



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Applications for authorisation A91556-A91557

lodged by

Aioi Nissay Dowa Insurance Company Australia Pty  
Ltd & Ors

in respect of

proposal to voluntarily limit the commissions  
and other payments paid to distributors of  
add-on insurance products through the  
motor vehicle dealership channel

Date: 17 February 2017

Authorisation numbers: A91556-A91557

Commissioners:

Sims  
Rickard  
Schaper  
Cifuentes  
Court  
Featherston  
Keogh

# Summary

**The ACCC proposes to deny authorisation to a proposal for 16 of Australia's major insurance companies to limit the commissions and other payments or benefits paid to distributors of "add-on" insurance products through the motor vehicle dealership channel to 20% of premiums.**

**The ACCC will seek submissions in relation to this draft determination before making its final decision.**

## Proposed conduct

On 13 September 2016, 16 of Australia's major insurance companies (the Applicants) sought authorisation to implement a proposal that will impose a cap of 20% of the premium on the commissions paid to motor vehicle dealerships for add-on insurance products<sup>1</sup> sold through the motor vehicle dealership distribution channel.

The Applicants' proposal includes an obligation for participating insurers to regularly report to the Australian Securities and Investments Commission (ASIC) on a number of metrics designed to quantify the effectiveness of the cap in reducing premiums and increasing claims ratios (the proportion of the premium paid back in claims).

## ASIC findings

The proposal follows a review conducted by ASIC into the sale of add-on insurance through motor vehicle dealerships. ASIC found that the market for the sale of add-on insurance products through motor vehicle dealerships is failing consumers. In particular, ASIC found consumers are being sold expensive, poor value products; products that provide consumers very little to no benefit; in a sales environment with pressure selling to consumers, very high commissions and conflicts of interest.

ASIC also identified that there is a lack of transparency in the purchase of add-on insurance by consumers as it is secondary to the purchase of a new vehicle, and that 'reverse competition' between insurers competing for access to the dealership sales channel has resulted in insurers offering dealers very significant commissions, thereby increasing the incentive for dealers to sell consumers add-on insurance products.

ASIC concluded that many consumers are unable to make rational, well-informed choices when buying add-on insurance products in these circumstances.

## ACCC position

### *Public benefit*

The ACCC recognises ASIC's findings as to the significant issues impacting consumers as the result of sales of add on insurance products through car dealerships. The ACCC also recognises that the high commissions that are regularly paid by insurers to car dealers for the sale of their insurance policies provides a significant incentive for the sale of policies that ASIC has found to regularly be of high cost and low value to consumers.

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<sup>1</sup> General insurance policies that are 'added on' to the sale of a primary product, in this case, the sale of a motor vehicle.

However, the ACCC is not satisfied that the Applicants' proposal, in and of itself, is likely to redress this market failure to any significant degree. In particular, the ACCC considers that a commission cap is unlikely to:

- remove incentives for the sale of poor value add on insurance policies
- reduce the overall price paid by consumers for add on insurance policies
- improve the quality of add on insurance policies
- remove the risk of inappropriate sales practices in the car dealership channel, or
- ensure that consumers have access to adequate information to make an informed purchasing choice at the time of purchase.

Accordingly, the ACCC is not persuaded that the proposed conduct is likely to result in any significant public benefit.

#### *Public detriment*

The ACCC considers that, in general, consumer protection issues such as those identified by ASIC should be appropriately identified and remedied individually by the companies concerned. Anti-competitive conduct, including agreements between competitors, has the potential for significant public detriment.

At the outset, the ACCC notes that a collective agreement between insurers to cap the commissions that they pay to car dealerships will primarily benefit insurers at the expense of car dealerships, and provide minimal if any benefit for consumers.

The ACCC considers the following public detriments are likely to arise from the conduct:

- reduction in competition between insurers, including greater opportunities for explicit or tacit collusion and greater shared knowledge between insurers of competitors' costs
- the likelihood that the 20% commission cap becomes a de facto industry standard rate of commission, and
- delayed implementation of effective reforms which properly address the market failures that have resulted in the consumer protection issues identified by ASIC.

#### *ACCC draft determination*

For the reasons outlined above, the ACCC considers that the likely public benefit from the proposed conduct (if any) does not outweigh the likely public detriment. Therefore, the ACCC proposes to deny authorisation.

The ACCC will seek submissions in relation to this draft determination before making its final decision. The Applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

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# The applications for authorisation

1. On 13 September 2016, 16 of Australia's major insurance companies (the Applicants)<sup>2</sup> lodged applications for authorisation<sup>3</sup> (A91556-A91557) with the ACCC. The Applicants are seeking authorisation to enter into a contract, arrangement or understanding that would limit the level of commission that they pay in respect of add-on insurance products sold through the motor vehicle dealership distribution channel to 20% (the proposed conduct).
2. The proposed conduct will take the form of a voluntary code of conduct. The Applicants provided a copy of a draft code with their application and provided an updated draft on 2 February 2017.
3. The Applicants' proposed code of conduct also includes an obligation for participating insurers to regularly report to ASIC on a number of metrics designed to quantify the effectiveness of the cap in reducing premiums and increasing claims ratios (the proportion of the premium paid back in claims).
4. Authorisation is sought as the proposed contract, arrangement or understanding may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of the CCA.
5. Authorisation is sought for ten years or until such earlier time as the arrangement is superseded by another mechanism. In this respect, the Applicants state that they will explore with the Australian Securities and Investments Commission (ASIC) options for including the proposed cap in a regulatory or legislative instrument in the future.
6. The proposed conduct is described in more detail at paragraphs 28 to 43.
7. The Applicants describe the proposed conduct as a key element of the insurance industry's response to serious concerns raised by ASIC in relation to the value of add-on insurance products sold through the motor vehicle dealership channel.
8. In short, ASIC found that the market for the sale of add-on insurance products through motor vehicle dealerships is failing consumers.<sup>4</sup> ASIC found that consumers are being sold expensive, poor value products that provide them very little to no benefit. ASIC's findings are discussed in more detail at paragraphs 13 to 26.

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<sup>2</sup> The Applicants are listed at paragraph 28.

<sup>3</sup> Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

<sup>4</sup> ASIC Report 492 – A market that is failing consumers: The sale of add-on insurance through car dealers.

# Background

## *Motor vehicle dealerships and “add-on insurance”*

9. When a customer purchases a new or used motor vehicle from a motor vehicle dealership, they may be offered a number of related financial products. For example, the customer may be offered a loan for the purchase of the motor vehicle. Many customers will have arranged authorisation for a loan prior to the purchase of the motor vehicle, but others will find it convenient to purchase finance offered at the motor vehicle dealership.
10. Where customers take out a loan for the purchase of the motor vehicle, they may be offered insurance products relating to that loan, for example:
  - consumer credit insurance (CCI), which covers the insured’s loan in the event that they are unable to meet their loan repayment obligations due to illness, injury, unemployment or death
  - gap insurance, which covers any difference between the insured value of the motor vehicle under a comprehensive motor vehicle insurance policy and the balance of the car loan, to ensure that the loan will be repaid if the motor vehicle is written off and in some cases to provide a cash benefit to assist with the expenses of purchasing a new vehicle
  - walkaway insurance, which provides a lump sum covering some or all of the outstanding payments on a motor vehicle loan in certain circumstances, typically including accidental death, involuntary unemployment, international job transfer, disability or trauma, and
  - trauma insurance, which covers the outstanding payments on a motor vehicle loan in the event of a serious or traumatic illness, typically including heart disease, heart attacks, cancer and strokes, and may be included as part of a consumer credit insurance policy or offered on a standalone basis.
11. Customers may also be offered insurance products relating to the motor vehicle itself, such as:
  - comprehensive car insurance, which covers damage caused by collisions or accidents, severe weather or vandalism as well as theft
  - extended warranty insurance, which covers some or all expenses relating to repairs, towing, temporary car rental and emergency accommodation that may not be covered by the manufacturer warranty or are incurred after the manufacturer warranty has expired, and
  - tyre and rim insurance, which covers damage to tyres and rims arising from punctures, blowouts or road hazards such as kerbs, potholes or debris, which is typically not covered under a comprehensive motor vehicle insurance policy.
12. These products are together described as “add-on” insurance products since they are typically ancillary to other products, in this case a motor vehicle or a motor vehicle loan.

*ASIC Report 492 – A market that is failing consumers: The sale of add-on insurance through car dealers*

13. The applications for authorisation follow analysis by ASIC, which identified significant concerns in the industry in its report *ASIC Report 492 – A market that is failing consumers: The sale of add-on insurance through car dealers*, September 2016.
14. Key drivers of the issues identified by ASIC are the lack of transparency of purchase for consumers as a result of add-on insurance being secondary to the purchase of a new car and/or finance; and as a result of this transparency issue, “reverse competition” whereby insurers compete for access to the dealership sales channel by offering dealers significant commissions as high as 79%.
15. ASIC found that consumers are being sold expensive, poor value products; products that provide consumers very little to no benefit; and a sales environment with pressure selling, very high commissions and conflicts of interest.
16. In particular, for the three year period that ASIC reviewed, it found that:
  - Consumers obtained little financial benefit from buying add-on insurance, with consumers paying \$1.6 billion in premiums and receiving only \$144 million in successful insurance claims - representing a very low claims payout of 9%. For some major add-on products, the benefit to consumers was even lower, with consumer credit insurance claims payouts representing just five cents for each dollar of premium.
  - Car dealers earned \$602 million in commissions - over four times more than consumers received in claims, with commissions paid to car dealers as high as 79%.
  - Payment for these insurance products is commonly packaged into the consumer's car loan as a single upfront premium. This can substantially increase the cost of the product by increasing the loan amount and interest paid. Consumers are often unaware that they even have the policy when it is paid upfront as a single premium, and they may not get a premium refund if they repay their car loan early. Policies have been sold where it is impossible for the consumer to receive a claim payout that is greater than the cost of the insurance.
  - The car sales environment inhibits good decision making about add-on insurance products because of the conflicts of interest and pressure sales built into the distribution model. The consumer is focussed on purchasing a car and financing that purchase – not on the details of the complex insurance policy.

*Why are add-on insurance products sold through the motor vehicle dealership distribution channel so expensive?*

17. The findings noted above raise questions about both why insurers are offering products with such high prices and why consumers are paying those prices. ASIC found that this was a result of two factors:
  - for consumers, due to the nature of add-on insurance, the primary product is typically the focus for the consumer at the time of purchase, while the

add-on product is not actively sought. The distinction is sometimes expressed as the add-on product being 'sold to' not 'bought by' the consumer, and

- for insurers, the high prices may be due to the practice known as 'reverse competition', where insurers compete on the price they pay to car dealers in commissions to buy access to distribution channels, rather than the price charged to the consumer.
18. ASIC found that many consumers who bought add-on insurance products through car dealers:
- had no awareness of add-ons, including their value, before entering the car yard
  - had already invested large amounts of time, energy and mental effort in buying the car and so, by the time they were offered the add-ons, found it hard to say no
  - said that they valued the insurance for providing peace of mind, although few could recall which products they had purchased, how much they cost and what they were actually covered for, and
  - if they did remember what they had bought, in some cases regretted their decision.
19. ASIC concluded that these findings explain why consumers may not always make rational, well-informed choices when buying add-on insurance products through car dealers.
20. ASIC also found that insurers may be paying a higher price to car dealers in commissions than through other distribution channels in order to obtain access to them as a distribution channel (reverse competition).
21. The ACCC notes that the effect of this competition is to increase the price paid by the consumer for the add-on insurance products (as insurers would need to recoup the commissions paid to car dealers).
22. In effect, because many consumers are inclined to accept the add-on insurance offer made to them by the dealer, insurers compete for access to consumers through the remuneration they pay to the dealer for the sale, rather than through the price and service qualities (terms and conditions) of the product being offered. Dealers will favour products that pay high commissions rather than those necessarily best suited to the consumer's needs and commissions offered by insurers reflect this.

#### *ASIC's response<sup>5</sup>*

23. When it released its report in September 2016, ASIC stated that it was putting general insurers on notice that they need to improve consumer outcomes by making substantial changes to the pricing, design and sale of add-on insurance

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<sup>5</sup> The information in this section is taken from ASIC media release 16-301MR, *ASIC puts insurers on notice to address serious failures in the sale of add-on insurance through car dealers*.



products or face additional regulatory action. The key commitments ASIC sought from insurers were:

- a significant reduction in the amount of commissions paid to anyone who sells an add-on insurance product through car dealers
  - a significant improvement in the value offered by these products, through substantial reductions in price and better product design and cover
  - a move away from single upfront premiums that are financed through the loan contract, given the adverse financial impact this has on consumers, and
  - providing refunds to consumers who have been sold policies in circumstances that were unfair, such as where a policy has been sold to a consumer who was never eligible to claim under the policy.
24. At the time of releasing the report and seeking these commitments ASIC noted that insurers had notified ASIC that they intend to implement a 20% cap on commissions, which ASIC described as a positive step. ASIC also noted that insurers in this market would also be providing ASIC with data on prices, premiums and claims on a regular basis so that it can monitor the impact of changes on consumers. These are the arrangements the subject of the applications for authorisation.
25. ASIC Deputy Chairman Peter Kell said, 'While we welcome the initial steps taken by the insurers to improve the value of these products for consumers, there is still a long way to go. If industry does not deliver swift improvements for consumers, ASIC will take further action, including enforcement action where appropriate.'
26. ASIC stated that its review of these products is ongoing and that it will continue to work with insurers and consumer representatives to ensure that proposals for change deliver significantly improved value to consumers.
27. ASIC's submissions commenting on to the applications for authorisation are summarised at paragraphs 73 to 80.

## The proposed conduct

28. The Applicants are:

- AAI Limited
- Aioi Nissay Dowa Insurance Company Australia Pty Ltd
- Allianz Australia Insurance Limited
- Allianz Australia Life Insurance Limited
- CGU Insurance Limited
- Eric Insurance Limited
- Hallmark General Insurance Company Ltd
- Hallmark Life Insurance Company Ltd
- Insurance Australia Group Limited
- Insurance Australia Limited
- MTA Insurance Limited
- QBE Insurance (Australia) Limited
- St Andrew's Life Insurance Pty Limited
- Suncorp Life & Superannuation Limited
- Swann Insurance (Aust) Pty Ltd
- Virginia Surety Company Inc

29. It is proposed that other insurers may also participate in the proposed conduct.

30. The proposed conduct takes the form of a voluntary code of conduct that the Applicants (and other insurers) may agree to adhere to.

31. The Applicants provided a draft version of the code of conduct with their application. The draft code has three components: a cap on commissions for add-on insurance sold through motor vehicle dealerships; transitional arrangements in respect of agreements entered into after 7 September 2016 and data reporting to ASIC.

32. The draft code provided with the application for authorisation did not include a compliance framework. At the time of lodging the applications the Applicants advised that a compliance framework for the voluntary code was yet to be finalised. Subsequently, on 2 February 2017, the Applicants provided a revised draft of the code which included details of the proposed compliance framework.

33. Further details of each component of the draft code are provided below.

### *Cap on commissions for add-on insurance products*

34. In summary, the draft code provides that: the total of any commission accepted by all or any of the following:
- (a) a motor vehicle dealership
  - (b) an associated credit provider
  - (c) an associated broker
  - (d) an independent finance broker, and
  - (e) any agent of a motor vehicle dealership, associated credit provider, associated broker or independent finance broker

must not exceed, in amount or value, 20% of the premium (excluding government charges) and a participating insurer must not pay a commission exceeding 20%.

35. The proposed cap on commissions would not extend to compulsory third party insurance which is separately regulated through state and territory legislation.

### *Transitional arrangements*

36. In order to provide certainty to the industry and avoid circumvention of the proposed cap the Applicants propose to agree transitional arrangements. Specifically, they propose that any up-front payment or sign-on fee paid by an insurer in connection with an add-on insurance product under arrangements entered into, renewed or varied in the period commencing 7 September 2016 and ending three months after the ACCC grants authorisation (the transition period) must be recovered by the insurer within 30 days of the end of the transition period.
37. The draft code proposes that where any new, renewed or varied arrangement increases commissions above the level that applied immediately before the transition period, all commissions paid in connection with add-on insurance products under any such arrangement that exceed 20% of premiums (excluding government charges) must be recovered by the insurer within 30 days of the end of the transition period.

### *Data reporting*

38. The Applicants propose that within 30 days of the end of each insurer reporting period, each insurer would provide data to a data reporting entity to be nominated by the Applicants relating to add-on insurance products that fall into or are similar in nature to the following categories:
- (a) consumer credit insurance, separately where issued for:
    - (i) personal or consumer use, and
    - (ii) business use
  - (b) gap insurance
  - (c) warranty or mechanical breakdown insurance

- (d) tyre and rim insurance
  - (e) loan termination or walkaway insurance
  - (f) guaranteed buyback insurance, and
  - (g) trauma insurance (if provided separately to consumer credit insurance).
39. The draft code also provides that each insurer will provide details of the name and product category of each product and would separately provide the following data in relation to policies incepted:
- (a) in the three months before, and
  - (b) after,
- the transition date:
- (a) details of pricing (including details of government charges)
  - (b) number of policies in force
  - (c) number of new policies issued
  - (d) average age of policies
  - (e) cancellation rate
  - (f) product split
  - (g) net earned premiums
  - (h) gross written premiums
  - (i) incurred losses, and
  - (j) number of claims paid
- in respect of each product within each product category.
40. Under the draft code, the nominated data reporting entity would provide data received from each insurer during each data reporting period to ASIC within 30 days of the end of each data reporting period.
41. The Applicants have advised that the data reporting aspects of the draft code are intended to provide transparency and accountability and to allow ASIC to monitor the effect of the package of changes that have been proposed. The exact process and the form of data to be provided would be finalised in conjunction with ASIC and any nominated data reporting entity.

#### *Monitoring and enforcement*

42. The draft code provides that an independent governance entity would be established with responsibility for monitoring and enforcing the code. The governance entity would provide quarterly reports to the insurers, with recommendations on any code improvements, code-related issues and matters of

importance. The governance entity will also prepare an annual public report containing aggregate industry data and consolidated analysis on code compliance.

43. The Applicants propose that the governance entity would investigate alleged breaches of the code and make determinations in relation to alleged breaches. The governance entity would notify an insurer's Chief Executive Officer in writing of its decision regarding any failure to correct a code breach and any sanctions to be imposed. The governance entity would be able to impose one or more of the following sanctions:
- (a) a requirement that the insurer pay to the insured the whole amount or value of the commission paid by the insurer
  - (b) a requirement that particular rectification steps be taken by an insurer within a specified timeframe
  - (c) a requirement that a compliance audit be undertaken
  - (d) corrective advertising, and/or
  - (e) publication of an insurers non-compliance.

#### **Other initiatives**

44. The Applicants acknowledge that the proposed cap will only partially address the concerns raised by ASIC. The Applicants submit that the proposed cap is part of a package of measures and is intended to complement reforms being developed by the Financial Services Council and Insurance Council of Australia.
45. The Applicants submit that other measures being developed include:
- Customer information and systems validation: where applicable, insurers would implement systems to collect customer information that would identify and prevent the sale of insurance to consumers who would not on the basis of that information be eligible to make a claim, or would receive limited value from the product.
  - Training and monitoring: insurers would review and strengthen dealership training on compliance and systems to ensure that appropriate conduct is clearly defined, and monitoring obligations will be clarified.
  - Product disclosure: the general insurance industry is in the process of developing and consumer testing point of sale product information to better assist consumers to assess the value of products against their needs and circumstances.
  - Sales practices: general insurers will commission independent reviews of insurer compliance and risk management procedures in addressing risks associated with the sale of add-on products, and the ICA's "Understand Insurance" website will enhance understanding about the range of general insurance products that could be offered through motor dealers.
  - Post-sale engagement: following a purchase, insurers will contact customers to ensure they are aware of the product they have purchased and their cooling-off rights, and will implement annual reminders in the case of multi-year products.

- Single premiums: insurers that offer a single loan-financed premium will also offer a non-financed payment option and will be encouraged to offer a choice of payment by instalments; customers will be given clear information about payment options and their implications.
  - Product design: general insurers will review their policy inclusions and exclusions with a view to increasing product coverage where possible for the benefit of consumers, and life insurers will review products to ensure they are sustainable, affordable and suitable to customers.
46. The Applicants note that all of these measures can be agreed through individual or industry negotiation with ASIC, as they do not require collective action or involve any risk of breaching the competition law if approached collectively. Accordingly, the Applicants have not sought authorisation from the ACCC in respect of these measures.

## The Applicants' supporting submission

### *Public benefit*

47. The Applicants submit that the proposal conduct provides tangible public benefits in addressing the issues of reverse competition, relatively high prices and low claims ratios, and incentives to engage in inappropriate sales practices, while allowing customers to continue to benefit from the ease, convenience and peace of mind provided by add-on insurance products sold through the motor vehicle dealership channel.
48. Specifically, the Applicants submit that limiting commissions to 20% would allow insurers to make material changes to the price of add-on insurance products, since their costs in providing these products will be reduced by the value of any current commissions or other payments above 20% of premiums.
49. They submit that removing reverse competition in relation to commissions would still allow insurers to compete for the dealership channel based on service, including genuine training and advertising support, and on the quality and price of products. While sales representatives may still have incentives to sell more expensive products, consumers will know that those incentives will apply consistently to all add-on insurance products and can make their own informed decisions about the value of a particular product.
50. The Applicants submit that the public benefits associated with the proposed conduct extend beyond the reduction in price that will flow from the cap on commissions. They submit that, along with the other measures being introduced, as summarised at paragraphs 44 to 46, the cap on commissions will drive insurers to continually improve the pricing, coverage and value of their products. The Applicants consider that these other measures will not be effective without also addressing the contribution that high levels of commission make to the market failure that ASIC has identified and submit that authorisation of a cap on commissions is necessary to facilitate this.
51. The Applicants submit that the proposed data reporting will allow ASIC to monitor both price and value for each insurer and thereby ensure that prices reduce and/or value increases in the form of additional coverage, service and product benefits following the introduction of the cap. The Applicants argue that ASIC has the ability to take further action against individual insurers who do not meet that expectation. They consider that these actions may be directed towards individual insurers and may range from adverse publicity to new licence conditions or action under consumer protection laws; or they may be directed towards the entire industry through class orders or other regulations. The Applicants submit that reporting to ASIC will give insurers very strong incentives to reduce their prices and increase their claims ratios in order to avoid these consequences.
52. The Applicants also submit that the proposed cap will mitigate the risk of the inappropriate sales practices identified by ASIC. In particular, the Applicants consider that high commissions paid in the motor vehicle dealership channel contribute significantly to the market failure identified by ASIC by providing incentives to engage in inappropriate sales practices such as providing incomplete information or explanation of the products, pressuring or rushing customers, downplaying the cost of products, using pre-filled application forms,

and in some cases misrepresenting the value or necessity of add-on insurance products.

53. The Applicants submit that the higher the commission, the greater the incentive to sell the relevant product and the greater the likelihood of problematic sales practices.
54. The Applicants submit that in the absence of the cap there is a real chance that regulatory or legislative intervention would prevent the sale of add-on insurance products through the motor vehicle dealership channel, either through an outright prohibition or through a ban on commissions that would make continued distribution through the channel unsustainable.
55. The Applicants submit that the 20% cap is a maximum only and insurers remain free to compete below the cap level. The Applicants submit that where reverse competition between insurers for access to the dealer's customers is replaced by more direct competition for customers – as is the intention of the proposed cap – lower rates of commission may well become a significant feature of this competition.

*Public detriment*

56. The Applicants submit that the proposed cap may result in reduced payments to motor vehicle dealerships and may be considered a detriment by individual dealerships and their trade associations. However, the Applicants argue that it is not clear that the reverse competition leading to higher commissions is a source of any efficiency or that it provides benefits beyond the motor vehicle dealership channel. Instead, it appears to supplant the competition for customers on the basis of price and service that characterises other channels and that provides clear efficiencies. Therefore, the Applicants argue, it is not clear that any such detriment would be regarded as a public detriment.
57. The Applicants also note that there is a chance that the proposed cap on commissions will result in motor vehicle dealerships charging higher prices for the sale of motor vehicles (including by being less flexible in negotiating prices) in order to remain profitable despite reduced revenue from commissions. The Applicants argue that while this may increase the price of motor vehicles for some customers it would also be likely to increase transparency and efficiency, as cross-subsidies between sales of motor vehicles and insurance would be reduced. As a result, the Applicants argue that it is not clear that any such increase in the price of motor vehicles would necessarily be a public detriment.



## Consultation

58. The ACCC tests the claims made by an Applicant in support of its application for authorisation through an open and transparent public consultation process.
59. The ACCC invited submissions from a range of potentially interested parties including insurers, underwriters, motor vehicle dealerships and associations, consumer groups, and relevant regulatory bodies.<sup>6</sup>
60. The ACCC received public submissions from twelve parties and one confidential submission. A brief of overview of submissions follows.
61. Insurance Council of Australia (ICA) supports authorisation of the proposed conduct, noting the problems identified by ASIC. The ICA argues that the proposed cap on commissions will lead to lower prices and better value for consumers. The ICA acknowledges that the cap will have an impact on motor vehicle dealerships but argues that in the absence of voluntary reform there is a risk that regulatory solutions will have an even greater impact.
62. National Insurance Brokers Association does not object to the principle of capping commissions at 20% of the premium but argues that it should only apply to the sales of add-on insurance products by motor vehicle dealerships and not, for example, where an insurance broker arranges the distribution of policies by insurers to motor dealers.
63. NM Insurance does not support authorisation of the proposed conduct, suggesting that the proposed conduct will not be followed by participants in the insurance industry other than the Applicants. NM Insurance submits that solutions to the issues identified by ASIC in its report are better left to legislation after consultation across the entire insurance sector. NM Insurance contends that a reduction in commissions may not necessarily result lower premiums and increased value for money for consumers.
64. The Underwriting Agencies Council (UAC) does not support authorisation of the proposed conduct. The UAC argues that:
  - the proposed arrangements may not be followed by participants in the insurance industry other than the Applicants
  - reducing commissions will result in savings for insurers but these savings will not necessarily be passed on to consumers
  - reducing remuneration to distributors will reduce incentives to sell add-on insurance thereby potentially impacting its availability
  - the cap may inhibit new entrants by eliminating one method by which they can compete with incumbent insurers for access to the motor vehicle dealership distribution channel, and
  - the proposal seeks to implement a regime that is better left to legislation and consultation across the insurance sector as a whole.

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<sup>6</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

65. The Consumer Action Law Centre (CALC) does not consider the proposed conduct, as presently structured, will deliver a net public benefit. The CALC argues that:
- the proposed conduct does not clearly address the systematic problems with add-on insurance sales through motor vehicle dealerships in a way that will benefit consumers
  - in spite of the proposed cap it will remain in motor vehicle dealerships' interest to sell consumers high cost add-on insurance to maintain commission revenue, and
  - capping the profits motor vehicle dealerships make on add-on insurance products may simply increase the profitability of insurers without addressing the problems with add-on sales practices.
66. The CALC submits that the application for authorisation may result in a net public benefit if the following changes were made:
- a ban on single premium policies (whereby a single premium price is added to the cost of the car loan, meaning that the interest payable on the premium, and the repayments are hidden in the loan repayments)
  - an "opt-in (deferred sales)" sales model whereby there is a mandatory delay between the sale of the primary product and the add-on product which allows consumers to make informed decisions about whether they need add-on insurance and if so, where to buy it
  - a ban on the sale of life insurance in car dealerships, and
  - limiting commissions to a lower level such as 10%.
67. Choice submits that the proposed conduct will result in little or no public benefit and is likely to delay effective regulatory solutions. Choice states that its preference would be that no commissions be allowed for the sale of add-on insurance but if they are allowed they be limited to 10% of the premium as suggested by the CALC. More generally, Choice endorses the submission made by the CALC.
68. The Financial Rights Legal Centre submits that the proposed conduct will not result in a net public benefit and suggests that the same changes be made as proposed by CALC.
69. The Australian Automotive Dealer Association (AADA) opposes authorisation of the proposed conduct submitting that it will maintain insurers' margins, without any mechanism to ensure savings are passed on to consumers, while financially impacting motor vehicle dealerships. The AADA also submits that the cap will place motor vehicle dealerships at a competitive disadvantage to other add-on insurance distribution channels. The AADA further submits that the proposed cap will in fact create incentives for insurers to increase rather than reduce premiums as this will become the only means available to them to compete for motor vehicle dealer distribution. With respect to the financial impact on motor vehicle dealerships the AADA submits that financial modelling undertaken for it estimates the industry's net profit before tax at approximately \$1.3 billion annually of which around \$297 million comes from insurance commissions. The AADA estimates

that the proposed cap will reduce these commissions by around 75% (\$223 million).

70. The Australian Holden Dealer Council (AHDC) supports the AADA submission. The AHDC questions why the proposal is channel related rather than product related. The AHDC submits that the proposed 20% cap is arbitrary and the proposed commencement date and transition period are unrealistic. The AHDC submits that the proposed conduct seemingly does not address the concerns raised by ASIC about reverse competition and that there is no mechanism for ensuring that reductions in commissions are reflected in reduced prices for consumers. The AHDC also states that there is a lack of consideration and financial analysis of the impact on motor vehicle dealers and that the reduced profit from insurance will necessitate an increase in the cost of motor vehicles.
71. The MMAL National Dealer Council (MMAL NDC) supports the AADA's position. The MMAL NDC questions the focus of the proposed conduct on the motor vehicle dealership distribution channel. The MMAL NDC argues that with lower commissions many dealers will not be able to continue to sell add-on insurance resulting in less competition in the supply of these products. The MMAL NDC states that the proposed conduct appears to focus on reducing the viability of this distribution channel so as to direct sales towards the insurers own online offers. The MMAL NDC also states that the proposed 20% cap is arbitrary, the commencement date and transition period are unrealistic and that the proposed conduct will not necessarily reduce premiums for consumers.
72. Yamaha is broadly supportive of the 20% cap on commissions paid to motor vehicle dealerships, but not in the form proposed. Yamaha submits that insurance agents and underwriters increase competition and should be excluded from the proposed cap. Yamaha also argues that the direct beneficiary of the 20% cap will be insurers rather than consumers. Yamaha submits that since October 2013 it has operated on a voluntary basis a self-imposed cap on commissions of 20% of the premium.
73. On 14 November 2016, ASIC submitted that:
  - in principle it supports a cap on commissions to help address the concerns identified in its reviews that consumers are paying too much for add-on insurance sold through the motor vehicle dealership channel, in part due to very high commissions.
  - it is supportive of the industry adopting this initiative and the industry's underlying recognition that there is a need for change. ASIC further states that given the complexities of this market and the long-standing poor consumer outcomes, it is important that any proposal to cap commissions will deliver measurable improvements to consumer outcomes.
  - it does not view the proposed cap as a complete solution to the many and varied concerns it identified in its reviews. Rather, ASIC submits that the application addresses particular concerns regarding the sale of add-on products, namely the high premiums consumers pay and the conflicting incentives to motor vehicle dealerships to sell add-on products at these prices.

74. On 14 February 2017, following correspondence between the ACCC and the Applicants in relation to the ACCC's preliminary views about the applications for authorisation, ASIC provided a further submission.
75. In this submission, ASIC reiterates that addressing the range of problems it has identified requires a 'package' of reforms. ASIC states that while a cap on commissions is likely to be a very useful element of this package, it would, on its own, not be sufficient. ASIC states that additional measures are clearly required and one such measure is a deferred sales model.
76. ASIC states that its view is that the ACCC's preliminary views flagged to the Applicants the need to provide a more comprehensive response to the concerns previously identified by ASIC, and to therefore supplement their application with other firm commitments to address the limitations identified by the ACCC in providing its preliminary views.
77. ASIC states that accordingly in a meeting with the Applicants in January 2017, it clearly stated its view that the Applicants should make a firm commitment to the development of a deferred sales model, which was one of the recommendations of ASIC Report 492. ASIC submits that the objective of this deferred sales mechanism is to allow increased competition in the add-on insurance market. ASIC submits that a deferred sales model encourages lower prices through greater competition and more consumer awareness.
78. ASIC submits that because the Applicants have failed to make such a commitment, the applications for authorisation are subject to the following limitations:
- They do not have a commitment to a deferred sales model or to any mechanism that would address the market failures relating to transparency in price and competition.
  - The risk of problematic or coercive practices in the current sales model would persist, and that a reduction in commissions would only reduce – but not eliminate – this risk.
  - They do not propose any measures to address the risk of continued sales of poor value policies as a result of the preferred insurer issue, which would encourage car dealers to sell the add-on product with the highest cost.
  - They do not include any commitment to pass on the savings from a reduction in commissions to consumers, even though the ACCC had expressed concerns about this.
79. ASIC states that it accepts that the above limitations could lead the ACCC to form the view that the cap on commissions is an inadequate response to the concerns identified and that, given the long-standing history of problems in this market, the Applicants could be expected to have responded more constructively to the concerns raised.
80. ASIC's states that its view nevertheless remains that there is a need for comprehensive changes in this market, and that an effective cap on commissions could still be considered as part of a package of reforms, including a move to a deferred sales model.

81. As ASIC's further submission was received on 14 February 2017, the Applicants have not had an opportunity to respond to it to date.
82. All public submissions are available from the ACCC's public register.<sup>7</sup>
83. The submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the applications for authorisation.

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<sup>7</sup> [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister)

## ACCC assessment

84. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit tests<sup>8</sup> contained in the *Competition and Consumer Act 2010* (Cth) (the CCA). In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the proposed conduct would outweigh the likely detriment to the public, including from any lessening of competition.

### Relevant areas of competition

85. The ACCC considers that precise identification of the relevant markets is not required for the purpose of assessing these applications for authorisation. The ACCC can consider the areas of competition in a broad sense when assessing any public benefits and public detriments that would likely result from the proposed conduct.
86. The ACCC considers the following areas of competition are relevant to its assessment:
- the wholesale distribution of add-on insurance products for motor vehicles
  - the supply of add-on insurance for motor vehicles to consumers, and
  - the supply of motor vehicles.

### Future with and without

87. To assist in its assessment of the proposed conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.
88. The Applicants submit that without the proposed conduct the current practice of reverse competition, relatively high premiums and relatively low value for customers will continue in the short to medium term. They submit that, in the longer term, in the absence of the proposed conduct there is a real chance that ASIC or the government will intervene with regulatory or legislative action. The Applicants submit that whatever the eventual regulatory response, the future without the proposed conduct would involve considerable delay and uncertainty around the resolution of these issues.
89. The ACCC considers that in the future without the proposed conduct, insurers would independently determine the commissions they pay to motor vehicle dealers selling add-on insurance, as is currently the case.
90. The ACCC notes ASIC's statements that if the insurance industry does not deliver swift improvements for consumers, it will take further action, including enforcement action where appropriate. Accordingly, the ACCC considers that if the proposed cap on commissions is not implemented, the insurance industry would be likely to consider other alternatives to address the concerns raised by

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<sup>8</sup> Subsections 90(5A), 90(5B), 90(6), 90(7), 90(8).

ASIC, and/or ASIC would consider taking further action, or legislative change would be considered.

## Public benefit

91. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>9</sup>

92. The ACCC considers that the public benefits claimed by the Applicants can be classified as:

- lower prices and better value for consumers
- mitigating the risk of inappropriate sales practices, and
- continued availability of add-on insurance products through the motor vehicle dealership distribution channel.

93. The ACCC's assessment of the likely public benefits from the proposed conduct is as follows.

### Lower prices and better value for consumers

94. The Applicants submit that the proposed conduct is designed to address the high commissions paid to motor vehicle dealerships as a consequence of the reverse competition by insurers to access the motor dealership distribution channel. The Applicants submit that insurers agreeing to a maximum 20% cap will result in lower priced insurance and better value for consumers. The Applicants also submit that the proposed data reporting as part of the proposed conduct will allow ASIC to monitor the effectiveness of the cap. Therefore the risk of ASIC taking action if the proposed cap does not result in improved outcomes for consumers will incentivise insurers to reduce their prices and improve claims ratios.

95. The ACCC does not consider that the proposed conduct directly addresses the market failure identified by ASIC, that many consumers are not put in a position to make rational, well-informed choices when buying add-on insurance products through motor vehicle dealerships. Instead, the arrangements are designed to address one of the consequences of this market failure, namely high commissions to motor vehicle dealerships.

96. The ACCC considers that as long as the fundamental issue identified by ASIC exists, dealerships will continue to have the opportunity and incentive to sell consumers expensive, poor value products. The ACCC considers that this is likely to be the case even if the cap is implemented and the cost (in commissions) incurred by insurers in providing these products through motor vehicle dealerships falls.

97. The ACCC also considers that insurers will continue to have incentives to seek to maximise their returns on add-on insurance products by charging what the market

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<sup>9</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

will bear. To the extent that they do so, at least part of the reduction in commissions will likely be reflected in a wealth transfer from motor vehicle dealerships to insurers rather than a reduction in prices for consumers. Further, because commissions will still be set as a percentage of the price of the policy, when selling add-on insurance products to consumers who are not price sensitive, motor vehicle dealerships will also still have incentives to favour higher priced policies over lower priced policies irrespective of which policy may represent the best value for the customer or best suit their needs. In respect of these customers, any insurer unilaterally lowering its prices will run the risk of motor vehicle dealerships switching to offering more expensive policies offered by other insurers.

98. Accordingly, notwithstanding the proposed cap on commissions at 20%, so long as the problem of many consumers not being in a position to make rational, well-informed choices when buying add-on insurance products through motor vehicle dealerships persists, it remains in both the insurers' and motor vehicle dealerships' interests to continue to favour policies that maximise their returns rather than those that represent the best value for consumers.
99. Therefore, the ACCC does not consider that, in and of itself, the cap on commissions will necessarily lead to lower prices or better value for consumers. Nor, as noted, does it address the market failure identified.
100. Further, the ACCC does not consider that data reporting is likely to significantly change the terms on which add-on insurance products are offered so long as the opportunity for insurers to continue to favour policies that maximise their returns rather than those that represent the best value for consumers persists (i.e. so long as the underlying market failure is not addressed).

#### *Complimenting other initiatives*

101. As noted, the proposed cap is one of a range of initiatives proposed. In particular, other proposed initiatives are being developed which are aimed at increasing consumers' price sensitivity by helping them understand the products that are available and the value they provide, and offering additional opportunities to compare prices, investigate alternatives and choose other options before or after the point of sale.
102. The ACCC notes that these other proposed initiatives are not part of the current application. The ACCC also notes that the Applicants have submitted that these initiatives can be agreed through individual or industry negotiation with ASIC, and do not need authorisation. Further, the ACCC considers that the proposed cap is not necessary in order for insurers to be able to adopt these other initiatives.

#### **Mitigating the risk of inappropriate sales practices**

103. One of the issues identified by ASIC is that the car sales environment inhibits good decision making by consumers about add-on insurance products because of the conflicts of interest and pressure sales built into this distribution model. The consumer is focussed on purchasing a car and financing that purchase – not on the details of the complex insurance policy.
104. The Applicants submit that the high commissions paid to motor vehicle dealerships contribute significantly to this problem and, accordingly, reducing the cap on commissions will mitigate the risk of the inappropriate sales practices.



Specifically, the Applicants argue that the higher the commission the greater the incentive to sell the relevant product and the greater the likelihood of problematic sales practices.

105. The ACCC considers that the Applicants agreeing to adopt a maximum 20% cap on commissions continues to provide a strong incentive for dealers to maximise sales of add-on insurance.
106. If consumers are not in a position to make well informed choices, motor vehicle dealerships are likely to continue to favour the products that most suit them (on the basis of commissions earned, time and effort involved in the sale) rather than the product that is best for the consumer. The ACCC does not consider that the proposed conduct addresses this issue.
107. Further, the ACCC does not consider that, as submitted by the Applicants, the proposed conduct will significantly shift (reverse) competition on commissions to competing for customers based on price and service. As discussed, as long as the fundamental issue identified by ASIC remains, incentives for both insurers and dealerships to engage in the types of problematic sales practices identified by ASIC will also remain.

### **Continued availability of add-on insurance products through the motor vehicle dealership distribution channel**

108. The Applicants submit that add-on insurance products that are appropriately priced and sold to informed customers through the motor vehicle dealership distribution channel provide real benefits to customers in terms of convenience and peace of mind.
109. The Applicants submit that in the absence of the cap on commissions there is a real chance of regulatory or legislative intervention either banning the sale of add-on insurance products through motor vehicle dealerships or banning commissions, making distribution through this channel unsustainable.
110. At the time ASIC released its report, ASIC stated that there are serious failures in the sale of add-on insurance through motor vehicle dealerships. Specifically, ASIC stated that it was putting insurers on notice that they need to improve consumer outcomes by making substantial changes to the pricing, design and sale of add-on insurance products or face additional regulatory action.<sup>10</sup>
111. The ACCC considers that the ongoing availability of add-on insurance products through motor vehicle dealerships at the point of sale can, provided the market failure is addressed (i.e. provided consumers are fully informed), potentially be of benefit to consumers. In particular, it can potentially provide a convenient option for the purchase of such insurance coverage.
112. The ACCC considers that the continued availability of add-on insurance products through the motor vehicle dealership distribution channel is only likely to result in a public benefit if the significant concerns about consumers being sold expensive, poor value products that provide them very little to no benefit are addressed. As noted, the ACCC does not consider that the proposed cap addresses these concerns.

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<sup>10</sup> ASIC media release 16-301MR, *ASIC puts insurers on notice to address serious failures in the sale of add-on insurance through car dealers.*

113. More generally, the ACCC also notes that add-on insurance is, and will likely remain, available to consumers through other distribution channels where analogous concerns have not been raised.

### **ACCC conclusion on public benefits**

114. The ACCC does not consider that the proposed conduct is likely to result in any significant public benefit. The proposed cap does not address the market failure identified by ASIC and it is unlikely to result in lower prices and better value for consumers.
115. Further, the ACCC does not consider that a 20% commission cap substantively addresses the risk of inappropriate sales practices. A 20% commission cap still provides a strong incentive for dealers to maximise sales of add-on insurance, including through continued use of inappropriate sales practices.

### **Public detriment**

116. The CCA does not define what constitutes a public detriment, but the Tribunal has taken a broad approach, defining it, as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>11</sup>

117. The ACCC's assessment of the likely public detriments from the proposed conduct is as follows.

### **Reduced competition between insurers**

118. Currently insurers compete to access the motor vehicle dealership distribution channel in respect of add-on insurance by offering high commissions to motor vehicle distributors.
119. Under the proposed conduct the insurers would agree to limit the level of commissions offered to motor vehicle dealerships to a maximum of 20%.
120. The Applicants submit that insurers remain free to compete below the agreed cap. Further, insurers will continue to compete to provide add-on insurance products through other distribution channels.
121. The ACCC notes that a collective agreement between insurers to limit the commissions they will pay to motor vehicle dealerships will primarily benefit insurers at the expense of motor vehicle dealerships.
122. The ACCC considers that the proposed cap is likely to reduce competition between insurers. In particular, it provides greater opportunities for explicit or tacit collusion and greater shared knowledge between insurers of their competitors' costs.
123. The ACCC also considers that rather than being only a maximum commission rate, the 20% cap would be likely to become a de facto industry standard commission rate.

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<sup>11</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

## **Delays in implementing effective reforms for the sale of add-on insurance through motor vehicle dealerships**

124. As set out in the consideration of public benefits, the ACCC does not consider that the proposed conduct addresses the concerns about consumers being sold expensive, poor value products that provide them with very little to no benefit. Accordingly, absent broader reform, the ACCC considers that this issue will persist.
125. As discussed above, ASIC has foreshadowed that if this issue is not addressed it will consider additional regulatory action. Specifically, ASIC has stated that it is putting insurers on notice that they need to improve consumer outcomes by making substantial changes to the pricing, design and sale of add-on insurance products or face additional regulatory action.
126. The Applicants also submit that in the longer term, in the absence of the proposed conduct, there is a real chance that ASIC or the government will intervene with regulatory or legislative action.
127. The ACCC considers that if the proposed cap were to proceed it is less likely that any broader reforms, whether they be legislative or regulatory action or another industry developed arrangement, would be implemented until such time as the effectiveness of the cap could be assessed.
128. In this respect, the ACCC notes that if the proposed cap on commissions were adopted, it would take some time to implement. Following implementation it would be necessary for the arrangements to operate for a significant period of time before any meaningful data would be available to assess the impact of the cap on the terms and conditions on which add-on insurance was being supplied through motor vehicle dealerships.
129. The ACCC considers that the proposed cap is likely to result in a public detriment by delaying implementation of effective industry reforms which properly address the market failures that have resulted in the consumer protection issues identified by ASIC.

## **Impact on motor vehicle dealerships and motor vehicle prices**

130. Some interested parties raised concerns that the proposed cap will adversely impact revenue for motor vehicle dealerships and may necessitate an increase in the cost of motor vehicles.
131. As discussed at paragraph 16, ASIC found that motor vehicle dealerships earn over four times more in commissions on the sale of add-on insurance products than consumers receive in claims.
132. These commissions are only sustainable because there is a lack of transparency around add-on insurance purchases by consumers through motor vehicle dealerships and, as a result of this transparency issue, 'reverse competition' whereby insurers compete for access to the dealership sales channel through the commissions they offer.
133. The ACCC notes that the argument that a reduction in revenue from add-on insurance commissions would necessitate motor dealers raising the price of motor

vehicles relies on the assumption that revenue derived from add-on sales commissions is currently cross-subsidising the cost of vehicles.

134. If this is the case, it is likely that customers who purchase add-on insurance through motor vehicle dealerships are both cross-subsidising the cost of their own vehicles, and the vehicles of customers who do not purchase add-on insurance.
135. While the ACCC does not consider that the proposed cap will necessarily reduce prices paid for consumers for add-on insurance purchased through the motor vehicle dealership distribution channel, the ACCC does consider that a reduction in commissions would likely reduce the level of such a cross-subsidy. In this context, the ACCC does not consider any associated loss of revenue to motor vehicle dealerships to be a public detriment.

### **ACCC conclusion on public detriments**

136. The ACCC considers that the proposed conduct is likely to result in public detriment. In particular, the proposed conduct has the potential to lessen competition between insurers including by providing greater opportunities for explicit or tacit collusion and greater shared knowledge between insurers of competitors' costs. It is also likely that the 20% cap will become the de facto industry standard commission rate.
137. The ACCC also considers that the proposed conduct is likely to result in public detriment by delaying effective reforms meaning that the practice of consumers being sold poor value add-on insurance products would persist longer than would otherwise be the case.

### **Balance of public benefit and detriment**

138. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
139. The ACCC considers that the proposed conduct is unlikely to result in any significant public benefit. The proposed conduct does not address the market failure identified by ASIC and the ACCC considers that with or without the proposed cap on commissions in place, insurers and motor vehicle dealerships will continue to have the opportunity and incentive to sell consumers poor value add-on insurance products that provide them with little or no benefit.
140. The ACCC considers that the proposed conduct is likely to result in public detriment by lessening competition between insurers and delaying the implementation of effective reforms that more directly address the market failure identified by ASIC.
141. For the reasons outlined in this draft determination, the ACCC is not satisfied that the proposed conduct is likely result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
142. Accordingly, the ACCC does not propose to grant authorisation.

# Draft determination

## The applications

143. Application A91556 was made using Form A and application A91557 was made using Form B of Schedule 1 of the Competition and Consumer Regulations 2010. The applications were made under subsection 88(1) and (1A) of the CCA.
144. Authorisation is sought for the Applicants, and potentially other insurers, to make and give effect to a contract, arrangement or understanding that would limit to 20% the commissions and other payments made or benefits paid to distributors of add-on insurance products through the motor vehicle dealership channel as described in more detail at paragraphs 28 to 43 of this draft determination.
145. Authorisation is sought as the proposed contract, arrangement or understanding may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of the CCA.
146. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

## The net public benefit test

147. For the reasons outlined in this draft determination, the ACCC is not satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.
148. The ACCC is not satisfied, pursuant to section 90(8), that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the proposed conduct should be allowed to take place.
149. This draft determination is made on 17 February 2017.

## Next steps

150. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

## Attachment A - Public benefit tests in CCA

**Subsections 90(5A) and 90(5B)** provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Subsections 90(6) and 90(7)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

**Subsection 90(8)** states that the ACCC shall not:

- make a determination granting:
  - i. an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - ii. an authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or
  - iii. an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.