

EXPOSURE DRAFT

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Inserts for
**Financial Sector Reform (Hayne Royal
Commission Response—Protecting
Consumers (2020 Measures)) Bill 2020:
Caps on commissions**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details

1. Schedule ?	The day after this Act receives the Royal Assent.	
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Schedule ?—Caps on commissions

Australian Securities and Investments Commission Act 2001

1 Subsection 12AC(2)

After “section 12GF”, insert “or 12GFA”.

2 Subsection 12BA(1)

Insert:

add-on risk product has the meaning given by subsection 12DMC(2).

Australian Consumer Law means Schedule 2 to the *Competition and Consumer Act 2010* as applied under Subdivision A of Division 2 of Part XI of that Act.

commission includes:

- (a) any financial or other benefit in the nature of a commission; and
- (b) in relation to an add-on risk product provided to a person in connection with the person providing a warranty to another person—the amount (if any) by which the consideration for the warranty exceeds so much of the consideration for the add-on risk product as relates to the warranty.

It may take any form of monetary consideration, or any form of non-monetary consideration to which a monetary value can be assigned.

long-term lease, of a motor vehicle, means a contract for the hire of the motor vehicle for a fixed period of more than 4 months, or for an indefinite period.

money has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*.

motor vehicle means any motor-powered road vehicle (including a 4 wheel drive vehicle).

National Credit Code has the same meaning as in the *National Consumer Credit Protection Act 2009*.

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3 After section 12DMB

Insert:

12DMC Caps on commissions for add-on risk products supplied in connection with motor vehicles

Commissions not to exceed determined caps

- (1) A person contravenes this subsection if:
- (a) the person provides a commission to another person, or receives a commission from another person, in connection with the supply (by any person to any person) of a financial service; and
 - (b) the financial service is the provision of an add-on risk product to a person (the *product recipient*) in connection with:
 - (i) the sale or long-term lease of a motor vehicle to the product recipient; or
 - (ii) the provision of credit connected with the sale or long-term lease of a motor vehicle to the product recipient; or
 - (iii) the provision of a warranty by the product recipient in connection with the sale or long-term lease of a motor vehicle to another person by the product recipient; and
 - (c) the person acquiring the motor vehicle does so as a consumer (within the meaning of the Australian Consumer Law); and
 - (d) providing the add-on risk product is covered by a determination under subsection (4); and
 - (e) the value of the commission exceeds the cap that applies, under that determination, to providing the add-on risk product.

Note: For the value of the commission, see subsections (5) to (7).

Meaning of add-on risk product

- (2) An *add-on risk product* is a financial product that is a facility through which, or through the acquisition of which, a person manages financial risk (within the meaning of subsection 12BAA(5)).

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ASIC may determine caps

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- 2 (3) ASIC may, by legislative instrument, determine a cap on the value
- 3 of commissions provided in connection with an add-on risk
- 4 product of a kind specified in the instrument.
- 5 (4) Without limiting subsection (5), the determination may do either or
- 6 both of the following:
- 7 (a) limit the circumstances in which provision of an add-on risk
- 8 product of that kind is covered by the determination;
- 9 (b) provide for the way in which the value of commissions is to
- 10 be ascertained for the purposes of the determination.

Valuing commissions

- 11
- 12 (5) The value of a commission provided in connection with an add-on
- 13 risk product is:
- 14 (a) the value ascertained in accordance with the determination
- 15 under subsection (3) that covers the provision of the add-on
- 16 risk product; or
- 17 (b) if the determination does not provide for the way in which
- 18 the value is to be ascertained—the sum of:
- 19 (i) to the extent that the commission is expressed as an
- 20 amount of money—that amount; and
- 21 (ii) otherwise—the market value of so much of the
- 22 commission as is not expressed as an amount of money.
- 23 (6) In working out the market value of something for the purposes of
- 24 subparagraph (5)(b)(ii) disregard anything that would prevent or
- 25 restrict its conversion to money.
- 26 (7) If a commission is provided in connection with 2 or more add-on
- 27 risk products, apportion the value of the commission between the
- 28 add-on risk products:
- 29 (a) in accordance with the determination under subsection (3)
- 30 that covers the provision of the add-on risk products; or
- 31 (b) if the determination does not provide for such
- 32 apportionment—on a reasonable basis.

Multiple commissions

- 33
- 34 (8) For the purposes of this Act, if more than one commission is
- 35 provided (by one or more persons to one or more persons) in

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1 connection with the add-on risk product, subsection (1) applies as
2 if:

- 3 (a) one single commission is provided that comprises all of those
4 commissions; and
- 5 (b) if those commissions are provided by more than one
6 person—that single commission is jointly provided by all of
7 those persons; and
- 8 (c) the value of that single commission is the sum of the values
9 of all of those commissions.

10 *Commissions for consumer credit insurance*

11 (9) This section does not affect the application of section 145 of the
12 National Credit Code to a commission paid in connection with
13 consumer credit insurance (within the meaning of the National
14 Credit Code) unless the insurance:

- 15 (a) is an add-on risk product of a kind covered by a
16 determination under subsection (3); and
- 17 (b) is provided in connection with:
 - 18 (i) the sale or long-term lease of a motor vehicle; or
 - 19 (ii) the provision of credit connected with the sale or
20 long-term lease of a motor vehicle.

21 Note: In the absence of an applicable determination under subsection (3),
22 section 145 of the National Credit Code imposes a 20% cap on
23 commissions provided in connection with consumer credit insurance.

24 **4 After subsection 12GB(1)**

25 Insert:

26 (1AA) A person commits an offence if the person:

- 27 (a) contravenes section 12DMC; or
- 28 (b) attempts to contravene that section; or
- 29 (c) is involved in a contravention of that section.

30 Penalty: 60 penalty units.

31 (1AB) Subsection (1AA) is an offence of strict liability.

32 Note: For strict liability, see section 6.1 of the *Criminal Code*.

33 **5 Subsections 12GB(1A) and (1B)**

34 After “paragraph (1)(c)”, insert “or (1AA)(c)”.

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6 Subsections 12GB(3), (5) and (6)

After “subsection (1)”, insert “or (1AA)”.

7 After section 12GF

Insert:

12GFA Recovering commissions that exceed a cap under section 12DMC

(1) If:

- (a) a person provides a commission to another person in connection with the supply (by any person to any person) of a financial service; and
 - (b) the financial service is the provision of an add-on risk product to another person (the *consumer*) in connection with:
 - (i) the sale or long-term lease of a motor vehicle to the consumer; or
 - (ii) the provision of credit connected with the sale or long-term lease of a motor vehicle to the consumer; and
 - (c) providing the commission contravenes section 12DMC;
- the consumer is entitled to recover the value of the commission from the person.

Note: For the value of the commission, see subsections 12DMC(5) to (7).

(2) If:

- (a) a person (the *motor vehicle dealer*) receives a commission in connection with the supply (by any person to any person) of a financial service; and
 - (b) the financial service is the provision of an add-on risk product to the motor vehicle dealer in connection with the giving of a warranty by the motor vehicle dealer in connection with the sale or long-term lease of a motor vehicle to another person (the *consumer*); and
 - (c) providing the commission contravenes section 12DMC;
- the consumer is entitled to recover the value of the commission from the motor vehicle dealer.

Note: For the value of the commission, see subsections 12DMC(5) to (7).

(3) This section does not affect the other person’s right to recover loss or damage under section 12GF.

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8 Section 12GG

After “section 12GF”, insert “or 12GFA”.

9 Subsection 12GM(1)

After “section 12GF”, insert “, 12GFA”.

10 Paragraph 12GN(1)(c)

After “subsection 12GF(1)”, insert “or 12GFA(1)”.

National Consumer Credit Protection Act 2009

11 At the end of section 145 of the *National Credit Code*

Add:

ASIC determinations of caps on commissions

- (6) Despite subsection (1), this section does not apply to commission mentioned in that subsection if the insurance:
- (a) is an add-on risk product of a kind covered by a determination under subsection 12DMC(3) of the *Australian Securities and Investments Commission Act 2001*; and
 - (b) is provided in connection with:
 - (i) the sale or long-term lease of a motor vehicle; or
 - (ii) the provision of credit connected with the sale or long-term lease of a motor vehicle.

Note: Under subsection 12DMC(3) of the *Australian Securities and Investments Commission Act 2001*, ASIC may determine caps for commissions provided in connection with consumer credit insurance for credit connected with the sale or long-term lease of a motor vehicle.

12 Subsection 204(1) of the *National Credit Code*

Insert:

add-on risk product has the meaning given by subsection 12DMC(2) of the *Australian Securities and Investments Commission Act 2001*.

long-term lease, of a motor vehicle, has the meaning given by subsection 12BA(1) of the *Australian Securities and Investments Commission Act 2001*.

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1 *motor vehicle* has the meaning given by subsection 12BA(1) of the
2 *Australian Securities and Investments Commission Act 2001*.

3 **13 Application of amendments**

4 The amendments made by this Schedule apply to commissions provided
5 in connection with supplies of add-on risk products that are supplies
6 under contracts, arrangements or understandings entered into on or after
7 the commencement of this Schedule.

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