

Response to notice of further consultation on Remedy 1C

Enterprise Rent-A-Car (Enterprise) has been fully supportive of the Competition & Markets Authority (CMA) investigation into private motor insurance, specifically as it relates to post-accident services, and particularly the provision of a temporary replacement vehicle (TRV) for non-fault drivers' claims.

We have agreed with the CMA's findings of a detriment in this area related to the separation of cost liability and cost control, and the resulting conduct of parties managing claims, which together results in consumers paying unnecessarily higher motor insurance premiums.

We have sought to engage with the CMA to ensure a balanced outcome to reduce the costs within the private motor insurance industry, whilst providing a fair result for consumers when an innocent party as a result of an accident. We have supported changes which would refocus the market on providing vehicles based on low cost, high service levels, and remove barriers to entry for traditional car hire companies.

We have addressed this investigation from our unique perspective as a major rental car company, a company that specialises in servicing the insurance industry, including provide credit hire services, and a significant compensator responding to third party liability claims arising from the operation of a fleet of over 60,000 vehicles. We have approached this process as a pivotal opportunity to correct the dysfunction that has enveloped the post-accident provision of TRVs for over 20 years, but are now concerned the process is reaching a conclusion without these being adequately addressed.

We now respond to your *Notice of further consultation on Remedy 1C* in the hope an effective remedy can still emerge.

We begin by specifically addressing the questions raised in paragraph 21 of your further consultation.

We would like to understand from parties whether:

(a) This alternative approach would be an effective way in which to implement Remedy 1C?

Notwithstanding the concerns with Remedy 1C we addressed in our response to the Provisional decision on remedies, we support this alternative approach to exercising cost control under Remedy 1C. However, it is unclear what other changes would be necessary to Remedy 1C as a result.

In particular, it is not clear how a dual rate cap, based off a liability decision of a third party, would be applicable to a contractual liability between a replacement vehicle provider and its customer. For the avoidance of doubt, Enterprise would support a single rate cap for the provision of TRVs on credit, if it were set at a level sufficient to cover the cost of providing the service and returning a reasonable margin. To be effective, a single rate cap would have to be significantly lower than the current GTA rates.

Further, Enterprise believes that a cap on the contractual liability of the customer may eliminate some of the concerns we expressed about the circumvention opportunities that would exist for parties;

- seeking to minimise the number of claims subject to the low rate cap, and

- maximise the number of claims reverting to the common law of torts and seeking basic hire rates.

(b) The remedy would create distortions between the provision of TRVs to non-fault claimants and the provision of hire vehicles to retail customers?

A cap on the amount a car hire company could charge a non-fault claimant would inevitably create a difference to the provision of a vehicle to a retail customer. Retail pricing is dynamic, and heavily influenced by seasonality, market conditions, supply and geography. Therefore, there would likely be times when retail pricing is higher than credit hire, and times when it is lower. However, for Enterprise, this is no different to the current situation, where we limit our charges for credit hire to GTA rates. Or indeed the situation in other sectors, such as insurance replacement direct hire or corporate rentals, where supply is guaranteed and prices are contractually guaranteed regardless of the prevailing retail rate, market conditions, supply and geography.

To avoid distortion, it would be essential to ensure that the cap could not be applied outside of the provision of:

- a TRV,
- supplied following a motor vehicle collision,
- provided on credit or other means of finance with the intent to recover charges from a third party or their insurer.

It would also be necessary to eliminate situations where the hire is bundled with another tort claim, such as vehicle repair or personal injury.

And the cap would have to specifically avoid covering;

- individual renters who choose to pay by credit card or debit card, or
- the normal trade credit terms extended many commercial customers, including insurers.

(c) The definition in paragraph 18 would capture effectively the provision of credit hire vehicles to non-fault claimants or whether there are any further circumvention risks from this proposed wording?

Circumvention risk will still exist with the proposed wording. Although the proposed wording may effectively capture most current business models, it will be critical to ensure that new models designed to effectively bypass the definition are also captured.

An example would be to use a different finance mechanism to ensure the claimant is not required to enter into a credit agreement, such as an after the event insurance (ATE) product. ATE could be provided to a not at fault claimant post-accident, indemnifying the claimant against their expense in hiring a TRV, and then recovery of the outlay could be sought as a subrogated claim. As the ATE product would only need to be offered to claimants assessed not at fault, and all damages would be recovered from the at fault insurer, there is no reason to charge the claimant a premium, so would have the same functional effect as credit. Given the additional margin over cost that can be recovered in a subrogated claim (see *Coles & ors v Hetherington & ors*), the same charges currently recoverable for credit hire, i.e basic hire rate, would be recoverable. By wrapping essentially the

same service in an ATE product, the definition would be effectively circumvented with little change to the business models of companies supplying vehicles under credit terms currently. This example also works effectively as a before the event insurance (BTE) product.

The precedent for adapting business models to avoid the intent of reform is well documented in response to the recent reforms to personal injury claims. This likely indicates that the outcome requires more focus than the definition of the activity. And, in particular, business models or activities that have the predominant purpose of providing a TRV whose cost will be recovered from another party would need to be captured. It would also need to encompass solicitors, as the opportunity for credit hire companies to partner with a solicitor firm, or indeed own a solicitors firm via an alternative business structure, is readily available. This would include being necessary to eliminate situations where the TRV claim could be bundled with another tort claim, such as vehicle repair or personal injury, to obscure the cost or the provision of credit and avoid the cap.

(d) The remedy would create distortions between CHC/CMC provision and non-fault insurer provision of TRVs?

The answer would depend on the method via which the CHC / CMC or insurer chooses to provide the TRV. If the definition in a paragraph 18 were to apply, it is likely any entity choosing to supply a vehicle via credit would be treated equally, as would any entity choosing to supply a vehicle via an insurance product.

(e) The courts would be likely to limit the sums recoverable in subrogated claims to the rate cap set by the CMA on the basis that this indicates the reasonable cost, or, if not, whether the cap for CHC/CMC provision would have to be set at a level which aligned with that currently allowed by the courts for subrogated claims for TRVs; and whether a dual-rate cap would create greater ambiguity for the courts in these circumstances?

It is unknown what the courts would allow for recovery if a rate cap is introduced by the CMA. It is most likely they would follow current principles, and the damages would be measured in terms of the cost the claimant would incur in remedying their loss. If the cost to the claimant was capped, then it is likely the subrogated claim would be capped. But if the cost to the claimant was only capped in certain circumstances, e.g. when they rent under a credit agreement, then the courts would be unlikely to heed that cap in the event credit was not involved. It is likely that this would create greater ambiguity if the courts were to have to consider the added complexity of a dual rate cap.

(f) Whether the remedy might be expected to lead to greater provision of TRVs by non-fault insurers under the terms of individuals' insurance policies, and the benefits and costs of this greater provision if it occurred?

Greater provision of TRVs by non-fault insurers would be a major benefit if it occurred. It would effectively fulfil the non-fault parties need, without the unnecessarily higher cost of credit hire. We have previously suggested this as a remedy to your identified theories of harm (TOH) and adverse effect on competition (AEC). Provision of TRVs under the terms of the individuals' insurance policies:

- Reduces the cost of supplying TRVs.

- Reduces frictional costs by aligning the process for repair and hire, and allowing insurers to efficiently subrogate for both.

It is difficult to predict whether the proposed remedy would create enough incentive for insurers to move to this model.

(g) Whether this alternative approach creates any other unintended consequences, costs or benefits from those already expressed?

It is unclear without greater clarity on the form of the remedies, including the definition and level of the rate cap(s).

Overall, we are concerned to note that after an extensive investigation by both the former Office of Fair Trading and CMA, resulting in findings of significant detriment to consumers of private motor insurance, and a consensus within the insurance industry that reform is required and welcome, you are considering pursuing no remedy addressing TRVs. Your evidence has established that rates for credit hire are unnecessarily high, when the consumers need for a TRV can be fulfilled at much lower cost by the provision of the vehicle directly by the fault or not at fault insurer.

We have provided evidence to support that hire can be provided at these lower rates, alongside evidence, as surveyed by an independent third party, to support that customer satisfaction under a direct hire and a credit hire are both at 96%.

If no remedy is pursued, then we would certainly support any efforts to encourage improved market practices.