

**SUBMISSION BY DIRECT ACCIDENT MANAGEMENT LIMITED TO THE CMA
IN RELATION TO REVISED REMEDY 1C**

1. INTRODUCTION AND SUMMARY

- 1.1. This memorandum sets out Direct Accident Management Limited's ("DAML") response to the CMA's consultation paper of 28th July 2014 on a revised version of Remedy 1C ("the Consultation Paper").
- 1.2. DAML has already responded in detail to the CMA's previous version of Remedy 1C. These submissions should be read alongside DAML's Litigation Report, Market Report, Economics Report and written Submissions of July 2014.
- 1.3. DAML agrees with the CMA that the version of Remedy 1C, that it initially proposed, was inappropriate (for the reasons suggested by the CMA and also for the further reasons set out in DAML's written Submissions). In particular, DAML concurs with the CMA's conclusion at §12: "We accept the arguments made by parties that we would be unable to cap the level of claims."
- 1.4. The purpose of this memorandum is to explain why the CMA's substituted Remedy 1C, canvassed in the Consultation Paper, presents equally serious difficulties and is equally unsuitable.

The issues identified by the CMA as regards possible substituted Remedy 1C

- 1.5. Part 2 below addresses the issues identified by the CMA themselves in respect of the possible substituted Remedy 1C. The CMA rightly concedes that there are potential difficulties with the substituted Remedy. As to those anticipated difficulties (and ignoring the broader issues), DAML makes three short points:
 - (i) No definition of the scope of this remedy, however broadly framed, can sensibly address the myriad different circumstances that arise within the credit hire market. For example, DAML understands that CHCs cannot charge above the capped level, irrespective of the customer's circumstances or needs. The cap may not be exceeded to reflect underlying driver risk (if an individual has an accident in a hire car, that accident means that a car is not available for hire), insurance/excesses (such as collision damage and theft waivers), added value services and so on. A cap which precludes this will exacerbate the issues associated with unmet demand, in particular the consumer detriment suffered by the innocent victims of collisions.
 - (ii) The CMA is right to be concerned about the issues it raises at paragraph 17 (b) of the Consultation Paper. The proposed alternative remedy will lead to substantial and harmful distortion of competition in the credit hire market. The proposed remedy will only impose a cap on CHCs, but not non-fault insurers

making subrogated claims. The CMA faces an unenviable choice when determining the 'breadth' of the remedy. Put simply, the tighter the definition, the greater is likely to be the distortion of competition because of the anti-competitive effects flowing from the price cap. Conversely, the weaker the definition, the more impossible the supposed 'remedy' would be to implement effectively (disregarding for the moment DAML's view that there are more effective and proportionate ways of reducing credit hire costs, see further below). Finally,

- (iii) It is no answer to the distortion of competition (as between CHCs and non-fault insurers) flowing from the new price cap to assert, as the CMA does, that the courts 'might' step in to prevent that distortion (§20). That is a non-sequitur. It also fails to appreciate how the courts will address claims that are brought before them. If there is a difference between the size of the damages claimed (under the two routes), the courts will simply award damages on the basis of the loss suffered in each case. The competition 'gap' will thus remain.

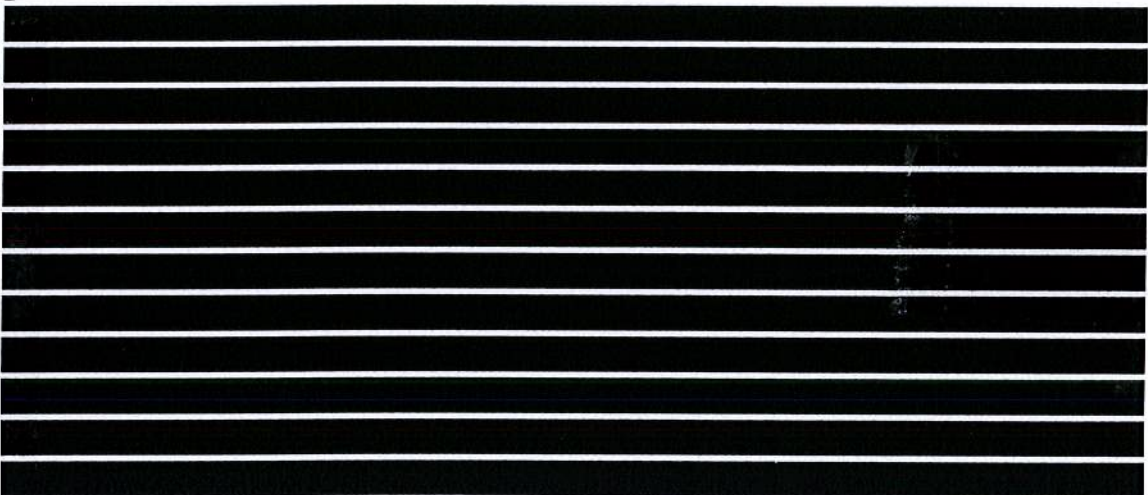
Unintended consequences

- 1.6. Part 3 below addresses the unintended consequences that flow from the substituted remedy. The CMA specifically asks if their alternative Remedy 1C would have unintended consequences. They also query whether it would increase the provision of temporary replacement vehicles by non-fault insurers under the terms of individuals' insurance policies and, if so, what the costs-benefits of this would be.
- 1.7. It is, of course, a truism that if the CMA intervenes in the credit hire market to undermine the tortious rights of not-at-fault drivers - directly as originally proposed or indirectly as now proposed - that may reduce overall insurance costs. However, the lowering of insurance costs cannot be an end in itself if the tortious and other rights of non-fault drivers are compromised and if there are other adverse consequences. It is these unintended consequences that are addressed below.

Compromising the tortious rights of not at fault drivers

- 1.8. The starting point, in terms of unintended consequences, is that this remedy will compromise the tortious and other rights of not at fault drivers, by (amongst other things) reducing the availability and quality of credit hire services.

- 1.9. 



Issues associated with increasing the provision of replacement vehicles under not-at-fault claimants' insurance policies

- 1.10. The CMA seeks comments on whether Remedy 1C may increase the provision of replacement vehicles under not-at-fault claimants' insurance policies. Many, but by no means all, claimants denied access to suitable credit hire services are likely to seek this. However, non fault insurers offering a vehicle on an own insurance policy would result in an increase in costs for the insurer, which would be reflected in the policy cost. Either an insured would elect to pay for the additional service if the CMA determines it is not a compulsory element of insurance, or an individual will be forced to pay a higher premium for this service if it's intended to be compulsory. In the first instance, a high percentage of DAML's clients, who vulnerable and impecunious consumers, would elect not to take this 'add on service' as their key driver when finding or renewing their car insurance policy is price and finding the cheapest quote.
- 1.11. In any event, however, incurring such costs would not be in the interests of these persons and such replacement vehicles (aside from not being available to many credit hire customers) would be likely to be low cost vehicles (if they are offered).
- 1.12. Moreover, there are serious policy issues associated with the consequential transfer of costs and risks from at fault drivers to not-at-fault drivers. In short, reducing bad drivers' insurance costs can be expected to have further adverse consequences given the costs of accidents.

Claimants' purchasing spot hire

- 1.13. There is a further flaw in the notion of a price cap that the CMA has not even begun to address. The CMA states that even with a price cap the individual claimant could easily go to a vehicle hire retail outlet and claim the cost through the courts. That is, of course, correct. However, the CMA goes on to state that *'we would not expect this*

to happen in many cases' (§ 19). The CMA's reasoning breaks down at this point. Either:

- (i) The CMA is right in which case it may leave many of the CHC's customers with unmet need. For the reasons set out in DAML's previous submissions, there will be an exodus from the market resulting from a price cap. That will precipitate lower service levels and increased discrimination against high cost claimants. The CMA has conducted no analysis whatsoever on the likely market exit of CHCs flowing from a price cap and the consequential consumer detriment arising from a cap. Or:
- (ii) The CMA is wrong (which Armstrong and DAML considers to be case and is reflected by the long history of litigation relating to not-at-fault car hire). In that case the attempted definition breaks down. The proposed remedy would be inherently discriminatory: pecunious customers would receive a more favourable outcome than vulnerable and impecunious customers. Impecunious customers will be forced to either face the unwarranted hardship of entering into spot hires or do without a vehicle. The credit hire market largely exists in order to serve the needs of impecunious customers. The CMA proposes to remove (or at the very least seriously undermine) the protection which that market provides to those customers.

Unmet demand and discrimination to reduce costs

1.14. The revised proposals also raise a number of substantial implementation risks that the CMA has not even considered. The CMA proposes a cap on the amount that hire companies can charge its customers. It does not acknowledge that many of the credit hire company's expenses are not open for negotiation. If the cap were imposed, the insurance costs would remain the same, as would leasing and infrastructure costs for prevailing service levels. This points to two specific adverse consequences, unmet demand [REDACTED] and reduced service levels and discrimination as to the claimants served in an effort to reduce costs.

1.15. The most expensive parts of DAML's business are those parts which allow access to a tailored service and a replacement vehicle to all types of individuals, regardless of their circumstances. A cap would at best [REDACTED] lead to inevitable cost cutting in those areas which allow and facilitate accessibility. It is more likely that DAML (and other providers) will simply cease to meet the needs of those customers. [REDACTED] These people would be left unaided leading to severe discrimination for those individuals who did not meet the standard criteria.

1.16. Vulnerable customers will suffer the most. Those who are well off will continue to be able to access spot hire, but who will serve DAML customers who are impecunious, have high insurance costs - and DAML insures all drivers regardless of their risk profile, unlike say Enterprise - and often not native English speakers?

More appropriate measures to reduce costs

1.17. Finally, the CMA - whilst conceding the possibility of abandoning remedy 1C - indicates that it still wishes to reduce frictional costs. Part 4 below considers this issue. As explained more fully below:

- (i) Insurers have ample opportunities to control costs by capturing the claims at the outset, sending a Copley compliant offer which will cap credit hire costs, and making without prejudice payments.¹ The harsh reality is that they do not do so for economic reasons. It is cheaper for them to adopt a 'passive' approach. Their costs are lower if not-at-fault customers do not receive access to the vehicle which they are entitled.
- (ii) These so called frictional costs could be reduced by imposing a ban on referral fees (as advocated by DAML, and which the CMA has found to be a key driver of frictional costs). DAML's only concern, in that context, is to ensure that whatever ban is imposed is rigorously enforced. The CMA could also impose measures on insurers to ensure the timely and efficient processing of claims (which would serve not only at fault drivers' interests but materially lower costs). The CMA should explore these options much more thoroughly. The CMA's proposed remedies simply do not address the extent to which the costs of credit hire flow from 'insurer side' conduct (for example, insurer delays which increase the duration of credit hire).

1.18. For these essential reasons, DAML strongly opposes the suggested possible alternative remedy.

¹ See DAML's submission provided in July 2014.

2. THE ISSUES IDENTIFIED BY THE CMA IN CONNECTION WITH REVISED REMEDY 1C

2.1. This section considers the implementation issues associated with the revised proposed Remedy 1C. Paragraph 14 of the Consultation Paper summarises the revised Remedy 1C in the following terms:

“Under this proposal, instead of capping the claims made by CMCs/CHCs on behalf of claimants and the subrogated claims made by non-fault insurers, the amount which would be capped would be that which a replacement vehicle provider charges its customers for the vehicle hire. By capping the contractual liability of the claimant for the vehicle, the amount which the replacement vehicle provider (or a solicitor) would be able to claim in tort on behalf of the claimant would also be capped.”

As a minor, initial observation, there is some ambiguity in the wording here. One assumes that the CMA considers the claimant's contractual liability to be coterminous with the amount charged by the credit hire company.

2.2. The CMA identified two particular potential problems with this remedy which are considered in turn below.

“(a) The need for a clear definition of the circumstances in which the remedy should and should not apply to vehicle hire transactions”

2.3. The CMA offers insufficient guidance as to the ‘boundaries’ of the remedy. It is a long established tortious principle that you take a victim as you find them. Any test is dependent on that individual claimant and their specific circumstances. The remedy cannot be a one size fits all, but must be based upon the actual market which credit hire services. Every situation and client is different, hence the requirement for an individual tailored service that CHCs can offer.

2.4. There cannot be a clear definition of circumstances, and indeed none have been offered. The list would be endless, and would be unlikely to cover every eventuality and there would be satellite litigation over the application of the cap or not in various circumstances. For example (as explained above), DAML understands that CHCs cannot charge extra to reflect underlying driver risk (if an individual has an accident in a hire car, that accident means that a car is not available for hire), insurance/excesses (such as collusion damage and theft waivers), added value services and so on, reflecting the precise needs of the claimant.

2.5. This remedy would be impossible to implement without discrimination occurring, since CHCs can be expected to respond to any price cap by focusing on those claimants who can be served at the lowest cost. However, in law everyone's tortious

rights are equal, regardless of age/experience etc. In particular, this remedy would have no regard to the types of individuals that companies such as DAML serve. The proposed alternative remedy undermines the very raison d'être of the credit hire market: it largely services the needs of those individuals who cannot access the spot hire market either at all or as this would cause undue hardship.

- 2.6. Capping companies who provide the service to those people who are left unaided by insurers will lead to certain sections of society being deprived of their tortious rights. The charges are not gold plating; they reflect the increased costs associated with ensuring that everyone secures their full tortious rights.

“(b) A possible distortion in the provision of temporary replacement vehicle provision between CHCs and non-fault insurers, if non-fault insurers would still be able to make subrogated claims at average retail rates which are above the actual cost of vehicle provision.”

- 2.7. DAML considers that there would be a serious distortion in competition in the temporary replacement vehicle provision between CHC and non fault insurers. Both providers would make replacement vehicles available. However, only one would be subject to a price cap. Distortion in service or provision of vehicles is also inevitable if one party is limited to capped costs.

- 2.8. The CMA speculates that this distortion of competition “might” be addressed by the courts:

“20. ... were a non-fault insurer to bring a subrogated claim for a temporary replacement vehicle the courts might regard the cap which would apply to CHCs as defining the reasonable cost of a temporary replacement vehicle so that the cap would be applied to subrogated claims also.”

- 2.9. That reasoning is most unsatisfactory. There is no reason to suggest that the courts will not follow the clear and long-standing authorities in this field. The current case law does not establish that recovery may be limited by reference to any cap. By way of example, the courts do not require that credit hire rates outside of the GTA are limited to those within the framework. As explained in DAML's Litigation Report, the courts (including the House of Lords on several occasions) have held that the claimant will recover a reasonable rate, dependant on the claimant's circumstances. If the claimant was offered a replacement vehicle from their own insurer, at a retail spot rate, it would be quite extraordinary for the courts to then hold that the victim acted unreasonably in accepting that offer.

3. UNINTENDED CONSEQUENCES

- 3.1. The CMA specifically asks if their proposed possible substituted Remedy 1C would have unintended consequences.

Compromising the tortious rights of not at fault drivers

- 3.2. The proposed alternative remedy will compromise not-at-fault drivers' tortious rights. One consequence of that may be that the insurance costs of drivers would decline overall. DAML submits that that 'benefit' would be disproportionate to the harm inflicted which the CMA has identified.
- 3.3. The proposed alternative remedy will compromise the tortious rights of not at fault drivers. It will reduce both the availability and the quality of credit hire services. The CMA should be slow to implement a remedy that undermines those legal entitlements. Parliament has required all drivers to obtain car insurance. The prime reason for that legislative requirement is to ensure that third party victims of an accident secure their full tortious remedies, including a replacement vehicle.
- 3.4. Furthermore, the courts have repeatedly considered the scope and nature of the credit hire market. As explained in some detail in the Litigation Report, provided by DAML in July 2014, the courts have held that credit hire is a lawful and necessary feature of the post-accident services market. The senior judiciary have carefully defined the level of damages that should be recoverable following a credit hire. Victims are entitled to recover their reasonable damages, by reference to all the circumstances of the case. The courts have resisted the temptation to impose any kind of 'threshold', boundary or financial guideline for damages. That approach stands in stark contrast to the approach adopted in other areas, for example recoverable damages for injury to feelings in employment discrimination cases.
- 3.5. The CMA should be very slow to implement a remedy that threatens the clear intention of Parliament and enters into terrain where the courts have refused to tread. Indeed, DAML considers that the CMA's conduct may well raise a number of *vires* issues, given the wider backdrop.
- 3.6. Subject to their precise circumstances, the courts have established that not at fault drivers are entitled to spot hire and credit hire. The courts pro-actively assess the reasonableness of both credit hire and spot charges (see the Litigation Report). The cost of credit hire is only payable when the sums charged have been agreed with the at fault insurer (which has many grounds to contest the reasonableness of the sums in question) or imposed by a court.

3.7. It is against this background that any cap should be assessed. For a claim to arise at all, it is necessary for the non-fault driver to be able to bring a claim in the courts covering the cost of a replacement vehicle since insurers will only have effective incentives to pay claims which can be enforced. The proposed remedy will undermine that right via two routes. [REDACTED]

[REDACTED] As previously explained, DAML serves the interests of some of the most economically and socially disadvantaged participants in the market. [REDACTED]

3.8. It is submitted that the imposition of any form of price cap will be to lead to a dramatic fall in the number of claims, not because a non-fault driver has not suffered loss, but because those who would have sought services from CHCs will no longer be in a position to do so. In substance, therefore, the proposed new version of Remedy 1C will be as much of an interference to access to a court as a direct cap on claims. In short, the proposed remedy is wholly disproportionate to the aim sought to be achieved by the CMA, even disregarding DAML's concerns that the CMA has not appreciated that insurers already have the means to control credit hire costs.

Claimants' purchasing spot hire

3.9. The CMA observes that, even with a price cap, the individual claimant could still go to a vehicle hire retail outlet and claim the cost through the courts:

"19. Under this definition, an individual non-fault claimant would still be able to go to a vehicle hire retail outlet, rent a vehicle on a credit or debit card and seek to recover the cost themselves. However, we would not expect this to happen in many cases."

3.10. The CMA's reasoning breaks down at this point. Supposing hypothetically that this were correct (which is not the case), it may leave many of the CHCs' customers with unmet need. As explained in DAML's Market Report of July 2014, there is highly likely to be an exodus from the market resulting from a price cap and lower service levels.

3.11. The CMA has not undertaken any analysis whatsoever concerning the likely consequences of market exit or service deterioration flowing from the price cap.

3.12. Moreover, the reality is that spot hire is not rare (hence the many court cases on this matter), and thus the CMA's attempted definition breaks down. There would then be

inevitable distortions between the capacity of pecunious and impecunious individual's capacity to secure access to appropriate temporary replacement vehicles.

3.13. Non-impecunious people, who are placed in an emergency situation and require an immediate replacement vehicle, will hire a vehicle by way of spot hire.

3.14. Take for example an individual who is a professional and uses his executive vehicle for work, including attending business meetings. Even if he is insured fully comprehensively, he may not have the benefit of a courtesy car. Alternatively he may have the benefit of a courtesy car, but insurers may not offer a replacement car that meets his immediate needs (e.g. it's too small). This individual is not impecunious.

3.15. His need for a replacement vehicle is immediate as he has work/personal commitments and to be without a vehicle would cause him significant disruption. He has not been offered a vehicle by the at-fault insurer and so he makes immediate arrangements to spot hire an executive vehicle from a provider (e.g. Hertz). He has the spare funds to be able to comfortably go out and pay for a replacement vehicle. He hires a Mercedes E class at a cost of £x per day.

3.16. It is highly likely that the cost of that vehicle will exceed the CMA's capped rate, not least because the vehicle has been hired last minute and is an executive type. This individual would present those hire charges to the at-fault insurer. If the insurer fails to pay, the only avenue for recovery would be to allow the court to adjudicate upon the charges.

3.17. The insurer may argue that the charges are excessive and further may indeed argue the claimant should only be entitled to recover the capped rate. The claimant argues that he had an immediate need for a vehicle and he was reasonable in the circumstances to hire a vehicle by paying £x for it.

3.18. The most likely outcome given the established case law is that such a claimant will be entitled to recover actual spot rates. Accordingly, if the remedy was implemented, a pecunious victim could probably obtain a benefit that goes beyond the cap. They will be able to secure an appropriate 'like-for-like' vehicle.

3.19. The position of an impecunious individual will be very different. Firstly, they will have to find a credit hire company that is willing to hire to them. They may then have to settle for a lesser vehicle, as the credit hire company are unable or unwilling to offer a like-for-like vehicle. The cost pressures imposed by the cap will require this in many cases. If the claimant has points on their licence or is under 25/over 70, they may not be able to get access to a vehicle at all: the insurance costs will be too high.

3.20. The impecunious customer faces three options. Either they hire a vehicle that they are legally entitled to (under current law), but can only obtain via a spot hire above the capped rate. That is likely to cause them severe financial hardship. Alternatively, they will have to take a vehicle that does not meet their requirements: as a consequence of their impecuniosity they will be 'locked out' of their full rights. In the worst case scenario, they will not obtain a vehicle at all.

3.21. For the reasons set out above, DAML believes that the CMA has failed to consider, or to appreciate, the very severe consequences of a price cap for the most vulnerable accident victims.

Issues associated with increasing the provision of replacement vehicles under not at fault claimants' insurance policies

3.22. The CMA also asks:

“Whether the remedy might be expected to lead to greater provision of temporary replacement vehicles by non-fault insurers under the terms of individuals' insurance policies, and the benefits and costs of this greater provision if it occurred?”

3.23. Given that CMA's revised Remedy 1C will reduce the availability and quality of credit hire, it is appropriate to consider whether non-fault consumers would increasingly prefer their own insurer to provide a replacement vehicle. Crucially, the non-fault insurer owes no legal obligation to satisfy the victim's tortious rights. Furthermore, they are under severe cost pressures. In such circumstances, this will reduce non fault insurers' incentives to provide replacement vehicles to their own clients and certainly not at the level which reflects their tortious rights. The risk of 'under-provision' is exacerbated by the possibility that the cost of providing the vehicle may not be recoverable (for example, the at fault insurer could contest the claimant's entitlement to credit hire).

3.24. The availability of such replacement vehicles services would also be subject to the precise commercial agreement each insurer may have with a provider: there will be significant variation in the market. The insurers themselves are likely to face significant costs. Such costs might be particularly acute for small non fault insurers with no commercial interests/agreements with car hire companies. They may well be required to pay rates equivalent to those charged to pecunious individuals on the spot hire market.

3.25. Any increase in costs for the insurer would be reflected in the policy cost. In this regard, DAML notes the CMA's conclusion in its provisional findings that “we

found strong rivalry in the sale to consumers of basic motor insurance”,² which suggests a high degree of pass through of higher costs into higher prices. Either an insured would elect to pay for the additional service if the CMA determines it is not a compulsory element of insurance, or an individual will be forced to pay a higher premium for this service if it's intended to be compulsory. In the first instance, a high percentage of DAML's clients, who vulnerable and impecunious consumers, would elect not to take this 'add on service' as their key driver when finding or renewing their car insurance policy is price and finding the cheapest quote. Indeed, about a third of DAML's clients are not insured fully comprehensively. These are the impecunious people who must live within their limited means and lack the funds to pay for fully comprehensive cover and courtesy cars. These people have no less rights in tort in the event of a non-fault claim, and DAML would be opposed to any remedy which compromised their position.

3.26. It is also legitimate to observe that increasing the costs of not-at-fault drivers to the benefit of at fault drivers (if the costs of such accidents are increasingly met by the non-at-fault drivers) increases the “moral hazard” risk associated with insurance (i.e. that those insured take more risks by virtue of insurance since they do not fully bear all of the consequences).

3.27. In other words, there could be serious policy issues if the costs of insurance to bad drivers were to fall due to the inappropriate transfer of costs and risks to not at fault drivers. In short, reducing bad drivers' insurance costs can be expected to have further adverse consequences given the financial, human and social costs of accidents.

Unmet demand and discrimination against higher cost claimants

3.28. As set out in DAML's Economic Report of July 2014, there would be two further specific unintended consequences, namely unmet demand and discrimination against higher cost claimants.

3.29. DAML has already dealt with why DAML's charges are higher, namely due to insurance costs, accessibility costs, the provision of vehicles to all types of ages, driving experiences, and racial/social groups, and access to non-English speaking individuals. (See pages 14 and 15 of the Credit Hire report.)

3.30. If prices were capped, supposing hypothetically that DAML could continue to operate, it is inevitable, in any scenario that costs would have to be cut. Otherwise it would go out of business. Costs would have to be cut on those elements of the

² §5 of the CMA's provisional findings.

business that provide accessibility to those individuals who would otherwise be left unaided following a non-fault claim.

- 3.31. Consider the cost of insurance for example. This is one of the most costly parts of the business. Insurance is a compulsory element in the provision of a hire vehicle. The cost of insurance is a non-negotiable expense, if a credit hirer is to provide a service to 17 years olds, the over 90's, and to people with points on their licence, previous bans etc. It is safe to say, if DAML could somehow reduce the cost of insurance within its business model, it would have already done as this would make DAML more profitable. If a cap were to be imposed, costs will have to be cut. Insurance would be a likely candidate for costs cutting. This would mean that DAML would no longer be able to provide hire vehicles for those categories of people who were non-standard in terms of insurance. These people would simply have to be turned away.
- 3.32. Even if DAML were able to offer them a vehicle and had availability for the type of vehicle that the individual needed, that individual would not be adequately insured and DAML would not be able to recover a charge for any additional insurance due to the capped rate. There is no suggestion that these individuals would receive any assistance from any other source, indeed Enterprise for example do not hire to drivers under 25 (see page 28 and footnote 99 of the Economic Report).
- 3.33. In DAML's view – and that of the courts - an individual who is young/old/has a poor driving history should have no less tortious rights than an individual who meets "standard" low cost criteria. ("Standard" covering a range of matters such as being over 25, under 70/limited points on driving licence/held a licence for over 12 months etc).
- 3.34. A similar scenario arises in respect of language service provision. DAML employs a number of interpreters and markets itself across a wide range of native tongue speaking garages to ensure access to those members of the public who cannot speak English. Cost cutting would mean that resources in this respect would have to be cut back, again leading to loss of accessibility and increasing barriers to proper remedies.
- 3.35. Further cost cutting would also have an impact on the nature of DAML's fleet. Some vehicles would be too expensive to retain on a fleet. Customers would lose access to their entitlement to a like-for-like vehicle when one is required, leading to a loss in tortious rights.
- 3.36. In short, any cap would lead to an inevitable need for cutting costs. The cutting of costs would deprive access to individuals who would be left out in the cold, but for the services of companies such as DAML. It would also potentially reduce the quality of service to individuals which would not only lead to a reduction in tortious rights, but also lead to a general dissatisfaction and loss of confidence of the general

public within the market. Price caps will encourage hire providers to “cut corners” and provide vehicles and services below what could be deemed to be an acceptable level by the courts.

3.37. Accordingly, individuals would be deprived of their legal entitlement. The same individuals may not be suitably educated to be fully aware of their true legal entitlement and may simply “settle for less”. This is entirely unacceptable especially when viewed in light of the CMA’s statutory duties and desired outcomes.

4. MORE APPROPRIATE MEASURES TO REDUCE COSTS

4.1. Finally, the CMA - whilst conceding the possibility of abandoning remedy 1C - indicates that it wishes to reduce frictional costs. Before discussing the options which the CMA does consider, it is important to appreciate that insurers have ample opportunities to control costs by capturing the claims at the outset, sending a Copley compliant offer which will cap credit hire costs and making without prejudice payments. The harsh reality is that they do not do so for economic reasons. It is cheaper for at fault insurers to adopt a 'passive' approach. The cost to them is less if the if not-at-fault customers do not receive access to the vehicle which they are entitled.

4.2. These so-called frictional costs, identified by the CMA, could be reduced by:

- (i) Imposing an enforced ban on referral fees, as advocated by DAML. As indicated in previous submissions, this would seem a logical solution since the CMA has found such referral fees to be a key driver of frictional costs; and
- (ii) Imposing measures on insurers to ensure the timely and efficient processing of claims. This would serve not only at fault drivers' interests, but materially lower costs.

4.3. The CMA's proposed remedies simply do not address the extent to which the costs of credit hire are driven by 'insurer side' conduct, such as insurer delays which increase the duration of credit hire.

4.4. The two sets of options which the CMA indicates it is considering are:

"a) encourage[ing] the General Terms of Agreement (GTA) to adopt aspects of Remedy 1C (and 1F) not already part of the GTA (such as a dual-rate system, the Mitigation Declaration Statement, an online portal to deliver quicker and cheaper administration of claims, and rates which are more in line with those which some insurers and CHCs have agreed through bilateral agreements)."

4.5. DAML has no objections to any industry initiatives which reduce the actual costs of credit hire through the more efficient administration of claims. It invites the CMA to review carefully the case studies of insurers' behaviour which are set out in the Credit Hire report in order to appreciate fully the extent of cost inefficiency which currently prevails. However, self-evidently an online portal is not sufficient to address, for example, the systematic disregard of correspondence by insurers which presently occurs.

~~*"(b) encourage[ing] insurers to take action themselves to reduce frictional costs by, for example, the more common use of bilateral agreements between CHCs and*~~

insurers, and between insurers in situations where insurance policies are extended so as to provide a like-for-like temporary replacement vehicle to a non-fault claimant under the terms of the insurance policy; and extending a non-fault claimant's insurance cover to their temporary replacement vehicle so removing the need for the CHC to incur costs in providing this insurance.”

- 4.6. DAML has specifically commented above on the consequences of extending non-fault claimant's insurance cover to include a temporary replacement vehicle. As regards bilateral agreements, these do not address the cost and inefficiency of claims (e.g. the delays in without prejudice payments being made so as to bring credit hire to an end).

Market context – insurers can control costs but choose not to do so

- 4.7. All of the adverse unintended consequences of Remedy 1C (as outlined above) need to be viewed in the wider context of insurer conduct in the credit hire sector. Insurers have the power to intervene at any time and to take control of the cost, but fail to do so. Companies such as DAML fill the gap that the insurance industry does not provide for (see further Armstrong's Litigation report and DAML's written Submissions).
- 4.8. For these essential reasons, DAML strongly opposes the suggested possible alternative remedy.