



NSW Legislative Council Hansard

Fair Trading Amendment (Motor Vehicle Insurance and Repair Industries) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 18 October 2006.

Second Reading

The Hon. ERIC ROOZENDAAL (Minister for Roads) [4.33 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

Honourable members would be aware that there has been longstanding tension between smash repairers and insurers. This is inherent in the relationship between the two industries—insurers want to minimise repair expenses and maximise profitability, and repairers want to maximise their work and revenue. What both industries have in common is an interest in providing a good service to the consumer. Industry trends have put added pressure on the relationship. The ratio of repair shops to the number of vehicles in Australia is high compared with similar economies around the world. There has also been a reduction in the number of accidents, possibly due to improvements in technology and drier weather.

In the last 15 years there has also been an increasing use of network repairer schemes by insurers. Repairers within those schemes are often promoted to carry out repairs on damaged vehicles insured by the insurer. In July 2003 the Insurance Australia Group, the insurer with the largest share of the vehicle market in Australia, further developed its network repairer scheme by introducing an Internet tendering system for repair work. From the point of view of the insurer, Internet tendering means that pictures of a vehicle, plus an assessment of the work needed to be done, can be posted on a secure web site. NRMA Insurance introduced such a system in New South Wales last July. Web-based repair management, or WRM, provides a forum where repairers compete for repairs by providing on-line quotes.

There have been general concerns about the outcomes of the changing insurer-repairer relationship, including the transparency of network repairer arrangements, the transfer of network repair status when the repair business is sold, repair methods, responsibility for repair warranties, payment terms, and the fairness of on-line tendering systems. The concerns raised in the disputes have been national in scope, given the national operation of the insurers involved, and have also related to market power issues, particularly as the insurance market is dominated by four major insurers—the Insurance Australia Group, which includes NRMA Insurance, Promina, which includes AAMI, Suncorp-GIO, and Allianz. Accordingly, the concerns were examined by the Australian Competition and Consumer Commission in 2003 and, more recently, by the Productivity Commission in 2005.

Disputes between repairers and insurers are in nobody's interest. They waste time and resources and prevent the formation of efficient business relationships that are built on trust and co-operation. Tensions between the industries spill over and, most tellingly, can have an impact on consumers and the wider community. In New South Wales, there was particular concern about NRMA Insurance's introduction of its web-based repair management system, which involved Internet tendering for work by smash repairers. Through negotiations which I mediated and the work of an independent expert I commissioned, we were able to bring important changes to the web-based repair management system—work which resulted in an undertaking that web-based quoting systems will be used only for non-structural damage.

Repairers were also concerned that insurers could use their network repairer arrangements to prevent consumers from exercising their choice of a repairer. I have been actively facilitating negotiations between IAG-NRMA Insurance and the Motor Traders Association [MTA]. These negotiations have resulted in the following achievements: IAG agreeing to suspend penalties imposed on repairers for the practice of lowballing, or underquoting to obtain a competitive advantage at the tendering stage in the Internet quoting system; the insurer working with the MTA in the development of a new process to prevent lowballing that both parties agree is fair and transparent; and, from 1 May 2006, NRMA Insurance agreeing to offer its customers, at no additional cost, the freedom to choose a repairer.

Other undertakings were also given by NRMA Insurance. The insurer agreed that terms such as "non-accredited" will no longer be used when describing licensed repairers outside of the insurance network of repairers; web-based repair management will be used only for superficial or non-structural damage; NRMA Insurance performance measurement systems will be based on quality, not just price; repairers who have opted

out of the NRMA Insurance Preferred Repairer Network will be given a fair and without prejudice opportunity to rejoin the network; the process and qualification guidelines for a preferred repairer will be fair, transparent and widely available. Furthermore, the Motor Vehicle Repair Industry Authority within the Office of Fair Trading, which is responsible for the licensing of repairers, has been monitoring the quality of repairs by investigating any complaints it has received about the quality of insurance repair work.

Under the Motor Vehicle Repairs Act 1980, disciplinary action may be taken against repairers if work is "below the usual trade standard". All parties concerned have come a long way in the last 12 months. It has taken a lot of hard work from repairers, insurers and members of this House to achieve this solution. As the Chief Executive Officer of the Motor Traders Association said on ABC Radio yesterday morning, this solution is, "a victory for both of us [repairers and insurers] and it is a victory for the consumer—I think everybody has won out of this situation".

I will now refer to the aims of the Government's legislative strategy. The dispute between insurers and smash repairers in recent years has now highlighted the need to put rules into place that ensure a fair deal for consumers and a sustainable industry for both repairers and insurers. The best way this can be done is by making the voluntary national Motor Vehicle Insurance and Repair Industry Code, released on 1 June 2006, enforceable under New South Wales legislation. The code is a result of the Productivity Commission's report on smash repairers and insurers and covers the key issues identified in that report.

The code includes a transparent and independent external dispute resolution mechanism, the requirement for full disclosure in preferred smash repairer arrangements, retention of preferred smash repair status upon the sale of a business, the requirement for full disclosure in quoting for work and payment, standards for the allocation of responsibility for repair warranties, standards for payment terms, and requirements for up-front disclosure on whether insurance policies provide choice of repairer.

The New South Wales Government has always stressed the importance of a negotiated outcome to the dispute between repairers and insurers. In this regard it must be stressed that the national voluntary code was developed by national insurer and repairer representatives and has been publicly supported by them. The administration and monitoring of the code at a national level will be by the Code Administration Committee, which consists of three appointees of the Insurance Council of Australia and three appointees of the Motor Trades Association of Australia. Any problems with the provisions of the code should be picked up through the review mechanisms that are built into the code.

There is to be an internal review of the code 12 months after its commencement on 1 September 2006. There is also provision for an external review of the operation of the code every three years from the commencement of the code. Furthermore, adoption of the national code ensures national consistency in the standards adopted and avoids the confusion that could arise from having different rules applied in New South Wales, particularly if the code is mandated at national level some time in the future. The New South Wales Government believes that the code needs to be mandated to ensure that the standards it puts into place can be enforced.

I will now briefly outline how the Government's legislation will work. It is intended to provide for fair, timely and transparent conduct between insurers and repairers so that consumers are not unduly inconvenienced or unfairly treated due to the business practices in, or disputes between, the insurance and repair industries. The Fair Trading Amendment (Motor Vehicle Insurance and Repair Industry) Bill 2006 will amend the Fair Trading Act 1987 so that the regulations may declare a mandatory code to regulate the relationship between insurers and motor vehicle repairers.

So that stakeholders can better understand the Government's intentions, I have also circulated a draft Fair Trading Amendment (Motor Vehicle Insurance and Repair Industry) Regulation 2006, which will make an industry code between repairers and insurers published in the New South Wales *Government Gazette* a declared code for the purpose of the Fair Trading Act. It is proposed to publish the national Motor Vehicle Insurance and Repair Industry Code in the *Gazette*, which, in tandem with the proposed legislation, will make it mandatory. The draft regulation essentially applies "interpretation provisions" to the national code so that all references in that code to voluntary application, signatories, and other incidental matters, do not apply.

However, I will now turn back to the provisions of the bill. It provides that the enforcement and remedies provisions of the Fair Trading Act will be triggered if a dispute has not been resolved by dispute resolution procedures specified under the code or if the insurer or repairer refuses to take part in those procedures. So that there is an understanding of the detailed dispute resolution mechanisms already in the Motor Vehicle Insurance and Repair Industry Code, I will briefly outline these procedures now. There are essentially three tiers of disputes identified in the national Motor Vehicle Insurance and Repair Industry Code. The first tier of disputes are those relating to the amount to be paid for repairs, and differences of opinion about the repair method which do not lead to a belief that the safety, structural integrity, presentation or utility of the vehicle will be compromised. These disputes need to be settled through individual negotiation between the parties.

The second tier of disputes relate to disputes about the repair and paint method in circumstances in which there

is a belief that the safety, structural integrity, presentation or utility of the vehicle will be compromised and cannot be resolved through the standards established in clauses 1 to 7 of the code, and to disputes which arise prior to the completion of repairs, other than those already mentioned. These disputes are handled through direct dispute resolution between the parties to facilitate a speedy resolution. The aim is to minimise inconvenience to consumers whose vehicles are being repaired. Under this mechanism the repairer may lodge a complaint with the insurer's complaint contact.

The insurer needs to make a determination in two business days. If the repairer disagrees with the determination, the code provides that the dispute is settled at this stage by the repairer retaining the right to refuse to carry out the repair and the insurer may transfer the vehicle to another repairer. The insurer reports annually to the Code Administration Committee about the number, nature and outcome of these disputes. In order to ensure that consumers are not inconvenienced, it is not intended that a second tier code dispute will trigger access to enforcement mechanisms under the Fair Trading Act. Furthermore, the code provides for the elevation of certain second-tier disputes to the other dispute resolution mechanisms available under the code. It is these dispute resolution processes that need to be attempted prior to action under the Fair Trading Act being possible.

The third tier of disputes relates to disputes about alleged non-compliance with clauses 4 to 9 of the code and disputes about contractual arrangements. Clauses 4 to 9 of the code deal with matters such as insurers and repairers relations; network smash repair schemes; the estimate, repair and authorisation process; repair warranties; payment terms; and disclosure obligations. Also, some of the disputes identified in the second tier, which arise prior to the completion of repairs, may be dealt with under this tier once the vehicle has been repaired. These third-tier disputes must first go through an internal dispute resolution mechanism established by insurers. There must be acknowledgement of the complaint within five business days and conclusion of internal dispute resolution within a further 10 days—15 days in total—unless both parties agree. If the repairer disagrees with the outcome of the internal dispute resolution, they can elevate the complaint to external dispute resolution.

Under external dispute resolution, the applicant lodges a notice of dispute with the Code Administration Committee or its nominee and with the respondent. The parties then have the opportunity to agree on a mediator within two business days. If not, the Code Administration Committee is requested to appoint a mediator within two business days. The parties should then try and resolve the dispute within 15 business days unless agreed to by both parties. If resolution is not reached, the mediator provides a written statement setting out the parties to the dispute, an outline of the dispute and a list of unresolved issues. The mediator has to advise the Code Administration Committee in writing of whether mediation was successful or not. The parties share equally in costs of mediation and pay their own costs for attending mediation. They must mediate in good faith.

In order to prevent the dispute resolution processes in the code from being needlessly bypassed, insurers or repairers will be able to use the enforcement mechanisms in the Fair Trading Act only if they are not the party refusing to take part in the dispute resolution procedure under the code. The dispute about the breach of the code will also have to satisfy a public interest test applied by the Minister and the Director General of Commerce. The existence of a public interest test is a standard consideration when deciding whether to commit government resources to enforcement action and will be a means of ensuring that vexatious complaints, for example, are not needlessly acted upon.

It is proposed that enforcement of the code will be through a range of existing civil, rather than criminal, measures in the Fair Trading Act. These include court orders to restrain the carrying on of a business, orders to disclose information or publish corrective advertising, orders to compensate for damage, show cause action by the Commissioner for Fair Trading to cease trading, and civil action for damages. The Office of Fair Trading may apply for certain types of court orders on behalf of wronged parties. Significant matters, such as the misleading and deceptive conduct and unconscionable conduct provisions of the Fair Trading Act, are also enforced using civil, rather than criminal, measures.

The Office of Fair Trading has, for example, taken action in the Supreme Court to obtain injunctions and other orders under section 65 of the Fair Trading Act to deal with breaches of the Fair Trading Act. The orders that can be sought under section 65 can be very broad as well as quite specific in terms of the conduct being restrained or the actions the respondent is required to undertake. If there is a subsequent breach of the orders, action can be taken in the Supreme Court for contempt. Fair Trading has taken contempt proceedings in many cases, and several respondents have been given custodial sentences. Bona fide traders are usually very careful to comply with Supreme Court orders, but the contempt action is available if necessary.

The Office of Fair Trading has also frequently used section 73A of the Fair Trading Act, which permits the Commissioner for Fair Trading to accept written undertakings from a trader that has engaged in conduct in breach of the Fair Trading Act. This provision is very broad and has been used when the trader has shown a willingness to take action to ensure a cessation of the conduct of concern and future compliance. Usually the terms of the undertakings are negotiated. The provision and acceptance of the undertakings is intended to avoid

the need for court proceedings. This is a benefit to the trader and the regulator. However, the undertakings can be enforced through the Supreme Court if the trader does not fully comply.

In bringing forward legislation to mandate the code, which has been nationally agreed to by repairers and insurers, the Government has demonstrated that it is serious about ensuring that there are enforceable rules to produce a fair result for repairers, insurers and, ultimately, consumers. While the provisions of the code and the bill before the House mainly mention ways of promoting transparent, informed, effective and co-operative relationships between smash repairers and insurance companies, there are also some provisions in the code which directly mention policy holders. These include clause 4.2 (f) of the code, which requires that insurers not knowingly ask claimants to drive unsafe motor vehicles for the purposes of obtaining alternative estimates. Also, clause 9 of the code includes specific disclosure obligations by an insurer to a policy holder. These relate to matters such as choice of repairer. It is important that a consumer whose insurer provides choice of repairer will, accordingly, be allowed to exercise that choice without being treated unfairly or inconvenienced. Not delivering what is advertised could be interpreted as being misleading or misrepresenting the truth. This can be dealt with under the Fair Trading Act.

Relationships between insurers and repairers can ultimately have an impact on consumers. Proposed section 60W provides a context for considering the mandatory code provisions. They are there to provide for fair, timely and transparent conduct between insurers and repairers so that consumers with damaged motor vehicles are not unduly inconvenienced or unfairly treated as a result of the business practices in or dispute between the insurance and repair industries. This might include unreasonable delays in awaiting assessment and authorisation of repairs, the ability to select a repairer where a policy provides for this, without being subject to pressure selling from insurers or repairers preventing insurers from processing a customer claim.

It is acknowledged that a small portion of the smash repair industry needs cleaning up. This code will contribute to ensuring that the few bad apples do not spoil the reputation of the entire industry. Proposed section 60W, in establishing an interpretative context, provides protection in addition to existing mechanisms that consumers with complaints about insurance matters can access. These include remedies under the Fair Trading Act in relation to misleading conduct, and remedies under the national General Insurance Code of Practice. The code also provides important protections for repairers in relation to what they can expect from insurers. From the outset of this dispute, one of the key concerns raised has been the use of quoting systems that do not allow repairers to adequately identify damage to a vehicle through digital images posted on a secure Internet site.

Clause 6.1 of the code covers fair and transparent process for competitive quoting and requires that sufficient information be provided by insurers to allow repairers to quote. If a breach of clause 6.1 should occur, the Act can be examined in the context of the consumer objective and the issues outlined in the principles of the code. Importantly, this includes the mutual responsibility of repairers and insurers to ensure that the safety, structural integrity, presentation and utility of the vehicle are restored. Effectively, licensed repairers have a legal obligation under the Motor Vehicle Repairs Act 1980 to carry out repairs to usual trade standards. Additionally, section 20 of the Insurance Act 1902 provides that in disputes about materials or method of repair, the onus is on the insurer to prove proper use of materials and that repairs are properly carried out. While not seeking to stifle business development on the part of repairers or insurers, quoting systems must ensure that adequate information is provided on which to provide a quote. The quoting system must be fair and transparent.

One final matter which was raised with me during consultation on this bill has been the jurisdiction of the Fair Trading Act. Legislation to clarify the jurisdiction of the Fair Trading Act is currently in the other place. The Fair Trading Amendment Bill 2006 will clarify that the Fair Trading Act extends to conduct by a person of the State, conduct outside the State that affects a consumer in the State, conduct in connection with goods or services supplied in the State, representations made in the State, and conduct that results in loss or damage in the State.

This dispute has been in nobody's interests. Many repairers have fought a long and hard battle with insurers. Sadly, some have not survived. The bill supports the small business owners and operators who, to a large extent, rely on the co-operation of insurers for survival. It provides the basis for a fair resolution for all parties concerned. On 4 September 2006 the NRMA Motoring Services wrote me a letter that said that the bill will have a "positive impact on motorists, as a result of its focus on the overall improvement in repair quality and the reduced likelihood of motorists becoming embroiled in disputes between insurers and repairers". The bill marks a new era of co-operation between insurers and repairers.

The Motor Traders Association has said that it will "work with them [IAG] and other insurers to make sure the systems work to everyone's benefit". Yesterday the Insurance Council of Australia issued a release stating that its members "are entering this new era with an open mind and with a view to ensuring the best outcome for consumers". The release further states, "Importantly, the code ensures consumers have access to quality vehicle repairs at a reasonable price in a reasonable timeframe". The bill provides for a fairer marketplace for repairers and insurers. It sets a pathway to resolve disputes. There are penalties for those who breach the code, and the bill will ultimately provide a good outcome for consumers. I thank the honourable member for Bankstown for leading the charge to protect the interests of repairers in this debate. I thank also the honourable member for Blacktown and the Staysafe Committee, and the honourable member for Northern Tablelands for

their important contributions. I commend the bill to the House.