

STEER CLEAR: ANALYSIS OF NEW ZEALAND'S MOTOR VEHICLE ADD-ON INSURANCE INDUSTRY

*Tomas Roche**

This article considers the current state of the motor vehicle add-on insurance industry in New Zealand in the light of the Commerce Commission's 2021 review of motor vehicle financing and add-ons. It suggests the current way the industry functions does not promote competition and facilitates several issues detrimental to consumers. The issues are the inadequacy of consumer awareness and understanding of add-on products (brought about by an insufficiency of information), a point of sales advantage enjoyed by providers of primary products, and an unsuitable dealer incentive system. These issues are producing negative consumer outcomes, as demonstrated by quantitative and qualitative industry evidence. The article considers how comparable jurisdictions, namely Australia and the United Kingdom, have corrected similar issues to increase consumer protection within their equivalent industries. It advocates similar industry reform for New Zealand. Industry reform should act in a preventative way to eliminate the creation of issues, as this best protects consumers. The primary reform that is recommended is the adoption of an industry-wide deferred sales model for add-on products.

I INTRODUCTION

Motor vehicles are a major asset for millions of New Zealanders. The New Zealand Commerce Commission has recognised that "[a]fter a house, a vehicle is often the biggest purchase that a consumer will make".¹ Additionally, because vehicles are often a necessity, a consumer may feel obligated to finance the purchase of a motor vehicle if they cannot pay the full price outright.² For these reasons it is natural for consumers to want to ensure their asset is afforded the best protection possible. Consequently, it has become common practice for motor vehicle dealerships to supplement

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1 Commerce Commission *Motor vehicle financing and add-ons review* (10 November 2021) at 3.

2 At 3.

a consumer's comprehensive vehicle insurance (CVI) with the offer of additional add-on insurance products that accompany the sale of the motor vehicle and the provision of finance.

This article aims to highlight some of the issues around the sale of add-on insurance products in the context of motor vehicle purchases, consider what New Zealand and other jurisdictions have done to address the issues, analyse the existing legal solutions available to consumers in New Zealand and finally make some recommendations as to how consumers may be afforded better protection. The recommendations are set out in Part VIII below.

II BACKGROUND

A What is Add-on Insurance?

Add-on insurance is an insurance product that is "added on" at the time of the sale of a primary product. Consumers are not generally seeking to purchase add-on insurance products; the add-on is "sold to" the consumer rather than "bought by" the consumer.³ In the context of this article, the primary product being purchased by consumers is a motor vehicle. Add-on insurance is then commonly sold by the motor vehicle dealer (the dealer) with the purchase. Four types of add-on insurance have been identified as common within the New Zealand motor vehicle industry:⁴

- (1) Mechanical breakdown insurance (MBI): MBI provides cover for unforeseen mechanical or electrical faults the vehicle may incur throughout the cover period of the insurance after the expiration of a manufacturer's warranty.⁵ A successful claim entitles the consumer to receive the cost of repairing the vehicle less policy excess to any extent applicable.⁶ MBI is the only add-on that relates to the vehicle's actual condition.⁷ MBI is offered by insurers and commonly sold through vehicle dealers. It is unrelated to any finance arrangement the consumer may have entered into.
- (2) Credit contract indemnity insurance (CCI) and payment protection insurance (PPI): CCI and PPI are identical products that insure a borrower of finance in the event they are unable to make repayment on their loan due to the occurrence of a variety of specifically covered events.⁸ Events that are commonly covered include sickness, hospitalisation, accident,

3 Australian Securities and Investments Commission *A market that is failing consumers: The sale of add-on insurance through car dealers* (REP 492, September 2016) at 4.

4 Commerce Commission, above n 1, at 17.

5 At 17.

6 At 17.

7 At 17.

8 At 21. "CCI" and "PPI" are two names for the same product.

redundancy, bankruptcy and death.⁹ If a claim is successful, the insurer will cover the payment proportionate to the number of days the consumer is out of work, as a result of a covered event eventuating.¹⁰ Any pre-existing conditions a consumer has, which they ought reasonably to have known about, are generally excluded from coverage.¹¹ CCI/PPI is offered by insurers and commonly sold through vehicle dealers at the time finance is arranged.

- (3) Guaranteed asset protection insurance (GAP): GAP insures a consumer for any "shortfall" between the consumer's CVI coverage and the amount left outstanding on the motor vehicle's finance.¹² GAP will apply where the consumer has incurred a total loss on the vehicle. The effectiveness of GAP is critically reliant on the consumer retaining a CVI policy. If this is not done, a GAP claim is likely to be declined.¹³ GAP is offered by insurers and commonly sold through vehicle dealers at the time finance is arranged.
- (4) Repayment waivers: Repayment waivers offer cover for a consumer who is unable to meet repayment obligations due to a covered event eventuating.¹⁴ Repayment waivers are offered by lenders rather than insurers. This means a proportion of the claim will be "waived" rather than "insured" based on how long the consumer is unable to work. Similar to CCI/PPI, exclusions are generally in place for pre-existing conditions.

As well as providing the financial benefits identified above, add-ons can be said to offer some other more intangible benefits to consumers. This includes consumers having added peace of mind over the security of their primary product for unforeseen events that may eventuate throughout the life of the policy. Valuing this kind of benefit is difficult to quantify.

B The Operation of the Motor Vehicle Add-on Insurance Industry

The motor vehicle add-on insurance industry commonly operates with dealers acting as intermediaries between the consumer and the ultimate provider of the add-on, whether that be an insurer or lender. Consumers will not usually have direct contact with the party they are ultimately contracting with. Instead, the dealer is relied on by that party to contract on behalf of them and fulfil any statutory obligations. Dealers are incentivised to sell add-ons alongside the motor vehicle (the primary product) as they receive fees and commission.¹⁵ A dealer may receive payment in the form

9 At 21.

10 At 21.

11 At 21.

12 At 18.

13 At 19.

14 At 22.

15 At 14.

of an introducer fee for initiating the arrangement.¹⁶ The dealer may also receive interest commission where the dealer adds a percentage to the base interest rate set by the lender, in the case of add-ons offered by a lender, or add-on commission where the dealer directly increases the base cost of the add-on for their commission, in the case of add-ons offered by an insurer.¹⁷

III ISSUES AND OUTCOMES CURRENTLY PRESENT IN THE MOTOR VEHICLE ADD-ON INSURANCE INDUSTRY

A Issues

The concept of an add-on insurance product is not in itself explicitly an issue. It can be beneficial for consumers to mitigate the risks of taking on a large debt when financing the purchase of a motor vehicle.

However, the current way the industry operates, and the design of products, has led to the industry being described as New Zealand's "least competitive market".¹⁸ This is of serious concern for consumers, particularly vulnerable consumers. Financial mentors have recognised that "these products are not providing value for money and are not useful and affordable insurance options for vulnerable consumers or poorer New Zealanders".¹⁹ A 2021 review conducted by the Commerce Commission (the 2021 Review) appears to have identified some alarming issues within the motor vehicle add-on insurance industry. This article will focus on three core issues present in the motor vehicle add-on insurance industry that are detrimental to consumers. The first two issues directly derive from the low level of competition present within the industry. The third issue relates to industry selling practice.

From a microeconomic perspective, five factors can influence a market's competitiveness.²⁰ Two of these factors are present in the motor vehicle add-on insurance industry in a way that indicates the industry is not competitive. Their presence contributes to the creation of the first two core issues.

The first microeconomic factor that can influence a market's competitiveness is the availability of information. Information availability relates to a consumer's ability to inquire about prices and products which other competitors offer. The Commerce Commission has identified that, in

¹⁶ At 14.

¹⁷ At 14–15.

¹⁸ Rob Stock "Scandal of the least competitive insurance and loan market" *Stuff* (online ed, New Zealand, 21 January 2022).

¹⁹ Ronji Tanielu *Not Adding Up: Spotlighting Add-on Insurance in Aotearoa* (The Salvation Army Social Policy and Parliamentary Unit, May 2022) at 5.

²⁰ Investopedia "What factors influence competition in microeconomics?" (7 April 2020) <www.investopedia.com>; and Raphael Zeder "Factors that Influence Competition in Economics" (29 June 2020) Quickonomics <www.quickonomics.com>.

competitive markets, consumers will have ready access to information needed to make well-informed decisions.²¹ Currently, in the motor vehicle add-on insurance industry, consumers have a low level of understanding of add-on products and their suitability.²² Additionally, consumers are unable to compare prices of add-ons easily, as these are not readily advertised.²³ Information about the coverage and value of add-ons is also not widely available or provided to consumers. A likely consequence of the lack of information regarding the coverage of add-ons is the high number of declined claims due to pre-existing health conditions. The Commerce Commission revealed in the 2021 Review that 57 per cent of declined CCI/PPI claims were due to pre-existing conditions.²⁴ This suggests consumers are unaware of the coverage afforded to them by specific add-ons, and more generally have very little knowledge about the product they are purchasing. A lack of information about add-on products for consumers is the first core issue within the motor vehicle add-on insurance industry.

The second microeconomic factor that can influence a market's competitiveness is sales location. This concerns the ease of access some sellers have over other sellers to consumers. In the motor vehicle add-on insurance industry, the provider of the primary product obtains the prime sale location for the add-on sale. The Commerce Commission has identified that, in competitive markets, consumers will have the ability to switch between rival suppliers easily.²⁵ However, in the motor vehicle add-on insurance industry, this appears to be difficult. The provider of the primary product has a considerable competitive advantage to supply the add-on over any standalone provider. The provider of the primary product has direct access, and the exclusive ability, to approach the consumer first regarding the sale of the add-on when making the sale of the primary product. The primary product provider also does not have to devote the additional resources, such as marketing costs, that are expended by standalone providers to make a sale. This effectively allows them to fence in consumers, creating the second core issue: a primary product provider point of sales advantage.

The third core issue in the industry is how dealers are incentivised and permitted to sell add-on products. The operation of the dealer commission system has the potential to encourage dealers to promote the sale of add-ons to consumers regardless of suitability.²⁶ Additionally, the level of commission dealers receive can be incredibly high. The Commerce Commission identified in the 2021 Review that, in the case of several add-ons, the value of the commission charged by dealers was

21 Commerce Commission *Market Studies Guidelines* (19 November 2020) at 5.

22 Commerce Commission, above n 1, at 6.

23 At 16.

24 At 21.

25 Commerce Commission, above n 21, at 5.

26 Commerce Commission, above n 1, at 6.

greater than the actual wholesale value of the product charged by insurers and lenders.²⁷ This means consumers are having, in some instances, to pay double the wholesale value of the add-on, solely because of the dealer's role as a salesperson for the insurer or lender. The third core issue is the design of the dealer incentive system, which is leading to consumers being sold less suitable products and paying significantly higher prices.

B Outcomes

As a consequence of the aforementioned issues, vulnerable consumers are being taken advantage of in the motor vehicle add-on insurance industry, resulting in poor outcomes.

Quantitative evidence from the industry is a key indicator of the poor outcomes to which consumers within the industry are subject. The claims ratio of add-on products suggests that the pricing and suitability of add-ons heavily favour the provider of the add-on at the expense of consumers. A claims ratio is a percentage figure that represents the value of successful claims payments received by consumers against the value of premiums paid by consumers.²⁸ The Australian Securities and Investments Commission (ASIC) has noted "[t]he claims ratio is an important indicator of the value consumers derive from an insurance product".²⁹ In the 2021 Review, of the four add-ons looked at across the three-year study, MBI had the most consumer-favourable claims ratio at 37 per cent and CCI/PPI had the least consumer-favourable ratio at eight per cent:³⁰

Product	Value of retail premiums	Value of approved claims	Claims ratio
MBI	\$312 million	\$116 million	37%
Repayment waivers	\$106 million	\$11 million	10%
CCI/PPI	\$91 million	\$7 million	8%
GAP insurance	\$39 million	\$5 million	13%

The claims ratios of add-on products can be compared to the loss ratios of other insurance products in New Zealand.³¹ The five-year average to September 2021 for domestic buildings and contents insurance policies was 58.6 per cent, for motor vehicles (commercial and private) it was 70.6 per cent,

²⁷ At 15.

²⁸ A claims ratio does not account for the value of intangible worth a consumer may derive from an add-on product, such as added peace of mind from knowing their primary product is better protected.

²⁹ Australian Securities and Investments Commission, above n 3, at 14.

³⁰ Commerce Commission, above n 1, at 17 and 24. The data were collected from 15 lenders and five insurers between financial years 2018 and 2020, providing a sample of the industry.

³¹ Loss ratios and claims ratios are very similar; however, losses in loss ratios include paid insurance claims as well as adjustment expenses. The formula for their calculation is the value of any insurance claims paid plus any adjustment expenses divided by total premiums earned.

and for personal accident, travel, livestock and other it was 52.8 per cent.³² These are all significantly higher than the claims ratios for add-ons, indicating consumers receive significantly more value from general insurance products. The low-value nature of these products is a concerning outcome for consumers.

Qualitative evidence from industry participants also raises significant concerns about outcomes for consumers within the industry. One financial mentor working in Auckland has detailed that they routinely work with clients with low financial literacy levels who have incurred significant debts by way of motor vehicle loans.³³ The clients' motor vehicle loans are often large, subject to high rates of interest and burdened with add-on insurance policies they were unaware of. The mentor expressed concern with the value vulnerable consumers derive from add-on insurance products in particular because, based on the 2021 Review, the probability of a consumer claiming and then having that claim approved is below three per cent for three of the four add-on products examined.³⁴ Furthermore, even if a client does make a successful claim, it is often the case that the claim payout is only marginally higher than the premium paid.

This financial mentor gave details to the author of a recent specific and representative case of a poor consumer outcome within the industry. In this case, the client financed the purchase of a motor vehicle for \$8,000. CVI insurance was taken out. The client also purchased GAP, MBI and PPI policies at an additional cost of \$2,701. Not long after the purchase, the client was unable to afford the cost of their CVI policy and cancelled it. The client was unaware of the add-on policies that had been purchased and continued to pay for them even though MBI ceased to be effective without CVI. The client's vehicle was involved in an accident. \$500 was recovered for the wreck and paid against the outstanding loan. The GAP policy was ineffective as the client had not maintained CVI. The client continued to be charged interest on the loan that remains outstanding.

As a result of these sorts of issues and resulting poor outcomes for consumers, the motor vehicle add-on insurance market has been the subject of regulatory scrutiny and observation in the United Kingdom, Australia and, more recently, New Zealand.

IV HOW NEW ZEALAND IS CURRENTLY ADDRESSING THE ISSUES

The Commerce Commission is responsible for administering and enforcing the Commerce Act 1986 (the Act). The purpose of the Act is "to promote competition in markets for the long-term benefit

32 Insurance Council of New Zealand "Market Data" (September 2021) <www.icnz.org.nz>.

33 Interview with Andrew Mitchell, Financial Mentor, Salvation Army Royal Oak Community Ministries (the author, 3 August 2022).

34 Commerce Commission, above n 1, at 25.

of consumers within New Zealand".³⁵ The Commerce Commission has identified several features that a workably competitive market should possess (and that the Commission will investigate), including consumer access to information, availability and access to substitutes, cost structures and consumer and business behaviour.³⁶ If a particular market is lacking "workable competition", consumers will suffer negative consequences such as higher prices and lower quality products.³⁷

In November 2021, the Commerce Commission released a comprehensive review of the motor vehicle financing and add-ons industry in Aotearoa.³⁸ This was at the prompting of financial mentors throughout the country who witness first-hand the impacts the sale of add-ons in their current form are having on the vulnerable in New Zealand.³⁹ In this review (the 2021 Review), the Commission made several important findings regarding the state of the industry in New Zealand. However, to the dismay of financial mentors in New Zealand, it failed to make any significant recommendation for reform.

While the 2021 Review offered an in-depth look at how the industry currently operates in New Zealand, it did little in the way of proposals for potential regulation. The Commission proposed that its "next steps" would be to provide advice to industry participants about their obligations, continue to assess compliance and take enforcement action where appropriate, undertake advocacy work with the consumer advisory sector and share observations made with other government agencies.⁴⁰ This low-level response has left some financial mentors disappointed.

Given that the same issues have been identified in other jurisdictions, it is instructive to consider how those other jurisdictions have responded.

V HOW THE UNITED KINGDOM HAS ADDRESSED THE ISSUES

A March 2014 FCA Market Study and Associated Reforms

In March 2014, the Financial Conduct Authority (FCA) released a market study on general insurance add-ons (the FCA Study).⁴¹ It looked at add-on insurance more widely, not purely motor

³⁵ Commerce Act 1986, s 1A.

³⁶ Commerce Commission, above n 21, at 5.

³⁷ At 4–5.

³⁸ Commerce Commission, above n 1.

³⁹ Stock, above n 18.

⁴⁰ Commerce Commission, above n 1, at 7.

⁴¹ Financial Conduct Authority *General insurance add-ons: Provisional findings of market study and proposed remedies* (MS14/1, March 2014).

vehicle insurance add-ons.⁴² The FCA had several concerns around the sale of add-on insurance and identified that "competition in add-on markets is not effective".⁴³ The concerns included the following:⁴⁴

- (a) Consumers were paying too much. The point of sale advantage could be exploited, leading to prices substantially above costs.
- (b) Consumers were not buying products at all if prices were too high. This meant a consumer who would otherwise have purchased a product at a lower price missed out on coverage.
- (c) Consumers were purchasing unsuitable products due to a low understanding of products.

A significant focus of the FCA Study was the lack of information available to consumers when purchasing an add-on. The FCA recognised that for a market to work competitively consumers must "have a range of options" available to them and "be able to access appropriate information at the right time about the options available".⁴⁵ The FCA Study looked at consumer understanding of the add-ons and concluded that, generally, consumer understanding was poor, with "widespread misunderstanding" of basic policy details.⁴⁶ The FCA observed that, for a consumer to be able to make an effective choice, not only do they need the right information, but it must also be provided at the right time.⁴⁷ The FCA was concerned that the way information relating to the add-on was often presented towards the conclusion of the sale of the primary product left little time for consumers to consider the add-on.⁴⁸ Without sufficient time to consider their purchase, consumers cannot make an informed and effective decision. Further, by introducing the add-on product late into the purchase of the primary product, consumers were less likely to shop around for an alternative provider.⁴⁹

The FCA Study also identified that when there is weak consumer engagement with a product, as is the case with insurance add-ons,⁵⁰ the seller is likely to have a point of sale advantage.⁵¹ A point of sale advantage can be of benefit to sellers as it can limit competition from other suppliers. The FCA

42 At 1.

43 At 1.

44 At 48–49.

45 At 16.

46 At 28.

47 At 36.

48 At 36–37.

49 At 36–37.

50 At 7. The FCA reached the conclusion that when purchasing an add-on product "consumers are often not engaging with the purchase".

51 At 7.

Study identified several other factors present within the add-on insurance industry that confer a point of sale advantage to the seller of the primary product. The first was that the seller already has direct access to the consumer through the provision of the primary product, which means the seller does not have to devote additional resources, such as marketing costs, to the sale of the add-on.⁵² This also means third-party suppliers are at a disadvantage; they need to devote far more resources to attract a consumer's attention. Sellers also have the benefit of being the first to offer the add-on to the consumer solely because they are the supplier of the primary product.⁵³ A point of sale advantage disincentivises standalone providers from offering the product as it can be too difficult to overcome the advantages enjoyed by the primary product supplier. This can lead to suppliers exiting the industry, which further lowers the level of competition present. Because of this point of sale advantage, the FCA was concerned that sellers could easily increase the price of add-ons significantly above cost, without suffering a significant decrease in consumer demand.⁵⁴

The FCA also considered claims ratios to be a significant indicator of the financial benefit the add-on provides to consumers.⁵⁵ The GAP claims ratio of 10 per cent was so low that it was of particular concern for the FCA; it demonstrated "particularly poor value" for consumers.⁵⁶ This concern was consolidated further when coupled with the claim frequency of add-on products. The claim frequency for GAP was "very low", at 0.3 per cent.⁵⁷

The FCA proposed several reforms designed to enable consumers to better make informed choices and to encourage providers of add-on products to offer more value to consumers.⁵⁸ The first proposal was to impose a two-day deferred opt-in sales model for GAP.⁵⁹ GAP was specifically targeted by the FCA for being poor value, evidenced by low claims ratios, and because of pressure selling occurring in car dealerships.⁶⁰ The deferred opt-in sales model, which was adopted, prohibits the sale of GAP alongside the sale of the primary product. Instead, the consumer can be informed about GAP and then needs to confirm with the seller after a stipulated lapse of time that they wish to purchase.⁶¹

52 At 35.

53 At 35.

54 At 36.

55 At 40. The FCA did recognise that claims ratios are slightly limited due to their inability to account for the intangible worth that add-on products may offer: at 42.

56 At 41.

57 At 42–43.

58 At 53.

59 At 56.

60 At 56.

61 At 57.

This was implemented to negate the point of sale advantage. It gives consumers time to shop around and research to better inform their decision regarding suitability and need, and to consider alternative suppliers, thereby also facilitating the improvement of information availability in the industry. The FCA also implemented a requirement that, if the introduction to GAP is made alongside the sale of the primary product, the seller must inform the consumer that they can purchase the add-on elsewhere, ensuring the point of sale advantage is broken down.⁶² In 2018 the FCA published an evaluation paper on the effectiveness of the deferred sales model.⁶³ It concluded the intervention had a positive impact by increasing consumer engagement and had more than doubled the level of shopping around consumers undertook within the industry.⁶⁴

The FCA also proposed and implemented a ban on "opt-out sales", which is a sale process where consumers have to actively acknowledge that they do not wish for the add-on to be purchased with the primary product, rather than actively acknowledging that they do wish for the add-on to be purchased with the primary product.⁶⁵ This intends to better enable consumers to make more informed choices.⁶⁶ A requirement was also introduced that requires firms to provide appropriate and timely information.⁶⁷ This requires that firms introduce add-ons earlier in the sales process and assist customers in their ability to compare add-ons by displaying the annual and monthly costs of the add-on.⁶⁸ The Commerce Commission has not recommended any of the reforms that were implemented by the FCA.

B Refund Scheme

Widespread misselling of add-ons has also been addressed in the United Kingdom through a refund scheme. This focused on the sale of PPI across a variety of industries. In August 2010 the United Kingdom Financial Services Authority (FSA) implemented a "package of measures" to remedy issues that had been identified in relation to the sale of PPI.⁶⁹ The FSA identified what it described as "serious concerns about ... widespread weaknesses in previous PPI selling practices"

62 At 57.

63 Jennifer Brauner and others *An evaluation of our guaranteed asset protection insurance intervention* (Financial Conduct Authority, Evaluation Paper 18/1, July 2018).

64 At 3.

65 Financial Conduct Authority, above n 41, at 59; and Financial Conduct Authority *General Insurance Add-Ons Market Study – Remedies: banning opt-out selling across financial services and supporting informed decision-making for add-on buyers* (PS15/22, September 2015) at 21.

66 Financial Conduct Authority *General Insurance Add-Ons Market Study – Remedies*, above n 65, at 6.

67 At 18–19.

68 Appendix 2 at 3–4.

69 Financial Services Authority *The assessment and redress of Payment Protection Insurance complaints* (PS10/12, August 2010) at 3.

that were detrimental to consumers,⁷⁰ poor handling by the industry of the increasing number of consumer complaints around PPI,⁷¹ and neglect of root cause analysis and fairness obligations owed to non-complainants.⁷² Common failings that were identified by the FSA included but were not limited to:

- (a) The seller pressuring consumers into taking a PPI policy.⁷³
- (b) The seller leading the consumer to believe that obtaining PPI was compulsory to obtain finance.⁷⁴
- (c) The seller providing misleading or inaccurate information about the PPI policy.⁷⁵
- (d) The seller not ensuring the consumer only bought a policy under which they were entitled to claim benefits.⁷⁶
- (e) The seller providing a policy to the consumer under which the total premiums paid would exceed any possible claim payable.⁷⁷

These were considered to be failings concerning the various FSA Principles.⁷⁸ The refund scheme was carried out under the FCA's power to make rules through the Financial Services and Markets Act 2000 (UK).⁷⁹ Importantly, the FCA mandated that providers of PPI may need to contact consumers proactively and invite them to complain if they believed they had been missold PPI. This was done

70 At 3.

71 At 4.

72 At 4. Root cause analysis is a mechanism that requires a firm, when certain criteria are met, to consider providing the chance for appropriate redress to customers who may have been affected but have not complained.

73 Appendix 4 at 1.

74 Appendix 4 at 1.

75 Appendix 4 at 1.

76 Appendix 4 at 2.

77 Appendix 4 at 3.

78 Appendix 4 at 1–14. The 11 Principles are at [PRIN 2.1] of the FCA Handbook: Financial Conduct Authority *FCA Handbook* (Release 28, London, 2023). The particularly relevant Principles include: Principle 1, requiring firms to conduct business with integrity; Principle 6, requiring firms to pay due regard to the interests of customers and to treat them fairly; and Principle 7, which requires firms to pay due regard to the information needs of consumers and communicate information to them in a way that is clear, fair and not misleading.

79 Financial Services and Markets Act 2000 (UK), ss 137–138, 149 and 157.

through the introduction of the Dispute Resolution: Complaints (Payment Protection Insurance) Instrument 2010,⁸⁰ which included "root cause analysis".⁸¹

Providers of PPI contested this requirement and sought judicial review, arguing these new standards could not be imposed retrospectively.⁸² In the context of this review, the British Bankers' Association (BBA) argued that s 150(2) of the Financial Services and Markets Act prevented the Principles from creating an obligation owed by firms to consumers; the FSA was wrong in law to use the Principles in advising firms on how to assess complaints and assess failings; and the Financial Ombudsman Service (FOS) should not consider the Principles when considering redress for complaints.⁸³ However, the High Court determined that the wording of s 150(2) did not prevent the Principles from giving rise to obligations,⁸⁴ and sch 17 of the Act does confer a broad power on the FOS to decide what it takes into account.⁸⁵ The Court held:⁸⁶

... it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford.

The Court then had to consider the issue of how the general Principles were interrelated with specific rules in the industry, as the BBA had contended the Principles could not be interpreted in a way that contradicted or augmented the specific rules handling the sale of, and complaints about, PPI.⁸⁷ The Court was clear that the Principles are an overarching framework for regulation, in place to govern the actions of firms and supplement specific rules where they do not provide adequate provision; therefore, specific obligations in the rules can be subject to the wider Principles.⁸⁸ This meant lenders were expected to reopen claims that had been made for misselling based on the new standards and also, where appropriate, to contact consumers who could be deserving of compensation

80 Financial Services Authority, above n 69, at Appendix 1.

81 Appendix 1 at 7–8.

82 *R (on the application of the British Bankers' Association) v Financial Services Authority* [2011] EWHC 999 (Admin).

83 At [55].

84 At [71].

85 At [75].

86 At [77].

87 At [95].

88 At [161]–[166].

because of the requirement for root cause analysis. The FCA set a claim deadline of 29 August 2019.⁸⁹ Over £38 billion has been paid to consumers of PPI products to date.⁹⁰

VI HOW AUSTRALIA HAS ADDRESSED THE ISSUES

A September 2016 ASIC Report and Associated Reforms

In September 2016, the Australian Securities and Investments Commission (ASIC) released its report on the motor vehicle add-on insurance industry (the ASIC Report).⁹¹ The ASIC Report focused on similar products to the Commerce Commission's 2021 Review including CCI, GAP and MBI.⁹² The Australian motor vehicle add-on insurance industry operates similarly to New Zealand's. Most add-ons are sold on behalf of insurers and lenders to consumers through dealers, with dealers receiving a commission.

The first significant finding of the ASIC Report was that the industry had extremely low claims ratios across the add-ons studied. In the three years of the study, the total claims ratio of all the add-ons combined was nine per cent.⁹³ This meant that for every dollar paid by consumers in premiums they received nine cents in claims. This was compared to other claims ratios in Australia such as that of car insurance at 85 per cent and home insurance at 55 per cent.⁹⁴

The ASIC Report also identified that dealer commissions were considerably higher than what consumers received in claims.⁹⁵ ASIC identified across the period covered by the Report that dealers received four times as much in commissions than what consumers did in claims.⁹⁶ Additionally, because dealers could receive a "volume bonus", there was a conflict of interest as dealers were incentivised to push products onto consumers even when they may not have needed them, thus "significantly increasing the risk of misselling".⁹⁷ The ASIC Report also noted that the insurers who offered dealers the best maximum rates of commission sold the most policies, indicating that dealers are motivated to sell policies that offer higher commissions.⁹⁸ ASIC also noted that the conflict of

89 Financial Conduct Authority "After you complain about PPI" (12 August 2020) <www.fca.org.uk>.

90 Financial Conduct Authority "Monthly PPI refunds and compensation" (7 May 2020) <www.fca.org.uk>.

91 Australian Securities and Investments Commission, above n 3.

92 At 5.

93 At 15.

94 At 15.

95 At 7.

96 At 7.

97 At 16.

98 At 17.

interest identified above in relation to volume bonuses is exacerbated by the high level of financial benefit dealers receive generally by way of commission, meaning consumers may be subject to pressure selling.⁹⁹

ASIC observed that many add-on products were poorly designed in relation to consumers' needs or offered little value.¹⁰⁰ Furthermore, policies often had significant restrictions on cover, which worsened claims ratios for consumers. In particular, and as identified in the 2021 Review,¹⁰¹ pre-existing conditions were broadly excluded, meaning the cover provided was "inconsistent with the consumer's reasonable expectations" about what would qualify as a covered event and the amount of coverage.¹⁰²

Shortly after the release of the ASIC Report, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Royal Commission) was conducted.¹⁰³ As part of its inquiry into the insurance industry more generally, the Hayne Royal Commission also considered the sale of add-on insurance products.¹⁰⁴

Springing from the ASIC Report and the Hayne Royal Commission has been some significant reform. The most significant is the introduction of a four-day deferred sales model for all add-on products.¹⁰⁵ The adopted model goes significantly further than the United Kingdom's deferred sales model which exists purely in relation to GAP. The Hayne Royal Commission recommended the introduction of a Treasury-led working group to develop the deferred sales model.¹⁰⁶ The Australian Treasury in its proposal paper stated:¹⁰⁷

The objective of the proposed deferred sales model is to promote informed purchasing decisions by consumers in add-on insurance markets. The model achieves this by introducing an enforced pause in the sales process between the purchase of a primary product and their decision to purchase add-on insurance.

99 At 17.

100 At 7.

101 Commerce Commission, above n 1, at 21–23.

102 Australian Securities and Investments Commission, above n 3, at 24.

103 Kenneth M Hayne *Final Report Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Commonwealth of Australia, 4 February 2019) vol 1.

104 At 288–292.

105 Australian Securities and Investments Commission "ASIC releases guidance and customer information requirements to implement the new add-on insurance deferred sales model" (press release, 28 July 2021).

106 Hayne, above n 103, at 291.

107 Australian Treasury *Reforms to the sale of add-on insurance products* (Proposal Paper, 9 September 2019) at 7.

The deferral period will enable and encourage consumers to consider the merits of the insurance offered and to consult alternative providers.

By providing consumers with time to consider the merits of an add-on, consumer information will improve and the primary product point of sale advantage is broken down, thereby increasing the level of competition in the industry. The Australian deferred sales model commenced on 5 October 2021.¹⁰⁸ ASIC has provided significant guidance on how the model operates to ensure compliance.¹⁰⁹

The level of commission that can be granted to motor vehicle dealers for selling add-on products has also been capped. In its inquiry, the Hayne Royal Commission considered that the level of commission paid to dealers for the sale of add-on products contributed to misselling.¹¹⁰ Although in the light of the ASIC Report those operating within the industry had voluntarily taken limited steps to lower commissions,¹¹¹ the Hayne Royal Commission considered it necessary to introduce a legal requirement lowering commissions.¹¹² This was done by amending the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), to confer on ASIC the power to place a cap on the level of commission that can be paid to dealers selling add-on products.¹¹³ It is now an offence to provide a commission to another person or to receive a commission from another person that exceeds the value of the cap determined by ASIC.¹¹⁴ The cap is set at 20 per cent. This is significantly lower than the 75 per cent commission some dealers had previously been receiving. By lowering the level of commission that dealers can make on the sale of an add-on it is intended that consumers will receive more value by paying a reduced price, thereby increasing claims ratios in consumers' favour. It is also likely to reduce the pressure selling that was occurring throughout dealerships prior to regulation.

B Refund Scheme and Consumer Action

Australian consumers have also received significant refunds for purchases of add-on insurance products. Refunds of \$130 million have been secured by ASIC for 245,000 consumers.¹¹⁵ This is to

108 Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (Cth), s 2(1) and sch 3.

109 Australian Securities and Investments Commission *The deferred sales model for add-on insurance* (RG 275, 28 July 2021).

110 Hayne, above n 103, at 291.

111 Peter Kell "Add-on insurance and flex commission practices" (30 March 2021) Australian Securities and Investments Commission <www.asic.gov.au>.

112 Hayne, above n 103, at 292.

113 Australian Securities and Investments Commission Act 2001 (Cth), s 12DMC(3).

114 Section 12DMC(1).

115 Australian Securities and Investments Commission "ASIC announces further add-on insurance refunds, bringing total to over \$130 million" (press release, 19 June 2019).

remedy harm already caused to consumers who acquired policies with little to no value.¹¹⁶ Consumers have also taken independent action in several ways. One way is through the consumer-established "Demand a Refund" campaign which facilitates consumers making a claim directly against their insurer or lender. Additionally, litigation funding has enabled the onset of a consumer class action which alleges various breaches of s 12 of the ASIC Act and seeks damages for class members.¹¹⁷

VII LEGAL SOLUTIONS CURRENTLY AVAILABLE TO CONSUMERS IN NEW ZEALAND

A Common Law

An agreement to purchase an add-on insurance product is a contractual relationship that exists between the consumer and the provider of the product. The equitable doctrines of unconscionable bargain and undue influence may be a source of relief for consumers who have entered into a contract that they then wish to avoid or have set aside.

Generally, at common law, a bargain being harsh is not sufficient to warrant its being set aside. However, the equitable doctrine of unconscionable bargain does allow equity to intervene to relieve a disadvantaged party from a transaction if certain circumstances are present. The leading case in New Zealand is *Bowkett v Action Finance Ltd*, which set out a five-step test.¹¹⁸ For a successful unconscionable bargain claim, the party alleging the unconscionability must be at a significant disadvantage.¹¹⁹ Although many consumers within the motor vehicle add-on insurance industry may be considered vulnerable, they would be unlikely to meet the threshold of being at a significant disadvantage. The doctrine of unconscionable bargain "is not intended to relieve parties from 'hard' bargains or to save the foolish from their foolishness".¹²⁰ It is intended to protect those under a significant disadvantage from exploitation.

The equitable doctrine of undue influence allows equity to intervene and set aside a transaction where one party has unconscientiously taken advantage of the other party by abusing their position of power or dominance. A leading authority is the House of Lords' decision of *Barclays Bank plc v O'Brien*.¹²¹ The House of Lords recalled two classes of undue influence, actual and presumed.¹²² It is likely the situation of an add-on purchase would need to come under the class of actual undue

¹¹⁶ Australian Securities and Investments Commission, above n 115.

¹¹⁷ *Fuller v Allianz Australia Insurance Ltd* [2021] VSC 581, (2021) 65 VR 78.

¹¹⁸ *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 (HC) at 460.

¹¹⁹ At 460.

¹²⁰ *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 at [30].

¹²¹ *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL).

¹²² At 189–190.

influence, as to establish presumed undue influence it is necessary that a certain relationship exist. To establish actual undue influence the person alleging must prove the wrongdoer exerted undue influence on them to enter the particular transaction which is impugned.¹²³ The doctrine may be able to provide redress in significantly severe instances of dealer misselling but is unlikely to be established in most cases where add-on products are sold.

Neither of these equitable doctrines provides an effective legal solution to this issue. The doctrines can only protect consumers on a specific case-by-case basis and require certain characteristics to be present in the dealing. They leave vulnerable consumers to fend for themselves and do not encourage proactive change to industry selling practices. Enforcement of these equitable doctrines also requires litigation, something which is costly and time-consuming. Additionally, this approach is consistent with the conventional interpretation of the law in this area that correspondingly exists in the jurisdictions of Australia and the United Kingdom, and it has been considered not to be sufficient to remedy the comparable issues in those jurisdictions.

B Legislation

Two pieces of legislation that regulate the actions of those operating in the industry are relevant. The first is the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and the second is the Fair Trading Act 1986 (FTA).

One of the purposes of the CCCFA is "to protect the interests of consumers in connection with credit contracts".¹²⁴ For the Act to apply to an add-on insurance contract, the add-on being sold must meet the definition of "credit-related insurance".¹²⁵ Alternatively, the Act will apply if the add-on meets the definition of a "repayment waiver".¹²⁶ The lender responsibility principles, provided in s 9C of the CCCFA, will then apply to "relevant insurance contracts".¹²⁷ These are "credit-related insurance" contracts where a borrower has entered, or is seeking to enter, an agreement with the lender, and the insurance is arranged by the lender.¹²⁸ Insurance is considered to have been arranged by the lender under a variety of circumstances, including where it is financed under the agreement

123 At 189.

124 Credit Contracts and Consumer Finance Act 2003, s 3.

125 Section 5 provides three definitions of "credit-related insurance". Paragraph (a) will apply to MBI; para (b) will apply to GAP; and para (c) will apply to CCI/PPI.

126 See s 5 definition of "repayment waiver".

127 Ministry of Business, Innovation and Employment *Responsible Lending Code* (June 2022) at 59–60.

128 Credit Contracts and Consumer Finance Act, s 9B(1).

between the borrower and the lender.¹²⁹ The lender responsibility principles also apply to repayment waivers.¹³⁰

The lender responsibility principles impose two important requirements on providers of relevant insurance contracts and repayment waivers. The first is to assess the product's suitability for the consumer's needs. This is done by ensuring the product will meet the consumer's requirements and objectives.¹³¹ It is important to note there is a difference between a product being "suitable" for the consumer and what the "best" product for a consumer is – there is no requirement to provide the consumer with the best product. The second is to assess the product's affordability for the individual consumer, by ensuring the consumer can make repayments "without suffering substantial hardship".¹³² The Responsible Lending Code provides non-binding guidance on how lenders can comply with the requirements.¹³³

A failure to comply with the lender responsibility principles can result in a court order prohibiting the lender from providing credit or being an employee or agent of a lender through s 108 of the CCCFA. Importantly, any person, including the Commerce Commission, can apply for an order under s 108.¹³⁴ The court is also able to make an order for compensation if the principles have been breached,¹³⁵ and a borrower can claim statutory or exemplary damages from the lender for a breach.¹³⁶

The CCCFA has also recently been amended to introduce s 9CA which imposes a record-keeping requirement on lenders to record how they have assessed a borrower's suitability and affordability, and the outcome of those assessments.¹³⁷ It is intended that this requirement will improve the enforceability of the rules around responsible lending.¹³⁸ This could serve to be of significant evidentiary assistance for regulators in the future if a refund scheme were to be introduced, as records

129 Section 9B(2).

130 Section 9B(4).

131 Section 9C(5)(a)(i).

132 Section 9C(5)(a)(ii).

133 Section 9E.

134 Section 109.

135 Section 9A(2)(a).

136 Sections 88(1)(a) and 94(1)(c).

137 Section 9CA(1).

138 (12 December 2019) 743 NZPD 15939.

of inquiries made must be available on request to the borrower, an approved dispute resolution scheme or the Commerce Commission.¹³⁹

The FTA prohibits persons in trade from engaging in "conduct that is misleading or deceptive or is likely to mislead or deceive".¹⁴⁰ Persons in trade are also prohibited from making false or misleading representations about the need for a good or service.¹⁴¹ Consumers can individually bring a claim for a breach of the FTA. This is relatively accessible, as a claim can be heard before the Disputes Tribunal, which has the power to award civil damages if the action in breach has caused loss. The Commerce Commission is also able to bring those engaging in trade in breach of the FTA to court. In considering enforcement action the Commerce Commission will consider the extent of detriment, the seriousness of the conduct and any public interest.¹⁴² The Commerce Commission has recognised those operating within the motor vehicle add-on insurance industry could be in breach of the FTA for making false or misleading representations regarding the need for an add-on, or regarding the existence, exclusion or effect of any condition included in the add-on contract.¹⁴³

Although there appears to be legislation in place that can assist consumers, enforcement appears to be an issue. The Insurance Council of New Zealand (ICNZ) is of the view that the necessary legislation is "in place to protect people against being sold financial products that are inappropriate or that they can't afford [but these] laws need to be enforced".¹⁴⁴ It is likely a lack of enforcement is due to a lack of resourcing, with the issues occurring in hundreds of car yards throughout the country. Effective enforcement would require widespread consumer reporting of breaches and significant resource devotion from the Commerce Commission to investigate.

The current legislation, if enforced effectively, is satisfactory to remedy reported individual situations where consumers have been mis-sold products. However, reliance on this is an "ambulance at the bottom of the cliff" approach to industry regulation. This is not sufficient to prevent the issues and outcomes currently occurring. As the FCA recognised in the United Kingdom, due to the profitability of add-on products, warnings and fines are not sufficient to change behaviour.¹⁴⁵ It is therefore suggested that any future regulation should adopt a "fence atop the cliff" approach, preventing issues before they arise. Future regulation should act as a sufficient changer of industry

139 Credit Contracts and Consumer Finance Act, s 9CA(3)–(5).

140 Fair Trading Act 1986, s 9.

141 Section 13(h).

142 Commerce Commission "Enforcement criteria" (3 April 2018) <www.comcom.govt.nz>.

143 Commerce Commission, above n 1, at 30.

144 Insurance Council of New Zealand "Enforcement Key to Consumer Protection" (press release, 15 June 2022).

145 Financial Conduct Authority *Redress for payment protection insurance (PPI) mis-sales* (TR14/14, 29 August 2014) at 8.

selling practice to protect consumers, but at the same time it should not require significant resource devotion or rely on consumer issue reporting to be effective.

VIII RECOMMENDATIONS

To prevent the issues and outcomes currently occurring within the motor vehicle add-on insurance industry, the suggested view is regulation is needed that acts as a fence atop the cliff. Any reform should seek to rectify the three issues identified as present in the motor vehicle add-on insurance industry at the beginning of this article, those being: the lack of consumer awareness and understanding of add-on products, brought about by a lack of information; the primary product provider point of sale advantage; and the dealer incentive system.

A *Deferred Sales Model*

One significant reform for adoption in New Zealand is a deferred sales model for add-on insurance products sold within the motor vehicle industry. A deferred sales model in New Zealand should be similar to that which applies to GAP in the United Kingdom, and that which applies to all add-on insurance products sold in the motor vehicle industry in Australia. A deferred sales model introduces an enforced pause in the sales process between the purchase of the primary product and the decision on whether to purchase the add-on.¹⁴⁶ It would aim to decrease the dealer point of sale advantage and provide time to facilitate better consumer understanding of the add-on, thereby improving competition in the industry.

A deferred sales model is a demand-side remedy.¹⁴⁷ Demand-side remedies seek to improve consumer decision-making and enhance the level of competition within an industry.¹⁴⁸ If the demand side of a market is operating effectively, "competing firms will win consumers only if, relative to their competitors, they provide them with the products that they most want, at the best possible value for money".¹⁴⁹ To be effective, demand-side remedies should ensure that consumers access key relevant information, assess that information effectively and then act on that information accordingly.¹⁵⁰ A deferred sales model can achieve this.

The United Kingdom's deferred sales model imposed on the sale of GAP is estimated to have increased consumer shopping around by 28 per cent.¹⁵¹ Additionally, GAP sales are now estimated

146 Australian Treasury, above n 107, at 7.

147 Amelia Fletcher *The Role of Demand-Side Remedies in Driving Effective Competition* (Centre for Competition Policy, 7 November 2016) at 47–50.

148 At 12.

149 At 12.

150 At 13.

151 Brauner and others, above n 63, at 4.

to be 16 to 23 per cent lower than they would have been without market intervention, which suggests more consumers are making an informed decision that products may not be suitable for them.¹⁵² The FCA reached the conclusion that some consumers, on reflection, are deciding not to go ahead with the purchase.¹⁵³ The amount of add-ons sold by standalone providers (an alternative provider to the provider of the primary product) has also increased.¹⁵⁴ This diversifies the market share, benefiting the overall level of competition. Although the FCA did recognise that this was less than expected,¹⁵⁵ they concluded that there was a noticeable consumer benefit from the intervention.¹⁵⁶

There are arguments against the adoption of a deferred sales model. The FCA did recognise that consumers do place value on the convenience of being able to purchase the add-on product alongside the primary product.¹⁵⁷ Some consumer convenience would undoubtedly be lost if a deferred sales model were introduced. Additionally, the adoption of a deferred sales model means that consumers are without the cover an add-on affords for the length of the deferral period.

ICNZ is of the view that, rather than a deferred sales model, the New Zealand approach should be a statutory cooling off period. This would permit consumers to receive a full refund if they decided they did not want the product within a specified period.¹⁵⁸ A statutory cooling off period would ensure consumers still retain the convenience of purchasing an add-on alongside the primary product and additionally are not exposed to the risk of a period without cover.

However, it is unclear how effective a statutory cooling off period would be at increasing competition. It seems unlikely that after a consumer has committed to something they will then withdraw and find an alternative provider. This is especially so considering some of the time consumers do not recognise that they have purchased add-on insurance altogether. Furthermore, a statutory cooling off period would also be unlikely to offset any of the competitive advantages primary product providers enjoy over standalone providers. Primary product providers retain the ability to approach the consumer first for minimal cost.

Additionally, concern regarding consumers being underinsured if a deferred sales model were adopted may be misplaced. With regard to MBI, the Consumer Guarantees Act 1993 would alleviate this concern in some instances, as motor vehicles that are sold must be of acceptable quality, and

152 At 3.

153 At 3.

154 At 3.

155 At 4.

156 At 49–54.

157 Financial Conduct Authority, above n 41, at 54.

158 Insurance Council of New Zealand, above n 144.

reasonably fit for any purpose the consumer has made known to the dealer at the time of acquisition.¹⁵⁹ With regard to CCI/PPI and repayment waivers, the CCCFA would alleviate this concern in some instances, as it enables borrowers to apply for hardship relief, enabling a debtor to apply to have payments postponed and the term of the contract extended.¹⁶⁰ It is also likely that the potential impacts of consumers being without cover can be lowered by having a relatively short deferral period. This is the approach in Australia.¹⁶¹

It is also possible to mitigate any consumer underinsurance and loss of convenience by permitting the lowering of the deferral period to one day after the completion of the sale of the primary product, if the consumer initiates the completion of the sale of the add-on product.¹⁶²

It is suggested a deferred sales model is the more appropriate way to proceed rather than a statutory cooling off period. The length of deferral should provide an opportunity for the consumer to assess the suitability of the product to their needs; at the same time, it should not be so long that it disengages a consumer completely from deciding to purchase.¹⁶³ It is suggested a four-day deferral period appropriately does this. This recommendation attempts to address the first and second issues identified in this article.

It is briefly worth mentioning a reform that could be adopted alongside a deferred sales model which would maximise the effectiveness of a deferred sales model: mandated disclosure requirements. This was done by the FCA in the United Kingdom.¹⁶⁴ This regulatory technique aims to improve decision-making by requiring that a discloser who holds a superior position provide a consumer with specific information.¹⁶⁵ Providing consumers with information about the add-on product maximises the effectiveness of a deferred sales model as it ensures consumers are able to make an informed decision. It is, however, important to recognise that mandated disclosure requirements, in the absence of a deferred sales model, are not effective alone to protect consumers.¹⁶⁶

159 Consumer Guarantees Act 1993, ss 6, 7 and 8.

160 Credit Contracts and Consumer Finance Act, ss 55–56.

161 Australian Treasury, above n 107, at 13–14.

162 At 14.

163 At 13.

164 Financial Conduct Authority *General Insurance Add-ons Market Study – Remedies*, above n 65, at 18–19.

165 Omri Ben-Shahar and Carl E Schneider "The Failure of Mandated Disclosure" (2011) 159 U Pa L Rev 647 at 649.

166 See Ben-Shahar and Schneider, above n 165, for a detailed analysis of the reasons for this.

B Statutory Cap on Dealer Commissions

It is proposed that the third issue identified in this article should be remedied by the introduction of a statutory cap on the level of dealer commission, mirroring the adoption of a statutory cap on commissions in Australia within the motor vehicle add-on insurance industry. This reform aims to prevent the retail price that consumers pay from being double the wholesale price that is set by the insurer or lender, as was identified as occurring in the 2021 Review.¹⁶⁷ It aims to stop, as recognised in the ASIC Report,¹⁶⁸ a race to the bottom where insurers and lenders, in order to have dealers prioritise their products, increase the commission they offer dealers, to the detriment of consumers.¹⁶⁹ A cap on dealer commissions would reduce the price consumers pay and consequently improve claims ratios in the industry in favour of consumers. It is not appropriate that dealers are currently able to double the price consumers pay through commissions for operating purely as a facilitator. The risk of the add-on contract sits with the insurer or lender, and the consumer provides financial consideration for the incurrence of that risk. The dealer operates in a facilitatory role as a salesperson and bears no risk of the add-on product. It is difficult to see any rationale for increasing the price of the add-on product this significantly.

Additionally, as the CCCFA lender responsibility principles require that an assessment of product suitability be conducted on any borrower,¹⁷⁰ a borrower should only be offered products that are suitable for them. However, this does not require that the borrower be offered the best product for them. Dealers retain scope to exercise their discretion, as there may be a range of "suitable" products. Naturally, it may be in the dealer's interest to promote the sale of "suitable" products that confer on them the highest level of commission, but this may not correspond to what the best product is for the consumer. By introducing a statutory cap on commissions, dealers would be less incentivised to provide less suitable products at the expense of the consumer's best interests.

C Refund Scheme

While the recommendations discussed so far have focused on improving outcomes for consumers in the industry moving forward, it is also important to acknowledge the harm that may already have been caused. It should be considered what can be done to remedy this. As discussed, regulators in the United Kingdom and Australia addressed this by way of respective refund schemes. It is suggested that a similar scheme could be adopted here to support consumers who have already been sold add-ons in breach of existing laws. There are strong policy arguments for this, including a need to protect vulnerable and innocent consumers from exploitation, a desire to correct unfair and unjust outcomes

¹⁶⁷ Commerce Commission, above n 1, at 15–16.

¹⁶⁸ Australian Securities and Investments Commission, above n 3, at 17.

¹⁶⁹ Commerce Commission, above n 1, at 40.

¹⁷⁰ Credit Contracts and Consumer Finance Act, s 9C(5)(a)(i).

in markets to ensure consumer trust is maintained in the law, and to act as a deterrent of future behaviour that has the potential to create outcomes of the nature identified. These align with the Commerce Commission's considerations for enforcement action.¹⁷¹

IX CONCLUSION

This article has sought to showcase the major issues currently impacting consumers of motor vehicle add-on insurance products in New Zealand. It has considered how comparable jurisdictions have minimised these issues to better protect consumers. Although New Zealand regulators appear to be well informed, as indicated by the Commerce Commission's 2021 Review, reform of the nature seen in comparable jurisdictions does not appear to be close. Currently, to a certain extent, legislation like the CCCFA and the FTA does position the Commerce Commission well to start driving change through enforcement action. However, this article suggests this is insufficient as it does not operate in a preventative manner. It is proposed that legal regulation is needed that reforms the industry in a way that effectively prevents the issues faced by consumers from eventuating. It is only reform of this nature that can adequately protect future consumers of these products from the ongoing issues and outcomes present in the industry.

171 Commerce Commission, above n 142.

