
**FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE—
PROTECTING CONSUMERS (2020 MEASURES)) BILL 2020: CAPS ON
COMMISSIONS**

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission
Bill	Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: Caps on commissions
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Chapter 1

Caps on commissions

Outline of chapter

1.1 Schedule ## to this Bill amends the *Australian Securities and Investments Commission Act 2001* to place a cap on the amount of commissions that may be paid in relation to add-on risk products such as tyre and rim insurance, mechanical breakdown insurance and consumer credit insurance (for the credit facility) supplied in connection with the sale or long-term lease of a motor vehicle.

Context of amendments

1.2 The Financial Services Royal Commission considered add-on insurance sold in car yards and found that the levels of commissions paid to motor vehicle dealers in connection with the sale of add-on insurance products contributed to the mis-selling of those products. The Financial Services Royal Commission noted that:

- amounts paid out in commissions on add-on insurance products regularly exceed claims payouts;
- insurers view car dealers as distribution networks and pay higher commissions to compete with one another to gain market share of those networks; and
- industry has taken limited steps to reduce commissions, but there are few legal requirements to do so.

1.3 The Financial Services Royal Commission recommended (Recommendation 4.4) that ASIC impose a cap on the amount of commission that may be paid to vehicle dealers in relation to the sale of add-on insurance products. The Government agreed to this recommendation in its response to the Financial Services Royal Commission on 4 February 2019.

1.4 Currently, commissions paid by insurers in connection with consumer credit insurance taken out by the debtor are capped at 20 per cent of the premium.

1.5 Similarly Part 7.7A of the *Corporations Act 2001* bans the provision and acceptance of conflicted remuneration, including commissions, between certain financial product issuers and financial advisers. Commissions paid in connection with general insurance and

consumer credit insurance products are carved-out from the ban on conflicted remuneration. The ban also does not extend to commissions paid to motor vehicle dealers for selling add-on insurance, unless they are also financial advisers.

1.6 The Government also agreed to establish an industry-wide deferred sales model, a pause in the sales process, for all add-on insurance products (Recommendation 4.3 of the Financial Services Royal Commission).

Summary of new law

1.7 Schedule ## to this Bill amends the *Australian Securities and Investments Commission Act 2001* to:

- provide ASIC with the power, by legislative instrument, to set caps on the amount of commissions that may be paid in relation to certain add-on risk products sold in connection with the sale or long-term lease of a motor vehicle;
- make it a criminal offence, civil penalty and offence of strict liability for a person to pay or receive a commission in relation to an add-on risk product that exceeds the cap determined by ASIC for that product; and
- give consumers the right to recover commissions paid in excess of the cap.

1.8 The amendments improve outcomes for consumers by discouraging the mis-selling of add-on risk products in car yards, particularly those products where the amounts paid in commissions are greater than those paid out in claims.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
ASIC may determine a cap on the amount of commissions that can be paid in relation to add-on risk products sold in connection with the sale or long-term lease of a motor vehicle.	No equivalent.
It is a criminal offence, civil penalty and offence of strict liability for a person (other than a consumer) to	No equivalent.

pay or receive a commission in relation to an add-on risk product that exceeds the cap determined by ASIC for that product.	
Where commissions are paid in excess of the cap, consumers may recover the entire amount of the commission.	No equivalent.

Detailed explanation of new law

Commissions for add-on risk products must not exceed the cap

1.9 Schedule ## to this Bill inserts a new offence into Subdivision D of Part 2 of Division 2 of the *Australian Securities and Investments Commission Act 2001*. The offence relates to providing or receiving commissions in connection with the supply of add-on risk products that are provided in connection with the sale or long-term lease of a motor vehicle, or the provision of credit connected with the sale or long-term lease of a motor vehicle. An offence is committed if the commission exceeds the cap determined by ASIC for that add-on risk product. *[Schedule ##, item 3, subsection 12DMC(1) of the Australian Securities and Investments Commission Act 2001]*

1.10 An ***add-on risk product*** is defined as a facility through which, or through the acquisition of which, a person manages financial risk. The concept of managing financial risk is defined in subsection 12BAA(5) of the *Australian Securities and Investments Commission Act 2001*. Add-on risk products include insurance products and certain insurance-like products. *[Schedule ##, items 2 and 3, the definition of ‘add-on risk product’ in subsection 12BA(1) and subsection 12DMC(2) of the Australian Securities and Investments Commission Act 2001]*

1.11 The offence applies to commissions provided or received in connection with the supply of a financial service that consists of providing an add-on risk product to the ‘product recipient’ in connection with the sale or long-term lease of a motor vehicle, or in connection with the provision of credit connected with the sale or long-term lease of a motor vehicle. The product recipient may be the consumer, or the person who sells or leases the motor vehicle and provides a warranty in connection with the motor vehicle to the consumer. *[Schedule ##, item 3, paragraph 12DMC(1)(b) of the Australian Securities and Investments Commission Act 2001]*

1.12 The financial service may be supplied by any person to any other person. It is not limited to transactions in which a financial service is supplied to a consumer. *[Schedule ##, item 3, paragraphs 12DMC(1)(a) and 12DMC(1)(b) of the Australian Securities and Investments Commission Act 2001]*

1.13 **Commission** includes any form of monetary consideration, or non-monetary consideration to which a monetary value can be assigned. Whether a payment or benefit is a commission is determined by the substance of the arrangement, regardless of how it is characterised by the parties to the arrangement. Examples of commissions intended to be captured by this definition include, but are not limited to:

- financial or other benefits in the nature of a commission;
- the amount of profit on the sale of an extended warranty which is underwritten by an add-on risk product; and
- payments or other incentives (such as holidays, hospitality or training) that are not necessarily linked to an individual transaction but are based on a cumulative amount of sales of add-on insurance or insurance like products.

[Schedule ##, item 2, the definition of ‘commission’ in subsection 12BA(1) of the Australian Securities and Investments Commission Act 2001]

1.14 **Long-term lease** of a motor vehicle means a contract for the hire of a motor vehicle for a fixed period of more than four months, or for an indefinite period. *[Schedule ##, item 2, the definition of ‘long-term lease’ in subsection 12BA(1) of the Australian Securities and Investments Commission Act 2001]*

1.15 **Motor vehicle** means any motor-powered road vehicle (including a four wheel drive vehicle). *[Schedule ##, item 2, the definition of ‘motor vehicle’ in subsection 12BA(1) of the Australian Securities and Investments Commission Act 2001]*

1.16 For the offence to apply, the person acquiring the motor vehicle must acquire it as a consumer within the meaning of Schedule 2 to the *Competition and Consumer Act 2010* as applied under Subdivision A of Division 2 of Part XI (the Australian Consumer Law). *[Schedule ##, items 2 and 3, the definition of ‘Australian Consumer Law’ in subsection 12BA(1) and paragraph 12DMC(1)(c) of the Australian Securities and Investments Commission Act 2001]*

1.17 The offence applies:

- where the supply of the add-on risk product is covered by an ASIC determination setting a cap on the commission; and
- where the value of the commission exceeds the cap that applies, under the determination, to providing that add-on risk product.

[Schedule ##, item 3, paragraphs 12DMC(1)(d) and (e) of the Australian Securities and Investments Commission Act 2001]

1.18 Where there is no determination covering the product, there is no cap on the commission.

ASIC's power to determine the cap on the value of commissions

1.19 The new law gives ASIC the power, by legislative instrument, to determine the cap on the value of commissions provided in connection with add-on risk products of a kind specified by ASIC. *[Schedule ##, item 3, subsection 12DMC(3) of the Australian Securities and Investments Commission Act 2001]*

1.20 The determination may limit the circumstances in which the provision of an add-on risk product of that kind is covered by the determination. *[Schedule ##, item 3, paragraph 12DMC(4)(a) of the Australian Securities and Investments Commission Act 2001]*

Example 1.1

ASIC makes a determination capping the commission payable on guaranteed asset protection insurance policies at 10 per cent of the premium. The determination provides that guaranteed asset protection insurance products with a claims ratio of 65 per cent or greater are not covered by the determination and can continue to attract uncapped commissions.

1.21 The determination may also provide for the way in which the value of commissions is to be ascertained for the purposes of the determination. *[Schedule ##, item 3, paragraph 12DMC(4)(b) of the Australian Securities and Investments Commission Act 2001]*

How commissions should be valued

1.22 The value of the commission provided in connection with an add-on risk product must be ascertained in accordance with the applicable ASIC determination that covers the product. *[Schedule ##, item 3, paragraph 12DMC(5)(a) of the Australian Securities and Investments Commission Act 2001]*

1.23 If the ASIC determination does not provide for a way to ascertain the value of the commission, the value of the commission is the sum of:

- the amount of money of the commission (to the extent that the commission is expressed as an amount of money); and
- the market value of so much of the commission that is not expressed as an amount of money (if any).

[Schedule ##, item 3, paragraph 12DMC(5)(b) of the Australian Securities and Investments Commission Act 2001]

1.24 **Money** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* and includes, broadly:

- currency;
- promissory notes and bills of exchange;

- any negotiable instrument used or circulated, or intended for use or circulation, as currency;
- postal notes and money orders; and
- payment by way of a credit card or debit card, crediting or debiting an account, or the creation or transfer of a debt.

[Schedule ##, item 2, the definition of ‘money’ in subsection 12BA(1) of the Australian Securities and Investments Commission Act 2001]

1.25 In working out the market value, anything that would prevent or restrict conversion to money should be disregarded. *[Schedule ##, item 3, subsection 12DMC(6) of the Australian Securities and Investments Commission Act 2001]*

1.26 Where a commission is provided in connection with two or more add-on risk products, the value of the commission is to be apportioned between the add-on risk products in accordance with the ASIC determination. However, if the ASIC determination does not provide for apportionment, the commission is to be apportioned between the products on a reasonable basis. *[Schedule ##, item 3, paragraphs 12DMC(7)(a) and 12DMC(7)(b) of the Australian Securities and Investments Commission Act 2001]*

Example 1.2

ASIC makes a determination imposing a cap on commissions for certain insurance products. The determination covers arrangements between licensees and intermediaries where employees who meet sales targets may attend an overseas conference paid for by the licensee. ASIC makes a determination:

- that prescribes how the value of the overseas conference is to be calculated; and
- that provides that the value of the benefit must be apportioned equally between the products sold by each employee in the period during which sales are used to ascertain eligibility to attend the conference.

1.27 The offence also applies where more than one commission is provided in connection with a single add-on risk product.

1.28 In these circumstances, the offence applies as if one single commission is provided that comprises all of those commissions. If those commissions are provided by more than one person, the single commission is jointly provided by all of those persons. The value of that single commission is the sum of the values of all of those commissions. *[Schedule ##, item 3, subsection 12DMC(8) of the Australian Securities and Investments Commission Act 2001]*

1.29 The effect of this provision is to stop providers and recipients of commissions from dividing a commission that would otherwise exceed the cap between multiple providers or recipients.

Example 1.3

An Australian Financial Services licensee issues mechanical breakdown insurance through an authorised representative (broker) who works on the same site as a car dealership. ASIC caps commissions on mechanical breakdown insurance at 15 per cent of the premium. If the premium is \$600 and the licensee provides a commission of \$70 to the broker and \$30 to the dealer on the sale of each product, the combined value of both commissions will exceed the 15 per cent cap.

Interaction with the National Credit Code

1.30 Section 145 of Schedule 1 to the *National Consumer Credit Protection Act 2009* (the National Credit Code) provides for a 20 per cent cap on commissions provided in connection with consumer credit insurance.

1.31 The offence of exceeding the cap on commissions being inserted by this Bill will only affect the application of section 145 of the National Credit Code to commissions paid in connection with consumer credit insurance if:

- the insurance is an add-on product of a kind covered by the ASIC determination; and
- the add-on product is provided in connection with the sale or long-term lease of a motor vehicle, or the provision of credit connected with the sale or long-term lease of a motor vehicle.

[Schedule ##, item 3, subsection 12DMC(9) of the Australian Securities and Investments Commission Act 2001]

1.32 If no determination has been made by ASIC in relation to the add-on product, section 145 of the National Credit Code will continue to apply a 20 per cent cap on commissions provided in connection with consumer credit insurance. *[Schedule ##, item 3, the note to subsection 12DMC(9) of the Australian Securities and Investments Commission Act 2001 and schedule ##, item 2, the definition of 'National Credit Code' in subsection 12BA(1) of the Australian Securities and Investments Commission Act]*

1.33 Consequential amendments have similarly been made in section 145 of the National Credit Code to provide for this interaction. *[Schedule ##, item 11, subsection 145(6) of the National Credit Code]*

1.34 New definitions of ***add-on risk product***, ***long-term lease***, and ***motor vehicle*** are inserted into subsection 204(1) of the National Credit Code to ensure the consequential amendments operate as intended. *[Schedule ##, item 12, subsection 204(1) of the National Credit Code]*

Criminal consequences for breaching the cap on commissions

The ordinary offence

1.35 Breaching the cap on commissions is an ordinary criminal offence under section 12GB of the *Australian Securities and Investments Commission Act 2001*. A person also commits an offence if they attempt to contravene or are involved in a contravention of the cap on commissions. The maximum penalty for an individual is 2,000 penalty units.

1.36 Section 93E of the *Australian Securities and Investments Commission Act 2001* outlines the penalty applicable to an offence where the offence is committed by a body corporate. In accordance with that section, the maximum penalty for a body corporate is 10 times the fine specified for the offence (that is, 20,000 penalty units).

The civil penalty

1.37 Breaching the cap on commissions is a civil penalty provision under subsection 12GBA(6) of the *Australian Securities and Investments Commission Act 2001*.

1.38 The maximum penalty for contravening the civil penalty provision is to be determined in accordance with section 12GBCA of the *Australian Securities and Investments Commission Act 2001* (section 12GBCA provides the penalty that is applicable to a contravention of a civil penalty provision by an individual and a body corporate).

The strict liability offence

1.39 Breaching the cap on commissions is an offence of strict liability. The strict liability offence also applies to those who attempt to contravene, or are involved in a contravention of, the offence. The maximum penalty for the strict liability offence is 60 penalty units for an individual. In accordance with section 93E of the *Australian Securities and Investments Commission Act 2001*, the penalty for a body corporate is 600 penalty units. [*Schedule ##, item 4, subsections 12GB(1AA) and (1AB) of the Australian Securities and Investments Commission Act 2001*]

1.40 Consequential amendments are made to subsections 12GB(1A) and (1B) to ensure certain standard criminal procedures apply to the accessory aspect (being involved in a contravention) of the strict liability offence. These are the same criminal procedures that currently apply to the accessory aspect of the ordinary offence in subsection 12GB(1). [*Schedule ##, item 5, subsections 12GB(1A) and (1B) of the Australian Securities and Investments Commission Act 2001*]

1.41 Consequential amendments are also made to subsections 12GB(3), (5) and (6) to ensure the strict liability offence operates consistently with the existing ordinary criminal offence. *[Schedule ##, item 6, subsections 12GB(3), (5) and (6) of the Australian Securities and Investments Commission Act 2001]*

Recovering commissions that exceed the cap

1.42 The amendments in Schedule ## to this Bill allow consumers to recover commissions that exceed a cap.

1.43 Where a commission is subject to a cap and exceeds that cap, the consumer is entitled to recover the value of the commission from the person who provided the commission. *[Schedule ##, item 7, subsection 12GFA(1) of the Australian Securities and Investments Commission Act 2001]*

1.44 Similarly where a person who is a motor vehicle dealer receives a commission that exceeds the cap in relation to a warranty they gave to a consumer, the consumer is entitled to recover the value of the commission from the motor vehicle dealer. *[Schedule ##, item 7, subsection 12GFA(2) of the Australian Securities and Investments Commission Act 2001]*

1.45 These provisions do not affect the consumer's right to recover loss or damage under section 12GF of the *Australian Securities and Investments Commission Act 2001* (section 12GF entitles a person to recover loss or damage caused as a result of conduct that contravenes certain provisions in the *Australian Securities and Investments Commission Act 2001*). *[Schedule ##, item 7, subsection 12GFA(3) of the Australian Securities and Investments Commission Act 2001]*

1.46 If a court finds that a person has committed an offence or contravened a civil penalty provision by breaching the cap on commissions, that finding may be used as evidence in a separate action to recover commissions that exceed the cap. *[Schedule ##, item 8, section 12GG of the Australian Securities and Investments Commission Act 2001]*

1.47 In an action to recover commissions that exceed the cap, the court may make other orders (other than to repay the excess commission) if the consumer has suffered loss or damage as a result of a contravention of a provision in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001*. *[Schedule ##, item 9, subsection 12GM(1) of the Australian Securities and Investments Commission Act 2001]*

1.48 In an action to recover commissions that exceed the cap, the court may, on application of the Minister or ASIC, make an order prohibiting the payment or transfer of money or other property. *[Schedule ##, item 10, paragraph 12GN(1)(c) of the Australian Securities and Investments Commission Act 2001]*

1.49 If a consumer makes a claim to recover a commission that exceeds the cap and wishes to rely on conduct engaged in outside

Australia in the proceeding to prove their claim, they may do so only if the Minister consents in writing. *[Schedule ##, item 1, subsection 12AC(2) of the Australian Securities and Investments Commission Act 2001]*

Application and transitional provisions

1.50 The amendments in Schedule ## to the Bill apply to commissions provided in connection with supplies of add-on products under contracts, arrangements or understandings entered into on or after the day after this Bill receives the Royal Assent. *[Schedule ##, item 13]*