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By email: FSRCconsultations@treasury.gov.au

Manager
Financial System Division
Treasury
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Dear Sir/Madam

Exposure Draft: Cap on vehicle dealer commissions

Thank you for the opportunity to comment on the exposure draft for the *Financial Sector Reform (Hayne Royal Commission Response) Protection Consumers (2020 Measures) Bill 2020: Caps on commissions (the Bill)* and the exposure draft Explanatory Materials (**the Explanatory Materials**). This submission has been drafted by Consumer Action Law Centre with contributions and endorsement from the following organisations:

- CHOICE
- Consumer Credit Legal Service (WA) Inc
- Financial Counselling Australia
- Financial Rights Legal Centre

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

Our organisations support the introduction of a cap on the amount of commission that may be paid to vehicle dealers in relation to the sale of add-on insurance products, as recommended by the Financial Services Royal Commission (**FSRC**) (Recommendation 4.4).

We consider an outright ban on the sale of add on insurance products by car dealers, or a prohibition on paying commissions for add-on insurance sales through car dealers, would be a more appropriate policy response to the consumer harm evident in this market.¹ However, we support the Bill as an important step towards improving consumer outcomes and limiting the influence of commissions in car yards.

¹ For further information, see previous Consumer Action submissions: Submission to ACCC, *Applications for authorisation – A191556-A91557 Aioi Nissay Dowa Insurance Company Australia Pty Ltd & Ors*, October 2016, available at: <https://www.accc.gov.au/system/files/public-registers/documents/D16%2B143590.pdf>; Submission to ACCC, *ACCC draft decision on car dealer add-on commission cap (A191556-A91557 Aioi Nissay Dowa Insurance Company Australia Pty Ltd & Ors)*, March 2017, available at: <https://www.accc.gov.au/system/files/public-registers/documents/D17%2B28607.pdf>; Submission to Financial Services Royal Commission, *Policy questions arising from Module 6 – Insurance*, October 2018, p. 19, available at: https://consumeraction.org.au/wp-content/uploads/2019/01/181025_CALC_Module6Insurance_PolicySub_FINAL.pdf; Submission to ASIC, *Product intervention: The sale of add-on financial products through caryard intermediaries*, December 2019, p. 2, available at: https://consumeraction.org.au/wp-content/uploads/2020/02/191220_JointSubmission_ASIC_CP324_CALC_FRLC.pdf.

'Commission'

We are concerned that the definition of 'commission' in section 12BA(1) would not capture commissions on warranties sold by car dealers where the dealer has self-underwritten the warranties. This is because there is no third-party underwriter involved in the process, meaning there is no difference between a wholesale and retail price on which to calculate the consideration given for the warranty. While we appreciate calculating the value of a 'commission' in this circumstance would be difficult, we suggest that a benchmark price could be set from which the 'commission' could be valued (for example, based on comparable third-party underwriting costs).

RECOMMENDATION 1. That dealer-issued warranties that are underwritten by the dealer be captured by the caps on commissions.

'Motor vehicle'

The definition of motor vehicle² in section 12BA(1) is limited to 'motor-powered road vehicle'. We are concerned this would unnecessarily limit the definition to exclude other common vehicles such as caravans, off road vehicles and motorised mobility scooters. We regularly assist consumers with legal issues relating to these products, and consider that the cap on commissions should capture add-on risk products sold with them to avoid regulatory arbitrage.

RECOMMENDATION 2. Extend the definition of 'motor vehicle' to other common vehicles such as caravans, off road vehicles and motorised mobility scooters.

Determining the cap on the value of commissions

We support ASIC being given the power, by legislative instrument, to determine the cap on the value of commissions provided in connection with add-on risk products under section 12DMC. We also support the determination being able to provide for the way in which the value of commissions is to be ascertained.

As set out above, we consider that commission payments for add-on insurance products should be banned, as it is with other financial products being sold to retail consumers. People should be able to make important decisions about their need for insurance, compare deals, understand complex policy terms, confirm existing coverage free from high pressure sales tactics that are fuelled by commissions and targets. 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. This perverse market rationale and structure has led to significant consumer detriment, including high commissions, pressure selling of unsuitable and poor-value products. Insurers have paid dealers four times more in commissions than they paid to consumers in benefits, there are appalling low claims ratios and the products provide little to no benefits to consumers.³ As such, if ASIC is to set the cap higher than nil, there needs to be robust evidence that this is in the consumer interest.

Interaction with the National Credit Code

We support ASIC being given the power to lower the current 20% cap on commissions in relation to consumer credit insurance (CCI) under section 145 of the National Credit Code. We note that it has been more than 20 years since this cap was first imposed. Since that time, evidence of serious consumer detriment and mis-selling of CCI has been uncovered, including during the FSRC. The 20% cap is therefore no longer appropriate for this market. In line with our comments about the value of commissions generally, we consider that if ASIC is to set the cap higher than nil, there needs to be robust evidence that this is in the consumer interest.

² We note the same definition is used in section 12DW of the exposure draft *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures) Bill 2020: Deferred sales model for add-on insurance*.

³ For more information, see Consumer Action's submission to ASIC, *Product intervention: The sale of add-on financial products through car yard intermediaries*, December 2019, p. 5, available at: https://consumeraction.org.au/wp-content/uploads/2020/02/191220_JointSubmission_ASIC_CP324_CALC_FRLC.pdf.

Recovering commissions that exceed the cap

We support consumers having the right to recover commissions that exceed a cap under section 12DMC.⁴ However, we note the evidentiary difficulties that would present a consumer wanting to enforce their rights to redress under this provision. For example, it would be almost impossible for a consumer to determine whether an insurer paid a car dealer a commission that exceeded the cap, as these are generally private commercial arrangements between the insurer and the car dealer.

Most actions for redress for contraventions of section 12DMC are therefore likely to result from class actions or ASIC enforcement action, rather than individual actions. It is critical that the Court be permitted to make orders for redress for loss or damage suffered by non-party consumers. On our reading of section 12GNB this would be allowed under the current Bill, as contravention of section 12DMC would be covered as a contravention in subdivision D. We strongly support this remedy remaining in place.

Actions for loss or damages

We also support consumers being able to take actions for damages under section 12GF for contraventions of section 12DMC, as it would permit consumers to recover any additional loss or damages, and allows consumers to take action against anyone 'involved' in a contravention – not just the person providing or receiving the commission.

A summary of recommendations is available at **Appendix B**.

Please contact Policy Officer **Cat Newton** at **Consumer Action Law Centre** on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE



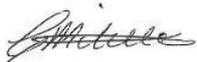
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⁴ See section 12GFA.

APPENDIX A – 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, campaigns, outreach, community engagement and more. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of banking and finance, and consumer law. We strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities. In the 2018/2019 financial year, we represented over 100 clients in their disputes, and participated in over 40 law reform activities.

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

Financial Rights Legal Centre

Financial Rights 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.

APPENDIX B - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. That dealer-issued warranties that are underwritten by the dealer be captured by the caps on commissions.

RECOMMENDATION 2. Extend the definition of 'motor vehicle' to other common vehicles such as caravans, off road vehicles and motorised mobility scooters.

