

Luke Spear  
Manager  
Insurance Unit, Financial System Division  
Treasury  
Langton Crescent  
Parkes ACT 2600

[AddOnInsurance@Treasury.gov.au](mailto:AddOnInsurance@Treasury.gov.au)

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Dear Mr Spear

### **DEFERRED SALES MODEL: WHOLESALE CLIENTS AND TRANSIT INSURANCE**

As noted in our confidential submission of 15 February 2021, the Insurance Council is pleased to provide additional details regarding the application of the Deferred Sales Model for add on insurance (*DSM*) to wholesale clients and transit insurance, based on further discussions with our members.

#### **Recommendations**

The ICA recommends:

1. That regulations should be made to ensure that the DSM applies only to retail clients as defined in Section 761G(5) of the Corporations Act. The preferred approach would be for the regulations to clarify that all products are exempt from the DSM except in relation to retail clients, which would align the DSM with the approach taken under Section 992A of the Corporations Act in relation to the anti-hawking prohibition, and more broadly is consistent with the approach taken in the financial services legislation of applying obligations to retail clients rather than carving out wholesale clients.
2. That regulations should also be made to exempt insurance applying to short-term single trip transits of goods purchased by individuals and small businesses.

#### **Wholesale clients**

##### **Policy intent**

The ICA has previously argued that the DSM should not apply in relation to business insurance products (including but not limited to) wholesale insurance products. As recommended in our submission to the Treasury Proposal Paper of October 2019:

A legislated DSM should only apply to add-on insurance products sold to 'retail clients' and not 'wholesale clients' (as defined in the Corporations Act). This would achieve the policy objectives of the DSM and be consistent with the approach generally taken under the Act that

the focus of regulatory action is in relation to products where there are direct interactions with retail customers.

The policy rationale for this reform – being to protect everyday consumers from pressure-selling of poor value add-on products – is not focused on customers purchasing business insurance products, including (but not limited to) wholesale clients, who are sophisticated and commercially-minded, and are often represented by insurance brokers who can recommend appropriate products and liaise with insurers on behalf of customers.

A similar policy distinction is drawn in other aspects of insurance product regulation, such as the different requirements for product disclosure and the application of other consumer protection provisions. This distinction recognises the different capability of retail and wholesale clients to consider, evaluate and make informed decisions regarding the suitability of products for their circumstances.

Further, we note that an approach of exempting wholesale clients from the DSM would also bring the DSM regime in line with the related anti-hawking reforms, which only apply to retail clients. In broad terms, concerns around factors that impede consumer decision-making – such as consumer decision fatigue, lack of a direct market, add on products not being well understood, complexity where financing is involved, and consumers being vulnerable to sales tactics – are overwhelmingly concerns that arise in relation to direct interactions with retail customers. We are not aware of evidence that similar concerns arise in relation to wholesale clients.

We are keen to gain certainty regarding the approach to wholesale clients as soon as possible in order to avoid additional unnecessary operational and compliance changes, both internally and for insurers' extensive external distribution networks. The impact of any such changes needed is likely to place upwards pressure on premiums and impact affordability.

### Current legislation

From recent discussions with Treasury and ASIC, our understanding is that wholesale clients were not intended to be captured under the DSM.

However, members agree that most business insurance products will be caught by the DSM under the legislation as it is currently drafted. This is given that wholesale insurance products would in many cases be captured as “*Add on insurance products*” as defined in Section 12DO – as financial products that are (among other things) offered or sold to a “*consumer*” and are “*contract[s] for insurance*”.

- The “*consumer*” definition: the \$40,000 monetary threshold under Section 12BC of the ASIC Act – which will be increased to \$100,000 from July 2021 –<sup>1</sup> will be a very high threshold for insurance premiums. Members have estimated that most of their wholesale insurance products will meet this definition.
- The “*consumer*” definition: the small business staff numbers test (20 people – increased to 100 people for manufacturers) is also expected to be a very high threshold given that 97% of all Australian businesses are estimated to employ less than 19 people.<sup>2</sup>
- The “*contract for insurance*” definition: members understand that all wholesale products would be regarded as contracts for insurance.

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<sup>1</sup> Clause 2DA, Schedule 1, Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020 (Cth).

<sup>2</sup> Australian Small Business and Family Enterprise Ombudsman (2016), “Small business counts: small business in the Australian economy”, Final report.

## Proposed approach

The ICA recommends that regulations should be made to ensure that the DSM applies only in relation to retail clients as defined in Section 761G(5) of the Corporations Act. This would align the DSM with the approach taken under Section 992A of the Corporations Act in relation to the anti-hawking prohibition, and more broadly is consistent with the approach taken in the financial services legislation of applying obligations to retail clients rather than carving out wholesale clients.

Relevantly we note paragraph 5.33 of the explanatory materials to the anti-hawking legislation:

In general terms, limiting the prohibition to retail clients ensures that offers, requests or invitations about financial products to sophisticated investors or wholesale clients (such as businesses that are not small businesses) are not prohibited. Such consumers are more capable of assessing the value of a financial product offered in the course of unsolicited contact and are less susceptible to pressure selling tactics.

We submit that these policy considerations apply equally in relation to the DSM; and given the close interlinkages between the hawking prohibition and the DSM, we would suggest that there is a strong case for aligning the treatment of retail and wholesale clients under both regimes.

To assist with your consideration of the impact of the proposed approach, Attachment A provides a list of examples of wholesale products. We have also listed as examples of add on products in the Treasury proposal paper of October 2019 – our preliminary view is that they will generally be regarded as retail products which will be subject to the DSM unless exempted under Sections 12DX or 12DY of the ASIC Act (Attachment B refers).

## Short-term transit insurance

The wholesale exemption proposed in this submission will not address the application of the DSM to insurance for the short-term transits of goods purchased by individuals and small businesses that will generally fall outside the Section 761G definition of wholesale clients.

Examples of short-term transit insurance include:

- Couriers, Carriers & Parcel services:
  - Consumer to Consumer (C2C) Business to Business (B2B) and Business to Customer (B2C) consignments.
  - Single Transit Insurance & Freight guarantees/warranties made available at point of booking freight movement.
- General Freight & Car Carriers:
  - C2C, B2B, and B2C consignments.
  - Single Transit Insurance & Freight guarantees/warranties made available at point of booking.
- Freight Market Places:
  - C2C, B2B, and B2C consignments.
  - Single transit insurance or freight warranty/guarantee can be purchased at time of freight booking.
- Freight Brokers & Aggregators:
  - B2B and B2C consignments.

- Single transit insurance or freight warranty/guarantee can be purchased at time of freight booking.
- E-Commerce & online retail:
  - B2C consignments.
  - Freight Protection (warranty) made available at time of purchase/checkout to cover damage or loss in transit.
  - Single Transit Insurance to consumer at time of purchase.

Impacts would also extend to:

- Livestock Sales & Auctions:
  - B2B.
  - Point of sale options are made available when purchasing or selling animals and when booking the transits to cover or insure the animals. These include both Insurance & Warranty options.
- Excess, unaccompanied, and oversize baggage services:
  - B2B and B2C consignments.
  - Single Transit Insurance and Freight guarantees/warranties made available at point of booking.

#### **Policy considerations**

A 4-day deferral period is not feasible in many of these cases since the transit of goods will often be less than 4 days from the point of purchase – leaving the transit exposed from the lack of insurance. Even for transits of greater than 4 days in duration, the DSM would mean that the first 4 days would be uninsured, leaving a significant financial exposure for the purchasing individual or small business.

While acknowledging that the general policy intent of the DSM is to provide protection to retail clients, policies for short-term transit insurance often provide financial protection for both the end consumer as well as the businesses involved in the transit – both the vendor of the product (particularly small businesses), as well as any transport or logistics companies involved in the delivery process.

While there may be scenarios where (often larger) businesses hold policies that provide annual or multi-transaction cover, many businesses and consumers purchase transit insurance on a transaction-by-transaction basis – such as to cover the risks of damage to goods purchased online, or damage to their possessions when moving to a new house.

The application of a deferral period to these products will have a significant impact on consumers' (and businesses') ability to utilise the financial protection that these products can provide. Insurance coverage is required from the moment of purchase, with goods often being dispatched from the vendor within four days.

Depending on the length of transit, the businesses involved, and their customer would be exposed to financial impacts of loss or damage during the first part of (or the whole of) the transit. The alternative would be for businesses to either assume the risk, or to delay deliveries until after the deferral period (with flow-on impacts to their business and the broader economy).

#### **Potential competitive neutrality considerations**

An issue for further consideration is how the DSM applies to insurance-like arrangements such as freight warranties and freight guarantees such as provided by Australia Post (given that they could be construed as contracts of insurance under Section 12DO(2)(b) of the

ASIC Act where “*the contract would not ordinarily be regarded as a contract of insurance*”). It should be noted for clarity that these arrangements are completely different from extended warranty products (for example offered at the time of purchase of consumer electronic goods) which are genuine regulated insurance products.

We would question whether it would be the right outcome from a competitive neutrality perspective if the DSM ends up applying to transit insurance but not to Australia Post warranties.

Another argument that transit and cargo policies and any other policies covered by the Marine Insurance Act should not be subject to the DSM regime is that they are carved out of the Insurance Contracts Act (and are treated as wholesale under the Corporations Act).

#### **Proposed approach**

That regulations should also be made to exempt insurance applying to short-term single trip transits of goods purchased by individuals and small businesses whether this insurance is sold to the individual or small business either as a retail or wholesale client.

#### **Next steps**

If you have any questions or comments in relation to our submission please contact Aparna Reddy, the Insurance Council's General Manager Policy, Regulation Directorate, on telephone: 02 9253 5176 or email: [areddy@insurancecouncil.com.au](mailto:areddy@insurancecouncil.com.au).

Yours sincerely



**Andrew Hall**  
Executive Director & CEO

## ATTACHMENT A

### Wholesale products: examples

Products	How they might work	Treated as "wholesale" under Section 761G?
Trade credit	Online platform for commercial sales offers trade credit insurance to guarantee the credit transaction.	Yes.  The product is not listed in 761G or the regulations.
Liability	Group purchasing bodies offer a benefit to members, on payment of premium.	Yes.  The product is not listed in 761G or the regulations.
Aviation	Sale of aircraft-by-aircraft brokers may include an offer to arrange insurance.	Yes.  The product is not listed in 761G or the regulations.
Livestock	<p>Sale of livestock is offered in conjunction with insurance, prior to the new owner taking on the risk of transporting the animals.</p> <p>The livestock industry has traditionally accessed cargo insurance as part of the sale / purchase process of the livestock itself, and purchased in conjunction with the transport, or via the stock and station agent as part of organizing the actual sale. Due to the urgency with which livestock are moved from the sale yards this is a same day transaction. It cannot be bought prior as the consumer would not be certain of their needs prior to purchasing the livestock (e.g., via an auction).</p>	Yes.  The product is not listed in 761G or the regulations.
Plant & Machinery	Insurance may be offered in the course of machinery sales to commercial customers.	Yes.  The product is not listed in 761G or the regulations.
Marine (incl. marine hull and wholesale transit)	Commercial sales of boats are offered by marine brokers who may also arrange insurance.	Yes.  The product is not listed in 761G or the regulations.
(excl. goods in transit	Wholesale transit policies are purely commercial in nature.	

Products	How they might work	Treated as "wholesale" under Section 761G?
and pleasurecraft, which are retail)	Example: Haulage (single transit) insurance covering a container transported from a port to the final recipient. Insurance is bought at the time the container is unloaded from the ship and put on the truck or train and covers the goods for the journey. Customers have an immediate need for cover with the journey commencing commonly the same day as the insurance and associated service is purchased.	
Fleet / Heavy Haulage	Insurance may be offered in the course of heavy vehicle sales to commercial customers.	Yes.  The product is not listed in 761G or the regulations.
Accidental damage insurance	Insurance offered as an add-on to sales of computers and electronic devices to businesses and educational institutions. These are often bulk purchases.	Yes.  Wholesale clients: business and educational organisations.

## ATTACHMENT B

### Examples of add on products in Treasury proposal paper of October 2019

Product	Features	Expected treatment
Accidental damage cover for mobile electronic devices	Covers accidental damage to mobile electronic devices such as mobile phones and tablets.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product (as defined in the regulations); or  (i) a mobile phone.
Cargo insurance	Covers cargo as it is transported from one location to another location.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product or home and contents insurance (as defined in the regulations); or  (a) moveables;
Consumer credit insurance (CCI)	Sold with credit cards, personal loans, home loans and car loans, CCI insures the debtor's capacity to make repayments under the credit contract if they become sick, injured or disabled; lose their employment or die.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a consumer credit insurance product (as defined in the regulations)
Home contents insurance	Covers cost of repairing or replacing household property such as jewellery, furniture and electrical appliances and devices.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a home contents insurance product (as defined in the regulations)
Guaranteed asset protection insurance (GAP)	Sold with assets, GAP insurance covers the difference between what a consumer owes on a loan and any amount received under a separate insurance policy if the asset is a total loss.	Depends on cover generally retail cover in respect of loss or damage to a motor vehicle.
Jewellery insurance	Covers cost of repairing or replacing jewellery.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED



Product	Features	Expected treatment
		a personal and domestic property insurance product (as defined in the regulations); or  (b) valuables;
Loan termination insurance	Sold with assets, loan termination insurance covers the difference between what a consumer owes on a loan and the value of the asset if they are unable to make a repayment and the asset is sold.	Not clear – could be treated as consumer credit insurance.
Mechanical breakdown insurance	Also known as an ‘extended warranty’, mechanical breakdown insurance covers the repair or replacement of specific parts where unexpected mechanical failure occurs. It typically applies after a manufacturer’s or dealer’s warranty has expired.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a motor vehicle insurance product (as defined in the regulations);
Motorcycle insurance	Three types of cover: damage to an insured’s motorcycle (comprehensive) and other people’s property; damage to other people’s property (third party property); same as third party property with fire and theft cover for the insured’s motorcycle.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a motor vehicle insurance product (as defined in the regulations)
Motor vehicle – cover for vehicles under a finance contract (CCI insurance)	Covers a borrower’s shortfall under a finance contract when they and the financial institution agree to return the vehicle and terminate the finance contract (for instance due to illness or bankruptcy) or relieves the borrower of repayment obligations if certain defined events occur (for instance due to involuntary unemployment).	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a consumer credit insurance product (as defined in the regulations)
Motor vehicle – excess insurance	Covers an insured’s excess payment on a claim under a separate motor vehicle insurance policy.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a motor vehicle insurance product (as defined in the regulations)
Motor vehicle – GAP insurance	When a vehicle is deemed a total loss, covers shortfall between the original purchase price of the vehicle and the total loss payment under a separate motor vehicle insurance policy.	Not clear – we understand retail as provides cover in respect to loss of or damage to vehicle.

Product	Features	Expected treatment
Motor vehicle – hybrid GAP insurance	When a vehicle is a total loss, pays an insured the greater of: the original purchase price of the vehicle (if owned outright) less the total loss payment, or the replacement vehicle value less the total loss payment and/or the loan settlement amount due to the financial institution less the total loss payment.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a motor vehicle insurance product (as defined in the regulations)
Motor vehicle insurance	Three types of cover: damage to an insured’s vehicle (comprehensive) and other people’s property; damage to other people’s property (third party property); same as third party property with fire and theft cover for the insured’s vehicle.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a motor vehicle insurance product (as defined in the regulations)
Motor vehicle – loss of personal effects	Covers loss of personal effects that were in a vehicle deemed a total loss under a separate motor vehicle insurance policy due to accident, fire or theft.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product (as defined in the regulations)  (a) moveables;
Motor vehicle – scratch and dent insurance	Covers the cost of repairing minor accidental scratches and dents to an insured’s motor vehicle.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a motor vehicle insurance product (as defined in the regulations)
Motor vehicle – novated motor vehicle lease insurance (CCI)	Covers an insured’s novated lease repayments if unable to continue them due to involuntary unemployment.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a consumer credit insurance product (as defined in the regulations)
Pet injury insurance	Covers injuries sustained by pets.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product (as defined in the regulations); includes:  (g) a horse;

Product	Features	Expected treatment
		(h) a domestic pet;
Pleasurecraft insurance	Covers vessels used for pleasure or recreation such as boats and personal watercraft.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product (as defined in the regulations); includes  (f) a marine pleasure craft;
Pleasurecraft – mechanical breakdown insurance	Covers repair or replacement of specific mechanical parts if an unexpected mechanical failure occurs.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product (as defined in the regulations); or  (f) a marine pleasure craft;
Rental bond insurance	Covers a renter for accidental damage to the rented premises and extra cleaning costs due to an estate agent's final inspection.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a home building insurance product (as defined in the regulations); or
Rental vehicle – accidental death, disablement & baggage insurance	Covers accidental death, disablement and damage/loss of baggage/personal effects during the hire period.	In part:  RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product (as defined in the regulations)
Rental vehicle insurance – excess	Covers excess that is payable when a rental vehicle is damaged while in the possession of the hirer.	Not clear.
Ticket event/ticket cancellation insurance	Ticket cover: covers an insured's ticket cost when they cannot attend the event due to for example illness or airline delays.	Not clear.

Product	Features	Expected treatment
	Event cover: covers the insured's loss of costs or expenses or income due to for example cancellation or postponement of the event.	
Transit insurance	Covers an insured's possessions when being transported by road, rail, sea, air or post.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a personal and domestic property insurance product (as defined in the regulations)
Transport package	Package contains several covers including liability, carrier's cargo and business interruption cover.	Not clear.
Travel insurance	Covers an insured for financial losses caused by certain defined events that can affect travel – such as trip cancellation, medical expenses or theft of luggage.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a travel insurance product (as defined in the regulations)
Tyre and rim insurance	This insurance covers the cost of repairing and replacing damaged tyres and rims.	RETAIL – SUBJECT TO DSM UNLESS EXEMPTED  a motor vehicle insurance product (as defined in the regulations)