.
4. **The decision to purchase and finance a car must be distinct from the decision to purchase and/or finance an add-on insurance product:** The central aim of the model should be to ensure that the decision to purchase a vehicle and the decision to purchase an insurance product are clear and distinct. The deferral period and its commencement must be designed to promote this as much as possible. This model separates the purchase decisions completely and removes any inference (express or implied) that the purchase of the add-on products can influence final approval of the finance or any other aspect of the sale.

We are, therefore, strongly opposed to this ASIC's proposal that the deferral period is could start by the consumer merely making an application for finance.

This proposal would mean that, in many cases, the consumer will need to re-engage with the dealer to accept delivery of the car or sign the loan contract, which means they are at risk of add-on insurances being bundled into the loan. Similarly, the implicit pressure from a desire to get finance approved will also be operative. The well-documented problems in mixing the two sales processes described above including confusion and other behavioural biases are still at play. A deferred sales model that allows pressure sales will defeat the very purpose of the reform.

ASIC acknowledges the defect with its own model in CP324:

There is merit in starting the deferral period at vehicle delivery or shortly thereafter. If the deferral period was, for example, 30 days from the date of delivery, they would be able to consider their need for add-on products in light of owning and using the vehicle during this time. However, we accept that starting the deferral period

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<sup>19</sup> ASIC CP294, Figure 1, Sales sequence C, page 52.

at this point would be too disruptive and significantly restrict the ability of intermediaries to sell add-on products.<sup>20</sup>

The product intervention order *should* significantly restrict the ability of intermediaries to sell junk insurance in add-ons. The junk add-on insurance scandal has been one of the worst torts in our financial services history, causing high detriment and requiring a multi-year, \$130 million clean-up and counting. Car dealers cannot be trusted to sell complex financial products.

ASIC's stated concern about the restriction of intermediaries' ability to sell junk add-on products is:

- not relevant to ASIC's decision to exercise the product intervention power under s 1023D(1)(b) of the *Corporations Act 2001* (Cth);
- not aligned with ASIC's objectives for this product intervention as stated at para 28 of CP324.

Our experience suggests that there is not a large market for these products in the absence of pressure selling tactics. Not a single DemandaRefund user has stated that they would buy the product, knowing what they know now. As CP324 notes, were there to be genuine demand for these add-on products, insurers and warranty providers would establish alternative distribution methods, such as online channels.<sup>21</sup> As ASIC has observed:

Because consumers would have a greater opportunity to obtain information about other competing products, providers currently locked out of car dealership distribution points could be encouraged to offer add-on products online. If online distribution becomes widespread, it could generate increased competition between providers and improve transparency on product price and cover, benefitting all parties.<sup>22</sup>

Our recommendation that the deferral period start after purchase, any finance approval and delivery meets the above principles. It will provide simplicity, certainty for distributors and supervisors, improve clarity of decision-making and allow consumers the space to consider their need for any insurance. It will be simpler to document the start of the deferral period. It would also resolve our concerns about gaming of the online portal and length of the deferral period, discussed below.

We note that the Draft Instrument does not ban, during the deferral period, contact relating to the loan, delivery or other matters not related to the add-on product. While such contact could be banned, it may delay the finalisation of the loan or the purchase of the car. Our recommendation is a simpler fix that would allow necessary communications relating to the car and loan but also prevent the pressure-sale of add-ons.

**RECOMMENDATION 4.** The deferral period should not start until after the car has been purchased, financed, and delivered to the consumer.

#### Online consumer roadmap

We broadly support the second limb. Consumers should have useful product information regarding an add-on insurance product and engage with it before the deferral period starts. This will enable the consumer to make a genuinely informed assessment. However, we have concerns about the format of the online consumer roadmap—see our comments at page 15 below.

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<sup>20</sup> ASIC CP324 at paras 120-1.

<sup>21</sup> ASIC CP324 at para 109.

<sup>22</sup> ASIC CP294 at para 187.

## Length of deferral period

We strongly recommend that the deferred period be extended from four days to 30 days or, alternatively, a minimum of seven days consistent with the recommendation of the Productivity Commission.

The longer the deferral period, the more distinct and disruptive the processes will be and therefore the greater the potential benefit to consumer decision-making. As CP324 acknowledges, there is considerable merit in introducing a 30-day deferral period for some products to allow a consumer to fully assess their financial situation before purchasing add-on insurance. A consumer would have made at least one payment towards any financing, allowing the consumer to better assess their financial situation and their ability to finance extra insurance.

The Productivity Commission considered that, in principle, a deferred sales model could enhance consumers ability to impose competitive pressure on insurers and product retailers by allowing consumers to consider the merits and appropriateness of the add-on product and to shop around for alternatives. It observed that:

In practice, this hinges on the model giving a sufficiently long break between the purchase of the primary product and the point at which the consumer can purchase the add-on product to allow the 'halo effect' to dissipate and the consumer to be able to dispassionately assess their need for insurance and consider the products available to them. The **four-day deferral period of the Banking Code of Practice deferred sales model is insufficient to achieve this end**. As the deferral period commences at the point at which the credit card application is submitted, the model can potentially allow CCI to be sold prior to credit approval. The Commission's view is that the deferral period should be a **minimum of seven days** from the point at which the consumer applies for the credit product.<sup>23</sup>

CP324 does not state why the Productivity Commission's recommendation of a seven-day deferral has not been adopted.

We reiterate that the length of the deferral period should not be the primary mechanism for separating the sale of the primary product and uptake of finance from the sale of add-on products. The deferred sales model would likely fail if it relied on the number of days in a transaction having this effect. For example, if a four-day (or even seven-day) deferral period meant that a car dealer could simply ask the customer to pick up the car on Thursday rather than Tuesday, and could sell add-on products before the car purchase and finance are finalised, the deferral period may have no benefit. As discussed above, the central mechanism to ensure distinct sales processes and purchasing decisions is in our view, the deferral period should only start after purchase, finance approval and delivery.

A four-day deferral is industry-friendly and would actually give sellers a benefit. Currently, the cooling-off period for add-on insurance is usually around 30 days. If the deferral period is less than the cooling-off period, then sellers are still getting a benefit from this reform. That is, if the consumer opts in after the deferral period, the seller knows they have a completed sale; at present, they don't really know they have a completed sale until the end of the cooling-off period.

**RECOMMENDATION 5.** Extend the deferral period to 30 days; alternatively, a minimum of seven days.

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<sup>23</sup> Productivity Commission, Report No 89, *Competition in the Australian Financial System*, 29 June 2018, 29 (internal citations omitted, emphasis added).

## Online consumer roadmap

We are concerned that the online consumer roadmap (also described as an online portal) may backfire in the proposed intervention. While we support the use of innovative forms of disclosure to provide meaningful product information, such innovation should not make it easier to sell junk insurance.

The following comments are provided on the basis that we are strongly opposed to the deferral starting after a mere application for finance. In fact, many of the issues we are seeking to be addressed below can be prevented by simply aligning the start of the deferral period with delivery. Aligning the start of the deferral period with a financial commitment does not eliminate the issues consumer representatives have long raised and therefore will need to be address through supplementary “roadblocks” or rules.

### Prevent simply deferring high pressure sales practices

There should be no obligation on the consumer to engage at all with the online consumer roadmap—either at the beginning of the process or at the end.

The proposed model does not prevent the salesperson talking a consumer through the online consumer roadmap and pressuring them to purchase the add-on insurance or warranty while in the car yard, even if the sale cannot be completed until the end of the deferral. We can envisage a salesperson forcing the person to open the portal on their phone or device while in the caryard and tell consumers how to click through and choose ‘proceed’ or ‘further information’, enabling contact at the end of the deferral. Given the purchaser will still need to return to pick up the car in many cases, this is likely to simply change the pressure sale to collection of the car.

The Financial Conduct Authority’s evaluation of the 4-day deferred sales model for add-on GAP insurance in United Kingdom found that 63 per cent of buyers believed that the same was finalised on the same day as the product was introduced.<sup>24</sup> While the survey data was not conclusive, the FCA observed that ‘this could point to some dealerships not applying this measure in its intended spirit.’<sup>25</sup>

The intervention must prevent salespeople:

- (a) forcing the consumer to access the online consumer roadmap in the car yard;
- (b) forcing the consumer to agree to proceed or receive further information (thus enabling contact at the end of the deferral period) and purchase the add-on when they return to pick up the vehicle.

At the very least the online consumer roadmap should not be able to be opened until 24 hours after being provided with it. In this way, it would allow the consumer to be separated from the sales context and be able to make decisions without pressure.

Further, a consumer could be provided with a hard copy factsheet with the link that activates 24 hours later rather than an electronically provided link—whereby requiring the consumer to proactively engage with the information and product, if in fact they are interested in the add-on.

If a consumer has not made any decision to purchase the add-on product or has not interacted with the online consumer roadmap, the intermediary must be *prevented* from initiating further contact or discussion with the consumer about the product. There is nothing in the proposed intervention that actually prevents the intermediary

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<sup>24</sup> Financial Conduct Authority, Evaluation Paper 18/1: An evaluation of our guaranteed asset protection insurance intervention. July 2018, page 40: <https://www.fca.org.uk/publications/corporate-documents/evaluation-guaranteed-asset-protection-insurance-intervention>.

<sup>25</sup> Ibid 40.

pressuring the consumer to purchase the add-on via the consumer roadmap in the car yard when they return to pick up the car.

However, given the model put forward by ASIC in CP324, it is unclear on face value how this behaviour can be prevented in the situation where the consumer needs to re-engage with the intermediary to pick up the car. This will pose significant supervision and monitoring resources. This is an issue that needs to be seriously reconsidered by ASIC.

### Legitimising an illegitimate product

The aim of this intervention must be to decrease the sale of junk insurance. We are concerned that the provision of the online consumer roadmap may increase, rather than decrease, add-on sales because it may add legitimacy to the sales process for junk insurance. The development and reifying of a roadmap will suggest to consumers that the product is a normal, everyday part of the process and may even suggest that it is something they both need to engage with or need to purchase. As ASIC's recent disclosure report found, transparency about conflicts of interest can actually increase trust in salespeople, and salespeople may feel morally licensed to recommend biased choices.<sup>26</sup> These insights should be applied to this intervention.

### Positive friction and consent

An online portal should not be seen as a way to create a "frictionless" experience making purchasing decisions easy. People may tend to click through things presented on a computer or app. Frictionless transactions already cause significant consumer harm in financial services due to consent not being genuine, voluntary or informed. If ever there was a case for slowing down the sales process using digital tools, it is the sale of add-on insurance in car yards. Positive friction built into the online portal would be desirable to enable better consumer decision making.

Under Rule 4.9 of the Consumer Data Right Rules, consent to collect and use data must be:

- a) voluntary;
- b) express;
- c) informed;
- d) specific as to purpose;
- e) time limited; and
- f) easily withdrawn.<sup>27</sup>

Similar principles need to be applied to consumer's interaction with this online portal and any consent to be contacted. While the knock-out questions as proposed are important, additional frictions should be built into the process.

### *Voluntary and express*

Pre-filled forms are a known problem in the mis-selling of car yard junk insurance. To prevent these problems recurring with the online portal, ASIC's intervention must prohibit pre-filled, pre-ticked or pre-selected options boxes in the portal. This would work in a similar fashion to the development of stronger consent rules under the Consumer Data Rules.<sup>28</sup>

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<sup>26</sup> ASIC and Dutch Authority for the Financial Markets (AFM), *Disclosure: Why it shouldn't be the default*, 14 October 2019, page 42: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

<sup>27</sup> Competition and Consumer (Consumer Data Right) Rules 2019, 4.9: <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-o/cdr-rules-banking>.

<sup>28</sup> Eg 4.11(2) Competition and Consumer (Consumer Data Right) Rules 2019, or Article 4(11) and Recital 32 of the General Data Protection Regulation 2016/679.



This means that the “Proceed” button presented in Figure 4 of CP324 should not be pre-highlighted or pre-selected. It should also not be highlighted more than the “cancel” button at any stage.

Dark patterns—used in websites and apps that make consumers buy or sign up for things that they didn't mean to—should be prevented. For example, the online portal must be prevented from switching “proceed” and “cancel” buttons. The use of colours red (commonly a negating colour) for proceed and green (commonly a proceeding colour) for cancel should be prevented. Prohibiting such techniques will assist the voluntariness of the consent.

### *Informed*

The design of the portal should be such that there needs to be a number of information pages presented before somebody is able to agree to “proceed”.

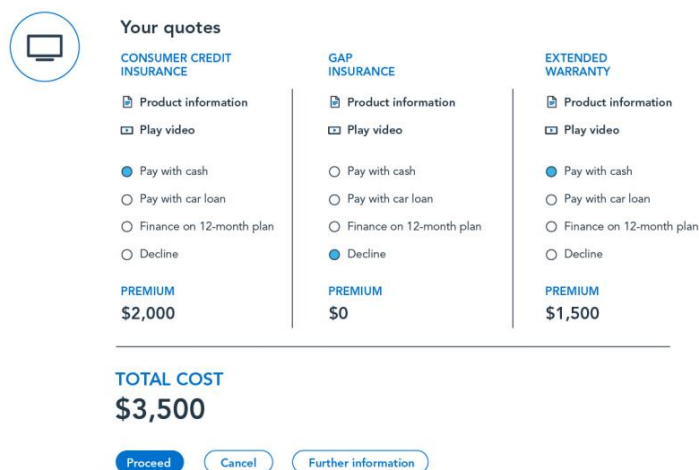
While we support “statements being displayed immediately on entering the portal that the consumer does not have to buy any add-on products” the consumer should not have to actively seek out the information via links. On the contrary all the information and key metrics should be provided first to the consumer before they reach a page where they can agree to be contacted. In other words: the link to proceed should only be provided after a consumer actually engages with the key metrics listed at para 149 of CP324, including the claims ratio. The opportunity to cancel should be provided at any time.

Ideally the key metrics information should be paginated—that is, the information and graphs should be split into multiple pages where a consumer must click a “next” button to receive the next piece of information. While this technique is abhorred in a clickbait context, here it would enhance the provision of information and key metrics and provide the necessary friction required to ensure greater consumer engagement with the material.

The use of such techniques is justified. For any “consent to be contacted” to be genuinely informed, the consumer must first engage with the information and key metrics. Merely providing such information in a link to another page, as proposed, will only serve to undermine the consent process and will lead to many under-informed consumers.

The portal should also state that alternative add-on products available via other channels. The information provided should make it clear that the add-on products may be available at competitive prices elsewhere, including directly from the insurer or warranty company, or that the consumer may already have similar overlapping cover, such as disability cover through their super fund.<sup>29</sup> Similar requirements apply in the United Kingdom's intervention in the GAP insurance market. The portal should not give the impression that this is the only way to obtain coverage.

Figure 4: Sample screenshot of an online portal



Source: ASIC CP324, page 40

<sup>29</sup> ASIC CP324 para 65(c).

## *Easily withdrawn*

Consumers should have the ability to undo their decision or withdraw their agreement to proceed during a cooling off period for that decision.

**RECOMMENDATION 6.** The online portal should adopt the Consumer Data Right principles that consent be voluntary, express, informed, specific as to purpose, time limited, and easily withdrawn.

### Option to reject

We also strongly support the option for the consumer to reject the sale entirely during the deferral period. Those who read the prescribed period and decide that the product is not for them should be able to communicate this without receiving further communications at the end of the deferral period.

### Accessibility concerns

It is unclear from CP324 whether the online portal will be sufficiently accessible to consumers from non-English speaking backgrounds, or with lower financial or digital literacy. How will people without any or reliable online access use the online portal? As the Consumer Credit Legal Service WA has noted, this is a big issue in remote communities in Western Australia.

The portal will contain a prominent statement that they are not obliged to buy add-on insurance or extended warranty. Will this warning and the information within be enough for consumers to understand? In our experience, providing consumers with more information to read and review rarely assists them. ASIC should ensure that the warning and consumer roadmap is consumer tested and monitored so that it does not backfire. This is particularly important in light of the findings of the recent ASIC/AFM joint report *Disclosure: Why it shouldn't be the default*, which confirmed that warnings have limited effectiveness and can actually backfire.<sup>30</sup>

### **Intervention not applying when car loan/lease extended**

There is no good reason to exclude from the intervention add-ons that are extended as a result of extending the term of the car loan or lease. A person's circumstances or desire for the product may have changed—particularly if it was not of use to them during the previous term, or where their employment has changed.

**RECOMMENDATION 7.** Apply the intervention to add-ons extended when a car loan or loan is extended.

**C7Q4: Please summarise your views on the additional obligations in this section (e.g. whether 'knock out' questions should be introduced). Please explain the reasons for your position.**

Yes, we strongly support the additional obligations to: a) introduce knock out questions; b) provide better information to consumers, and c) address pressure selling and unfair tactics.

The age of disclosure as the primary consumer protection is over. There is overwhelming evidence that the current disclosure requirements for add-ons sales have not ensured that people understand what they are being sold. From ASIC's recent joint report on disclosure<sup>31</sup> to the Insurance Council's own research,<sup>32</sup> we know that the disclosure

<sup>30</sup> ASIC and Dutch Authority for the Financial Markets (AFM), *Disclosure: Why it shouldn't be the default*, 14 October 2019, pages 45-50: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

<sup>31</sup> Ibid.

<sup>32</sup> Insurance Council of Australia, *Consumer Research on General Insurance Product Disclosures: Research findings report*, February 2017, which found that 81 per cent of people did not read the PDS before buying their comprehensive car insurance (page 18).

alone is not an effective form consumer protection. As our DemandaRefund data reveals, of people making demands about GAP insurance:

- 55 per cent didn't even receive the PDS;
- 63 per cent weren't given a chance to go through the documents before agreeing to the purchase;
- 97 per cent did not think the salesperson explained all the important exclusions and limitations; and
- 92 per cent did not think the process was fair.

### Knock-out questions

CP324 states at para 142 that each insurer and warranty provider will develop knock-out questions based on their own products. We are concerned that providers will not necessarily develop the knock-out questions in good faith. These questions should be set through a transparent process, with oversight by ASIC and input from consumer representatives. Knock-out questions should be consistent across products and providers and set a high bar.

The Draft Instrument requires some tightening to achieve the policy intent. Section 6(2) of the Draft Instrument states:

(2) The intermediary:

(a) for each add-on insurance product or an extended warranty product, or option of cover within the product, that is made available by or through the intermediary—must identify each class (**unsuitable class**) of retail clients for whom the intermediary reasonably believes would not benefit from acquiring the add-on insurance product or extended warranty product or option of cover within the product; and

(b) must not make available the product or option of cover through the online consumer roadmap to a retail client that the intermediary reasonably believes falls within the unsuitable class.

We have two concerns with this drafting. Firstly, while CP324 states an intention for providers to develop criteria to restrict sales so consumers are not offered products that are unlikely to offer them a 'significant benefit' (at para 132), the unsuitable class will be focused on those who 'would not benefit'—this is a much higher bar and means people receiving even a very small benefit will not be knocked out.

Second, the words 'reasonably believes' in section 6(2)(a) and (b) Draft Instrument are too subjective, giving the intermediary too much discretion to identify the unsuitable class, and in not making the product available to the unsuitable class.

**RECOMMENDATION 8.** Amend the Draft Instrument to so that add-ons cannot be offered to people who will not receive a significant benefit, and remove intermediaries' discretion in relation to the unsuitable class.

**RECOMMENDATION 9.** Knock-out questions should be set through a transparent process with oversight from ASIC and input from consumer advocates.

### Pressure selling and unfair tactics

We strongly agree with CP324.132(c) that obligations should be introduced to address the risk of pressure selling and unfair tactics at the point of sale. However, the Draft Instrument appears to set a higher bar at section 8(1):

Unconscionable conduct or manipulation: The intermediary must not, in relation to an add-on insurance product or an extended warranty product, engage in conduct that involves a technique that should not in good conscience have been used in relation to the retail client or which manipulates the client.

While we support this obligation, as drafted it may not capture all of the known pressure-selling and unfair tactics. DemandaRefund users reported that the salesperson pressured them into buying the insurance (between 56-65 per cent) or other unfair tactics (41-49 per cent). Overwhelmingly, users reported that the overall sales process was not fair (87-92 per cent). Concerningly, sixty-one per cent of DemandaRefund users for GAP insurance reported that the salesperson told them that they had to buy it. Many people report being misled or pressured to buy the add-on insurance or extended warranty to secure finance or complete the purchase. Section 8(2) of the Draft Instrument does not prevent these types of misrepresentations.

**RECOMMENDATION 10.** Amend the Draft Instrument to explicitly ban intermediaries from engaging in pressure-selling and other unfair tactics.

### **Case Study – Delia (C191038)**

Delia is 75 years old and relies on the Centrelink Aged Pension as her only source of income. She lives in community housing. In June 2019 she attended a car dealership in NSW looking to buy a car as her current car needed repairs. A salesperson told her that she could buy a car on finance. She took a car for a test drive and the salesperson told her that the total cost of the car would be approximately \$7,000 if she traded in her old car. He said that if she purchased the new car with finance, the loan repayments would be approximately \$35 per week. The salesperson told her that she could take the new car home that day and return another day to finalise the paperwork.

Delia was later contacted by a finance broker and she advised him of her financial situation. She returned to the dealership to finalise the paperwork a few days later. The salesperson told her that the loan amount was \$10,900 with repayments of \$210 per fortnight, far above the amount he originally told her.

Delia could not afford this amount. The salesperson also told her that she was required to purchase an extended warranty under the loan contract. She was told that if she did not go ahead with the finance contract she would not get her old car back as it had already been transported. Delia felt pressured into signing the contract. She had no means of transport as she drove the new car to the dealership and felt that she had no option but to sign the contract.

*Case study provided by Financial Rights Legal Centre*

### **Other measures**

In addition to the above features of the proposed intervention, we recommend the following measures to improve outcomes for consumers in car yards:

**RECOMMENDATION 11.** Ban the financing of premiums.

**RECOMMENDATION 12.** Restrict the sale of add-ons that do not achieve a high claims ratio.

**RECOMMENDATION 13.** Ban conflicted remuneration for all add-on insurance and warranties, as foreshadowed by FSRC Recommendation 2.6.

**RECOMMENDATION 14.** Remove exemptions for point-of-sale credit (FSRC Recommendation 1.7).

**C7Q5: How would the proposal and obligations set out in this section affect businesses (e.g. insurers, car dealers, finance brokers, credit providers)?**

No comment, other than to note the benefits to businesses in response to C7Q6.

**C7Q6: If you are able to do so, please provide an estimate of the impact of implementing the proposed model, or any changes or variations to this model set out in your response, including: (a) the likely compliance costs (e.g. training, software); (b) the likely effect on competition; (c) the impact of additional costs on businesses and consumers; (d) who would bear the cost; and (e) other impacts, costs and benefits.**

The proposed intervention will:

- improve competition by reducing dealers' situational monopoly at the point of sale, which has allowed high and uncompetitive prices to be charged. As the Productivity Commission found, the caryard distribution channel does not provide consumers with adequate capacity to compare different products such as the cost of an add-on product sold by one dealership to the same or similar products sold by another dealership.<sup>33</sup> This gives insurers and product retailers that sell add-on insurance price setting power.
- improve competition by levelling the applying field for warranty providers—at the moment, 'dealer-issued' warranties are not regulated like mechanical risk insurance and regulated third-party warranties.
- reduce remediation and compliance cost for firms following decades of mis-selling—we note that ASIC has announced over \$130 million in remediation for over 245,000 consumers for caryard add-on insurance and extended warranties, and over \$6.8 million in refunds have been demanded through DemandaRefund alone;
- have significant beneficial impacts for consumers through reduced sales of junk insurance and worthless warranties;
- benefit consumers and industry through reduced internal dispute resolution and complaints to the Australian Financial Complaints Authority;
- over time, see benefits from reduced supervision—ASIC, along with consumer advocates, industry peaks and individual firms, have invested significant time and resources into reform and redress of caryard junk insurance; and
- improve trust in car dealer and insurers.

An evaluation of the 4-day deferred sales model introduced in the United Kingdom for GAP insurance found that, one year after the intervention an estimated £26-28 million of ongoing consumer benefits, which exceeded the total costs of implementation, and shopping around for add-ons doubled, increasing from 17 to 45 per cent.<sup>34</sup>

**C7Q7: Do you consider there is a significant risk of avoidance of the proposed obligations? If so, should ASIC introduce additional measures to address that risk?**

Yes, we are very concerned that car dealers, insurers and warranty providers will avoid the proposed obligations.

<sup>33</sup> Productivity Commission, Report No 89, *Competition in the Australian Financial System*, 29 June 2018, 421.

<sup>34</sup> Financial Conduct Authority, Evaluation Paper 18/1: An evaluation of our guaranteed asset protection insurance intervention. July 2018, page 40: <https://www.fca.org.uk/publications/corporate-documents/evaluation-guaranteed-asset-protection-insurance-intervention>.

The history of add-ons in car yards is one of avoidance, with ASIC caught in a game of 'whack-a-mole' with insurers and their retailing partners, according to the Productivity Commission.<sup>35</sup> Dealers remained concerned about their profits and will likely find ways to subvert the intervention. As the representative of the Insurance Council of Australia admitted in evidence to the Financial Services Royal Commission, car dealers have become dependent on commissions and volume-based bonuses that were likely to create incentives to engage in poor sales practices.<sup>36</sup> This risk remains and gives rise to the real possibility of deliberate avoidance of the product intervention to keep revenue high at the cost of ongoing consumer detriment.

**RECOMMENDATION 15.** Introduce anti-avoidance obligations in the Intervention Order.

We refer to our comments above, which highlight the following avoidance risks:

- **Start of the deferral period not being aligned with delivery:** people may be pressured to buy add-ons when the consumer returns to collect the car or feel pressured to agree to add-ons to secure car finance or financing of the add-on premiums.
- **Length of the deferral:** A four-day deferral is open to abuse, particularly in combination with the deferral period starting before delivery.
- **Contact during the deferral:** Section 7(2) of the Draft Instrument prevents contact being *initiated* during the deferral period in relation to the add-ons, but it does not prevent discussion of add-ons during contacted initiated for other purposes, such as delivery arrangements or signing of loan documents. There is nothing in the model to stop a dealer from pressuring a person to open the app and click 'proceed' of 'further information'.
- **Knock-out questions:** Giving intermediaries too much discretion in setting and applying the questions.

We identify further avoidance risks below.

### Obligations not applying to 'free' products

Under s 5(3) of the Draft Instrument, the prohibitions will not apply to products issued for no consideration—that is, products offered for free. Dealerships may throw in add-ons as a sweetener to get the deal done. The reality is that the consumer *always* pays for the product, one way or another. DemandaRefund users have described situations where they thought the add-on was being offered for free, but later found premiums charged to the loan or their credit card.

We are concerned that creating this loophole will incentivise dealers to restructure the payment of add-ons to appear free and hide the cost in other products. This is particularly concerning given ASIC's finding that on average, 96 per cent of low-value warranties are given away for free.<sup>37</sup>

### Definition of add-on insurance product

We are concerned the definition of 'add-on insurance product' and definitions of subsequent products at section 4 of the Draft Instrument will not capture all add-ons. For example, it is unclear with Eric Total Assist Insurance would be covered by the intervention. Eric describes the policy as follows:

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<sup>35</sup> Productivity Commission, Report No 89, *Competition in the Australian Financial System*, 29 June 2018, 430.

<sup>36</sup> Evidence of Rob Whelan, 21 September 2018, para 6408 available at: <https://financialservices.royalcommission.gov.au/public-hearings/Documents/transcripts-2018/transcript-21-september-2018.pdf>.

<sup>37</sup> ASIC CP324 at para 195.

If your vehicle is stolen or damaged beyond reasonable repair, Eric's Total Assist Insurance can give you added financial protection to cover the additional costs that may be incurred over and above what your comprehensive insurer pays out. Expenses could include the claim excess, new car on road costs and any personal items lost such as sunglasses, child seats and tools.<sup>38</sup>

Providers could alter the terms of their products, or create new low-value products, to fall outside the definition. Similarly, the definition of 'guaranteed asset protection insurance product' could be avoided by changing one of the reference points in the policy away from 'balance owing' on the loan to another measure. While 'tyre and rim insurance' is covered, a 'bumper and wheel' product is not.

This concern is not theoretical—parties operating in the add-on caryard market have a history of altering and creating junk products to evade regulatory scrutiny, including the move from mechanical breakdown insurance to discretionary risk products and then to dealer warranties.

A simpler and safer definition would be to the effect of 'any insurance product or warranty sold at or through a motor vehicle dealer or caryard.' This would ensure all caryard add-ons were captured by the intervention.

At a bare minimum, the definition of 'add-on insurance product' should be extended to add 'or any other similar products' to capture new products designed to avoid the product intervention order.

If necessary, our proposed broader definition can exclude comprehensive car insurance, so long as it only excluded genuinely comprehensive cover. We note the current definition of 'motor vehicle insurance product' is not genuinely comprehensive because it does not require the product to cover both loss/damage *and* liability for damage to other's property. A comprehensive car insurance policy that covered only one of these risks would be low value and would not meet consumers' expectations, so would not deserve an exemption from the deferred sales model.

Similarly, the definition of "extended warranty product" in the Draft Instrument focuses on a contract 'under which a dealer *promises to rectify*, or arrange another person to rectify, defects with the motor vehicle' (emphasis added). This definition should be reviewed against dealer-issued warranties that purport not to hold the dealer responsible for any obligation to pay claims and that only offer to pay reasonable costs to repair up to stated limits and commensurate with age and kilometres travelled.<sup>39</sup> We note that in the case of a discretionary risk extended warranty, the promise was found to be illusory and thus there was no valid contract.<sup>40</sup>

**RECOMMENDATION 16.** Amend the definition of 'add-on insurance product' to cover any add-on insurance sold through a caryard, rather than a defined list of products.

**RECOMMENDATION 17.** Review the definitions and terms in the Draft Instrument for avoidance risks and to capture all products.

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<sup>38</sup> Eric website, *Our products – Dealer*, accessed 20 December 2019: <https://ericinsurance.com.au/products-dealer/>.

<sup>39</sup> For example, see Davantage Group Pty Ltd trading as National Warranty Company, *Sentinel Warranty Terms and Conditions*. Clause 2.3 states: 'You agree not to hold your Motor Dealer responsible for any obligation to pay a warranty claim if NWC has finalised its review of your claim and either paid the claim... or provided notice to you that claim does not come within the Warranty terms and will not be paid.' Clause 2.9 states: 'Your Motor Dealer will, in respect of the Mechanical Failure of the Vehicle, pay the reasonable costs, up to the Financial Limits applicable, to repair the failed Covered Components commensurate with the Vehicle's age and kilometres travelled subject always to the Terms and Conditions in this document.'

<sup>40</sup> *Evans v Davantage Group Pty Ltd* [2019] FCA 884.

## Bridging insurance

ASIC's product intervention order should ensure that there is no ability to undertake regulatory arbitrage with the creation of bridging insurance. The risk of being uninsured during the deferral period is very small and does not create a need for 'bridging' cover,<sup>41</sup> which is neither practical nor desirable.

Bridging insurance would establish a new opportunity for high-pressure selling in car yards. It would also have the 'endowment effect' or exploit the consumers' 'status quo bias,'<sup>42</sup> by making them feel invested in the bridging product, and, because they have something akin to the add-on product, that the add-on product has some intrinsic value. This would distort people's decision-making and make them more inclined to buy add-on products after the deferral period. If car dealers used incentives or discounts for add-on insurance, the risk of poor decision-making would significantly increase.

We note that comprehensive car insurance (which covers a very real and present risk) is excluded from the intervention and will still be available before the consumer takes the delivery of the vehicle or drives it. Many add-on insurance policies and warranties currently include waiting periods, during which the customer is not covered.

It is difficult to understand any industry concern that consumers will not be covered from the moment they drive away from the caryard when this is the status quo. If insurers were genuine in their concern and wish to reduce the time in which people are not covered by an add-on product, they should remove the waiting periods from existing add-on and other insurance products.

**RECOMMENDATION 18.** The intervention should ban bridging insurance during the deferral period.

## Proposed intervention: Mechanical risk products

**E3Q1: Do you consider that there is significant consumer detriment from the sale of add-on mechanical risk products in the circumstances described by ASIC? Please provide evidence in support of your response.**

Yes. As above for add-on insurance, there is overwhelming evidence of past, continuing and future significant consumer detriment unless ASIC makes a product intervention.

The extent of consumer harm in this area, including payment of premiums and interest for a useless product, requires a strong response. Some warranties offer such a low level of cover that they are almost worthless to consumers. We share ASIC's view that there are particular issues with an effective intervention for mechanical breakdown insurance and warranties where the car is still covered by a manufacturer's warranty. Consumers lose money by paying a premium when cover will not start for 3 to 7 years, and in some cases will not be able to claim at all.<sup>43</sup> Given this, a deferred sales period alone (even with the 30-day deferral period we recommend for other add-ons) would not stop the harm.

In the case of a discretionary risk extended warranty, the Court found that the promise was illusory and thus it was not a valid contract.<sup>44</sup> Junk warranties must be banned.

We endorse ASIC's summary of significant consumer detriment at para 169 onwards of CP324, which is consistent with our ongoing casework and the experiences of DemandaRefund users below.

<sup>41</sup> ASIC CP294 at para 212.

<sup>42</sup> See Daniel Kahneman, Jack L. Knetsch, Richard H. Thaler, Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, *The Journal of Economic Perspectives* 5(1), pp 193-206, Winter 1991.

<sup>43</sup> ASIC CP294, para 238.

<sup>44</sup> *Evans v Davantage Group Pty Ltd* [2019] FCA 884.



## Evidence from DemandaRefund

DemandaRefund continues to see high traffic from people aggrieved by the mis-selling of extended warranties. An empirical analysis of letters of demand generated through the website as at 9 December 2019 reveals a damning picture of the mis-selling of extended warranties. Remarkably, of the not a single person stated that would have decided to buy the extended warranty if they knew then what they know now. For more information about the assumptions in this analysis, see 'About this data' at page 6 above.

Extended warranty	No	Yes	I don't know	Total
Was the cost of the warranty added to your loan or paid for by credit card?	177 15%	938 77%	98 8%	1213
Did the salesperson explain the full cost of the warranty?	809 67%	404 33%		1213
Did you know you had bought the warranty?	227 19%	986 81%		1213
Did the salesperson tell you that you had to buy the warranty?	616 51%	597 49%		1213
Were you given an opportunity to review the documents before agreeing to the purchase?	786 65%	427 35%		1213
Do you think the salesperson explained all the important exclusions and limitations?	1181 97%	32 3%		1213
Did the salesperson explain your 'cooling off' rights?	1056 87%	157 13%		1213
Did you know the warranty was optional?	655 54%	558 46%		1213
Were you told (either in person, on the phone or in writing) that the salesperson would receive a commission for selling you this insurance?	997 82%	82 7%	134 11%	1213
Did the salesperson pressure you into buying the warranty?	425 35%	788 65%		1213
Did the salesperson use any other unfair sales tactics?	691 57%	522 43%		1213
Did the salesperson suggest that the warranty would be the only protection you'd get if something went wrong with the car?	344 28%	869 72%		1213
Did the word 'warranty' make you think the product would work like a manufacturer's warranty?	64 5%	1030 85%	119 10%	1213
Did the salesperson give you information that was misleading?	454 37%	759 63%		1213
Did this information or lack of information influence your decision to buy the warranty?	119 10%	102 8%	2 %	1142
Did the salesperson recommend the warranty to you personally based on something he or she knew about you, such as your age, state of health or employment status?	386 32%	283 23%	544 45%	1213
Did you receive a product disclosure statement (PDS)?	687 57%	526 43%		1213
Overall, do you think the sales process was fair?	1052 87%	161 13%		1213
If you had known what you know now, would you have decided to buy the warranty?	1213 100%			1213

It is clear that the detriment to consumers continues, even after action by ASIC. An analysis of demands made through the website from 1-31 October 2019 alone reveals 12 demands relating to extended warranties that were taken out in 2019, and 25 demands for warranties taken out in 2018.

Year Extended Warranty taken out <sup>45</sup>	2019	2018	2017	2016 and earlier	Total
Number of demands generated in October 2019	12	25	54	377	461

<sup>45</sup> Note: Consumer Action only has available data on the year that the extended warranty was taken out for demands generated through DemandaRefund from 1-31 October 2019.

This continuing detriment is unsurprising given the known problems in the caryard sale of extended warranties, and the volume of ongoing sales. As ASIC found, the sale of extended warranties remains significant, with over 400,000 warranties sold in a recent year with premiums totalling over \$161 million, and a claims ratio of only 23 cents in the dollar<sup>46</sup> (by comparison to around 89 cents for comprehensive car insurance). Without this intervention, the significant consumer detriment will continue.

## Case studies

Our services continue to assist consumers who have been recently mis-sold junk warranties.

### Cooper's story

Cooper (name changed) is an Aboriginal man who lives in regional Victoria. Cooper works full time earning an average income. Around May 2019, Cooper attended a second-hand car dealer (the Car Dealer). After seeking advice from a representative of the Car Dealer, Cooper entered into an agreement to buy a car manufactured in 2012 by a well-known brand (the Car). The purchase price for the car was just under \$14,000. To facilitate the sale, the Car Dealer arranged same-day finance through a third-tier lender. Cooper never spoke to the lender. The Car Dealer also added on three additional products to the sale:

- A comprehensive car insurance policy with a Car Insurer (the Car Insurance);
- An extended warranty with a Warranty Provider (the Warranty); and
- Roadside assistance with the same Warranty Provider (the Roadside Assistance).

All three products were for a period of 12 months. By adding these products onto the sale, the total amount of the loan increased to just under \$17,000. This was an increase of almost \$3,000 from the original purchase price of the Car.

In arguable breach of various legal disclosure requirements, Cooper was not provided with a breakdown of the loan or the costs of the Warranty or the Roadside Assistance. Cooper did not understand that he was paying an additional cost for the Warranty or the Roadside Assistance, nor was he given an option to buy the car without any of the three additional products. From the documents, it is apparent that the total premiums for the 12-month Car Insurance were around \$850, leaving the combined cost for the Warranty and the Roadside Assistance amounting to around \$2,000.

Just four months after buying the Car, Cooper noticed it was making concerning noises, so he took it to get inspected by a mechanic at his local authorised dealer. The mechanic assessed that there was 'severe damage' to the engine and that the Car was 'unrepairable'.

While the Warranty was purportedly designed to provide Cooper with 'protection against unforeseen mechanical failure', it only provides for a maximum benefit of \$1,000 for engine repair and only covers certain engine parts. It does not cover a complete engine replacement, for example. In fact, the terms and conditions contained within the Warranty significantly reduce its ability to provide any protection at all. Specifically, the Warranty:

- Only covers a 12-month term;
- Only covers a failure of certain engine parts and only when those parts cause a 'sudden stoppage';
- Says that noise does not necessarily constitute sudden failure;

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<sup>46</sup> ASIC CP321 para 174-5.

- Does not cover general wear and tear;
- Does not cover certain pre-existing faults;
- Does not cover replacements that occur as part of 'normal vehicle maintenance;'
- Does not cover the cost of mechanical diagnosis of the kind that would allow a person to ascertain whether they were entitled to make a claim under the Warranty.

Says that the Warranty will become 'inactive', affecting a person's entitlement to claim, if the car is not serviced every 6 months or every 10,000km (whichever occurs first). This clause is particularly problematic for Cooper because at the time he took the Car to the mechanic, he had driven the car over 11,000km since purchasing it.

In contrast to the very limited protection offered by this expensive Warranty, the consumer guarantees under the Australian Consumer Law that are automatically available to Cooper:

- Say that goods purchased must be of acceptable quality, meaning they must be safe, durable and free from any defects;
- Allow a person to reject the goods in the case of major failures;
- Allow for replacement or repair in case of non-major failures;
- Do not have strict time limits.

Despite being described as 'comprehensive cover', the Car Insurance sold to Cooper is also of limited value in the circumstances that Cooper finds himself in. The Car Insurance says it will repair, reinstate or replace a vehicle up to an amount of \$13,520. In any case, the Car Insurance will only pay out this benefit amount if the insured car is damaged in an accident, fire, theft, storm, flood or malicious act. None of these apply here. Furthermore, the Insurance specifically excludes pre-existing damage, which is arguably the case here.

Given the issues with both products, the Warranty and the Car Insurance would offer limited or no assistance to Cooper if he were to try to make a claim for the costs of repairing his lemon car. Cooper then sought the assistance of Consumer Action, which is helping Cooper access his rights under the Australian Consumer Law and credit laws. The case is ongoing.

*Case study provided by Consumer Action Law Centre*

### **Tim's story**

Tim went to a used car dealership to upgrade his car. He traded in his old car and bought a newer model, which was financed by a loan arranged by the car dealership. The dealer also sold Tim a three-year used car extended warranty and roadside assistance. Tim knew from the dealer that the car would have a warranty but he did not know it would cost anything extra. Tim did not read the documents when he signed them, and the costs were not explained to him at the time. Tim is now paying back a high interest loan that covers the costs of the warranty and roadside assistance as well as the cost of the car. Tim's car has broken down multiple times since he bought it, and he has been unable to claim repairs on the warranty. When Tim called the dealership to ask for their help, the dealership informed Tim that the warranty did not cover those kinds of repairs, and that he had not met the warranty's servicing and mileage requirements, so he could not make a warranty claim.

*Case study provided by Consumer Credit Legal Service WA*

**E3Q2: If you consider there is significant consumer detriment, do you think it should be addressed by the proposal in this section, or by some other intervention or action by ASIC? Please give reasons why you think a particular approach will be more effective.**

We strongly support ASIC’s proposed intervention, subject to our recommendations below.

Feature of proposed intervention	Summary of our position
Ban sale of mechanical risk products on new cars where manufacturer’s warranty has 12 months’ cover remaining	Strong support but change to one month’s cover
Other obligations (Section C of CP324) apply	Strong support
Ban the sale of mechanical risk products with claims limits under \$2000	Strong support with changes
Require refund rights	Strong support
Remove onerous servicing requirements	Strong support
Remove tied servicing requirements	Strong support
Obligations would not apply to warranties given away for free	Do not support – significant risk of avoidance
Intervention is product and channel neutral	Strong support

### Duration of ban

We agree that mechanical risk products should be banned until close to the expiration of the manufacturer’s warranty, given the significant consumer detriment. A deferred sales model alone would not assist in preventing the harm because the cover under most warranties commences after the manufacturer’s warranty ends—generally 5 or more years after purchase.

However, we maintain that the ban should continue until one month before the expiration of the manufacturer’s warranty, rather than the 12 months in the proposed intervention. Were the ban to lift 12 months prior to expiry, consumers may still experience the harm identified by ASIC:

- Lose money from any return they would have otherwise generated from the premium for 12 months before cover starts – 77 per cent of DemandaRefund users reported that the cost of the warranty was added to their loan or credit card;
- pay interest on any financed premiums for 12 months before cover starts;
- underestimate the distance to be travelled during the next 12 months, resulting in insufficient cover;
- exceed kilometre limits under the extended warranty during the 12 months.

We note the above issues will be mitigated by proposed refund rights, including the backdating of refunds, should consumers know to seek a refund or that they have even paid for the extended warranty.

Our recommendation would ensure that consumers who genuinely want and need an extended warranty can better predict their needs, and therefore are more likely to take out a warranty that is valuable to them. It would better prevent the detriment from the premature sales of mechanical risk products and reduce the complex decisions before the consumer at the time.

**RECOMMENDATION 19.** The ban on the sale of mechanical risk products on new cars should continue until one month (not 12 months as proposed) before the expiration of the manufacturer’s warranty.

## **Ban on warranties with maximum claim limits less than \$2000**

We strongly support this intervention. We agree that these warranties involve unfair pricing practices and fail to meet the consumer's needs. We strongly agree that these products are designed to minimise the financial risk to the warranty provider (and thus increase profits) rather than for consumers' needs and interests. People do not need these worthless junk warranties flogged as part of the sales process.

We have two recommendations to improve this measure.

Firstly, the Draft Instrument does not appear to prevent unreasonably low sub-limits for individual items. For example, the \$1000 item limit for engine repair in Cooper's story, above, would not be resolved by this measure. The measure should capture claim limits *to the effect of* capping claims at \$2000. Otherwise, high co-contributions for repairs by consumers may persist.

Second, setting the intervention at \$2000 without reference to the cost of the warranty could see continuing poor value warranties causing consumer detriment. For example, an extended warranty with a maximum claim limit of \$2000 that costs \$1,950 is still a worthless product, with most people better off self-insuring. By comparison, a warranty that pays out a maximum of \$2000 but costs on \$200 is much better value.

To resolve this, we recommend adding in an additional measure to section 10 of the Draft Instrument, being that the 'terms of a mechanical risk product must not have a maximum individual claim amounts of not less than 5 times the premium' or a similar relative value measure.

**RECOMMENDATION 20.** Amend section 10(b) of the Draft Instrument to capture low-value item or sub-limits.

**RECOMMENDATION 21.** Introduce an additional intervention that mechanical risk products must not have a maximum individual (or effective) claim amounts of not less than 5 times the premium or a similar relative value measure.

## **Warranties given away for 'free'**

This will potentially carve out most warranties from the proposed intervention. As ASIC's review of warranties found, 96 per cent of low-value warranties are given away for free.<sup>47</sup> Even where it is offered as a sweetener to complete the deal on the car, the reality is that the consumer always pays for the warranty. This poses a risk of avoidance if intermediaries bundle the cost of the warranties into the car purchase price. We are concerned about avoidance risks and number of warranties excluded from the intervention. This will require significant monitoring from ASIC.

**E3Q3: How would the proposal in this paper affect businesses (e.g. insurers, car dealers, finance brokers, credit providers)?**

No comment, other than to note the benefits to businesses in response to C7Q6.

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<sup>47</sup> ASIC CP324 para 195.

**E3Q4: What would be the advantages and disadvantages of car dealers no longer being able to rely on the exemption for incidental financial products (as a result of the proposal in paragraph E1(a))?**

We strongly support car dealers no longer being about to rely on this exemption, which has enabled the rise of problematic 'dealer-issued' warranties. These warranties cause the same harm as mechanical breakdown insurance and third-party warranties.

A number of the providers that previously structured their warranty offering as a regulated product have shifted to become 'dealer-issued' in recent years, while the underlying offer and branding remains the same. In our view, the existing exemption is used by warranty providers in conjunction with dealers as a blatant attempt to avoid regulation by ASIC and redress for consumers through external dispute resolution.

There are no disadvantages to car dealers no longer being able to rely on this exemption. Indeed, there are significant advantages:

- Access to justice would increase dramatically, as consumers would be able to complain to the Australian Financial Complaints Authority and receive compensation. This would also hold car dealers to account, assist in identifying systemic issues through AFCA reporting, and incentivise dealer to act properly in the first place.
- Ensuring providers are required to hold minimum levels of capital against future claims – this will mean people can have comfort that their claims will be paid.
- Mis-selling may reduce, as staff would be required to meeting minimum training and supervision requirements under the *Corporations Act 2001*.

If car dealers genuinely want to be in the business of issuing financial products, then they should be licenced accordingly. This would align with Commissioner Hayne's recommendation that exceptions and qualifications in financial services legislation should be eliminated.<sup>48</sup>

**E3Q5: If you are able to do so, please provide an estimate of the impact of implementing the proposed model, or any changes or variations to this model set out in your response, including: (a) the likely compliance costs (e.g. training, software); (b) the likely effect on competition; (c) the impact of additional costs on businesses and consumers; (d) who would bear the cost; and (e) other impacts, costs and benefits.**

Please see response to C7Q6.

## General comments

### Monitoring and compliance

We strongly support enhanced supervision obligations for add-ons sold through caryards. There is overwhelming evidence that insurers' current supervision of the car dealer channel for add-on insurance sales is manifestly inadequate. While insurers have acknowledged that the commissions they pay to car dealers lead to unfair and misleading sales, we agree that addressing commissions alone will not necessarily see benefits flow to consumers.

We supported ASIC's proposal of the use of risk indicators to allow early intervention where a particular dealership is selling add-on products in a way that is non-compliant or unfair.

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<sup>48</sup> FSRC Recommendation 7.3.

Other measures which would improve supervision and compliance include:

- Analysis of the data collected through filter and knock out questions (discussed above) to check whether dealers are selling policies to people for whom they are unsuitable.
- Benchmarking and analysis of claims experience data (discussed above), including denied claims, which may indicate a higher level of unsuitable sales in some dealerships. We would expect this data to improve over time.
- Benchmarking and analysis of penetration rates. We would also expect penetration rates to improve over time.

As we know from recent casework and DemandaRefund, people are still only now finding out that they are entitled to refunds on junk insurance, even with a Royal Commission, extensive media, remediation schemes and class actions. It will be much simpler and effective to track the outcomes along the way, rather than try to locate and refund consumers later.

Given the difficulties, delay and expense involved in cleaning up the mess afterwards, it is essential that the consequences for breaching the deferred sales model are sufficient to deter misconduct in the first place. Insurers should establish systems which will not only prevent and detect mis-selling but provide quick and complete remediation to victims of mis-selling. Remediation schemes should be designed at the same time as monitoring and compliance systems.

**RECOMMENDATION 22.** Remediation schemes should be designed at the same time as monitoring and compliance systems.

### Interaction with ban on unsolicited selling of insurance

It is clear that many people have been sold add-on insurance that they did not intend to buy thus falling within a common understanding of what is unsolicited. ASIC should consider and clarify the interaction of these reforms to add-on insurance with:

- The forthcoming deferred sales model for other add-on insurances (FSRC Recommendation 4.3);
- the forthcoming ban on unsolicited selling of insurance (FSRC Recommendation 4.1) and Commissioner Hayne's statement that it is 'desirable' to introduce a statutory definition of what is 'unsolicited';<sup>49</sup> and
- ASIC's regulatory guidance on the anti-hawking provisions.<sup>50</sup>

### Contact details

Please contact Senior Policy Officer Cat Newton at Consumer Action Law Centre on 03 9670 5088 or at [cat@consumeraction.org.au](mailto:cat@consumeraction.org.au) if you have any questions about this submission.

Yours Sincerely,



Gerard Brody | CEO  
CONSUMER ACTION LAW CENTRE



Karen Cox | CEO  
FINANCIAL RIGHTS LEGAL CENTRE

<sup>49</sup> FSRC, *Final Report: Volume 1*, page 283: <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>.

<sup>50</sup> ASIC, *Regulatory Guide 38: The hawking provisions*, 1 May 2005.

## **Appendix A: About the Contributors**

### **Consumer Action Law Centre**

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

### **Financial Rights Legal Centre**

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.