

MOTOR VEHICLE REPAIR INDUSTRY

Organisation: NSW Government
Name: The Honourable Stuart Ayres MP
Position: Minister for Fair Trading
■ Minister Assisting the Premier on Western Sydney
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Minister for Fair Trading
Minister Assisting the Premier on Western Sydney

Ref: FTMIN14/278

Ms Rhonda Miller
Clerk of the Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Miller

I refer to the NSW Government Legislative Assembly Select Committee on the Motor Vehicle Repair Industry which was established on 19 November 2013.

Please find attached the NSW Government submission which outlines the regulation in NSW of smash repairers in the motor vehicle repair industry, and the relationship between insurers motor vehicle repairers.

Should the Members of the Select Committee require any further information regarding the submission, Mr Lucas Kolenberg of NSW Fair Trading can be contacted on 9619 8622.

I trust the submission is of assistance to the Committee.

Yours sincerely

6/2/14

Stuart Ayres MP
Minister for Fair Trading
Minister Assisting the Premier on Western Sydney

NSW Government Submission

Legislative Assembly Select Committee

Inquiry into Motor Vehicle Repair Industry

Background

In NSW, the relationship between licensed motor vehicle repairers and insurance companies is regulated through the Motor Vehicle Insurance and Repair Industry Code of Conduct. The Code is intended to promote transparent, informed, effective and co-operative relationships between smash repairers and insurance companies.

The Code of Conduct is a national voluntary code which applies to all insurers and repairers that choose to sign up to the requirements. It was established following an Australian Competition and Consumer Commission examination in 2003 and a further Productivity Commission Inquiry into the relationship between the motor vehicle smash repair industry and the motor vehicle insurance industry in 2004/5.

The automobile smash repair industry has significantly changed since the Australian Competition and Consumer Commission and then the Productivity Commission inquired into the sector in 2003-5. Since this time significant consolidation of the supply chain has occurred in the industry

In NSW, the Code is mandatory for all insurers and repairers and all vehicles repaired under an insurance contract. The *Fair Trading Act 1987* mandates the Motor Vehicle Insurance and Repair Industry Code of Conduct in NSW. The Code is effectively self-enforced by the two industries and includes a dispute resolutions system including external dispute resolution, in the event of a dispute between a repairer and an insurer over repair work. However, failure to comply with the Code could constitute a breach of the Act. If an insurer or repairer has failed to comply with the Code, a party to a dispute which has not been able to be resolved through the dispute resolution process, can take court action for compensation or other orders against the party contravening the Code. If it is in the public interest, Fair Trading can also take action to enforce compliance with the Code.

Motor vehicle repairers are also regulated by the *Motor Vehicle Repairs Act 1980* which provides consumer protection through a business and an occupational licensing system for motor vehicle repairers. This Act will shortly be replaced by the *Motor Dealers and Repairers Act 2013*, which simplifies and consolidates the current licensing system and is expected to commence in mid-2014. Fair Trading can take action against a repairer if repair work is not completed to the appropriate standard. Consumers and insurers can also make a complaint about poor repair work to Fair Trading which is able to investigate such a complaint and take action, including prosecutions, if necessary.

Motor vehicle repairers in dispute with an insurer can also approach the NSW Small Business Commissioner to assist in the resolution of a dispute. The role of the Office of the Small Business Commissioner is to support small businesses throughout NSW by providing dispute resolution services, quality business advice and speaking up for small business within government. The Commissioner provides a central point of contact for small businesses to make complaints about their commercial dealings with other businesses and about their dealings with government agencies. The Commissioner facilitates the resolution of disputes involving small businesses through mediation and other appropriate forms of alternative dispute resolution. This service provides procedural and strategic information to help parties resolve their issues at the earliest possible point. There is assistance with negotiation as well as informal and formal mediation processes.

Motor vehicle insurance and repair industry Code of conduct

Background

In 2006, the Motor Vehicle Insurance and Repair Industry Code of Conduct was established following a Productivity Commission Inquiry in 2004-5 which recommended the establishment of a voluntary Code to govern aspects of the relationship between repairers and insurers and their dealings with each other.

The Code is a voluntary national code which regulates the relationship between repairers and insurers in relation to insurance smash repair work. The Code was mandated in NSW through the *Fair Trading Act 1987* since late 2006 which requires all insurers and repairers in NSW to comply with the Code. It applies to all motor vehicles that are repaired in NSW, irrespective of where they are registered, but does not apply to motor vehicles owned or used by repairers. A copy of Part 4 Division 4, Industry Code for Motor Vehicles Insurers and Repairers, and the NSW Government Gazetted (Government Gazette, Number 127, Friday, 27 October 2006) Code which applies in NSW is attached.

The Code is administered by a Code Administration Committee made up of equal representative members of the insurance industry and the motor vehicle repair industry. As such, while the NSW Government currently requires insurers and repairers to abide by the Code, it is unable to amend the provisions contained in the Code.

The Code is regularly reviewed by the Code Administration Committee, however despite recommendations for change over the years it has not been varied significantly.

Principles of the Code

The Code is intended to promote transparent and co-operative relationships between smash repairers and insurance companies based on mutual respect and open communication. Insurers and repairers agree they have a responsibility to ensure vehicle repairs are authorised and carried out in a

professional manner and to ensure the safety, structural integrity, presentation and utility of the vehicle are restored. Insurers and repairers will also comply with relevant legislation and fulfill their obligations to both the claimant and each other.

Repairer requirements

Under the Code, repairers are required to:

- prepare estimates that provide for an appropriate range of repairs;
- ensure that all repairs are carried out in a safe, ethical, timely and professional manner and in accordance with the method of repair and the parts specified by the insurer;
- not dismantle a vehicle for the purpose of preparing an estimate unless requested or authorised to do so by the insurer;
- not engage in practices designed to hinder or prevent the insurer or claimant seeking to obtain an alternative quotation;
- repairers will carry out repairs, taking into consideration the age and condition of the motor vehicle, that:
- are in accordance with the manufacturers' documented technical specifications, including those supplied by other industry recognised agencies or authorities, or any lawful mandatory specifications and/or standards;
- use methods that are consistent with vehicle warranty conditions; and,
- in the absence of the points above, are in accordance with accepted industry standards and practice.

Insurer requirements

Under the Code, insurers are required to:

- provide repairers with relevant details to enable them to prepare a repair estimate or undertake the repair, including details of sub-let repairs and payments by the claimant including any excess and contributions;
- not refuse to consider an estimate on unreasonable or inconsistent grounds;
- pay the agreed amount for all work that has been authorised or requested by the insurer and has been completed;
- ensure all assessors engaged by the insurer:
- are appropriately trained and have appropriate technical experience, or
- have successfully completed an approved assessors course, or
- have not less than five years' experience as an insurance (motor) assessor;
- not remove a motor vehicle from a repairer's premises without notifying the repairer in advance and compensating the repairer for any legitimate or reasonable towing or storage costs associated with the vehicle and in compliance with relevant legislation; and
- not request claimants to drive unsafe motor vehicles for the purposes of obtaining alternative estimates.

Estimate, repair and authorisation process

Insurers must ensure that their competitive estimation processes are fair and transparent and, as far as is practicable, that estimates are comprehensive, complete and inclusive of all obvious damage. They must clearly state the estimation techniques to be applied. Insurers may not unreasonably alter a repair estimate unless the insurer insists on changing the repair process, parts or materials to be used.

Insurers may enter into commercial arrangements with repairers that specify performance targets but must not unduly influence any repairer to submit estimates on the basis of continuing work. Repairers may separately cost paint, parts, significant consumables and any mandatory government environmental levies.

Repair warranties

Insurers must provide details in writing to repairers of the warranty cover that the insurer provides to the claimant, including the insurer's responsibilities under lifetime warranties. Repairers must provide insurers with a warranty for their workmanship for three years, from date of repair. Repairers are only required to provide a guarantee for parts or paint to the extent that the manufacturer, distributor, supplier or importer of the parts or paint is liable under an express warranty or under the law. Repairers will still have to provide a guarantee for the quality of workmanship carried out using the parts or paint. The insurer is not liable to pay any loss or liability incurred by the repairer where the loss or liability arises from faulty workmanship. Where rectification is required, the repairer must be offered the first option to do so where practicable, taking into account customer preferences.

Disclosure obligations

Insurers must provide information to consumers in their Product Disclosure Statements, and over the telephone, about their policy in relation to choice of repairer, the use of new, non-genuine and recycled parts, sub-let repairs, and guarantees and warranties. Insurers must not make misleading or deceptive comments about the quality, capability or timeliness of repairers that are not members of an insurer's Network Smash Repairer (NSR) scheme. Similarly, repairers must not make misleading or deceptive statements about the quality, safety or timeliness of repairs based on who the insurer is or the approach the insurer uses to allocate repairs or manage claims.

Dispute resolution – repairs

If a repair has not commenced or been completed and the repairer believes that the safety, structural integrity, presentation or utility of the vehicle will be compromised by the proposed repair method, the repairer must notify the insurer, providing full details of the dispute, supporting evidence and the redress sought. Insurers must investigate and make a determination within two business days. If the repairer disagrees with the determination, the repairer has the right to refuse to carry out the repairs and the insurer may transfer the vehicle to another repairer. Disagreements relating to the amount to be paid for repairs or differences of opinion as to the preferred repair

method, other than those outlined above, are matters for individual repairer/assessor negotiation and cannot be disputed under the Code.

Dispute resolution – Code of practice

Any dispute related to an alleged breach of the Code or disputes of a contractual nature must first go through internal dispute resolution, conducted by the insurer. Insurers must provide repairers with a written acknowledgment of receipt of such a dispute within five business days. The internal dispute resolution process must be concluded within a further ten business days, unless both parties agree to an extension of time. If a repairer disagrees with the outcome of the internal dispute resolution process, they can elevate the dispute by lodging a notice of dispute with the Code Administration Committee and the insurer. The cost of mediation is borne equally by the repairer and the insurer.

Role of NSW Fair Trading

The *Fair Trading Act 1987* (the Act) requires insurers and repairers to comply with the Code. Failure to comply with the Code could constitute a breach of the Act. If an insurer or repairer has failed to comply with the Code, a party to a dispute which has not been able to be resolved through the dispute resolution process, can take court action for compensation or other orders against the party contravening the Code. If it is in the public interest, Fair Trading can also take action to enforce compliance with the Code.

Complaints to Fair Trading

The principle of the Code is that it is self-enforcing and insurers and repairers can resolve the dispute themselves using the internal and external dispute resolution procedures.

Fair Trading receives complaints and enquiries relating to the Code. If the repairer or insurer contacting Fair Trading has not used the provisions of the Code, they are provided with information including the requirements regarding the internal and external dispute resolution provisions.

If the dispute resolution procedures have been followed and the dispute was not successfully resolved, either party can take their own legal action for a breach of the Code. The Minister for Fair Trading or Commissioner for Fair Trading can take action for a breach of the Code, however, the Act allows them to decline to take action under the Act for a breach of the Code if it is considered that it is not in the public interest to take that action. As of this time, no action has been taken by Fair Trading in relation to complaints regarding a breach of the Code.

Motor Vehicle Repairs Act 1980 (Motor Dealers and Repairers Act 2013)

The Act aims to protect consumers by mandating certain minimum standards of repair and establishing a licensing regime for the repair of motor vehicles in NSW. It requires certain probity standards to be met before a licence is issued and that licence holders maintain records of traceable parts to assist the NSW

Police Force with investigations into stolen parts. It also sets standards for tradespeople in the industry to be certified in relation to their technical skills.

The licensing regime centres on two key requirements:

- Business licensing: This requires the owner of a motor vehicle repair business to hold a repairer's licence in order to advertise for, or carry out, repair work. A repairer's licence does not require the licence holder to have qualifications relating to vehicle repair work – it simply authorises the holder to advertise and contract for the repair work. However, a business licensee must employ persons with an occupational licence to repair vehicles.
- Occupational licensing: This requires those who carry out repair work to hold the appropriate tradesperson's certificate for the prescribed category of repairs. For example, a person repairing the structural components, frames or panels must hold a panel-beater certificate. A tradesperson certificate is granted where the applicant holds an approved qualification and meets certain probity checks.

The Act allows for disciplinary action to be taken by Fair Trading in response to improper conduct or work performed below trade standards (the new laws require this work to be done to consumer guarantee standards under the Australian Consumer Law). Consumers can initiate dispute resolution through Fair Trading and if this proves unsuccessful, seek resolution of a dispute through the NSW Civil and Administrative Tribunal for substandard work by repairers.

The Act also allows consumers to obtain compensation for losses resulting from substandard repair work through the Motor Vehicle Repair Industry Contingency Fund. Typically, claims are made when a repairer has ceased to trade. Claims on the Fund can only be made if a consumer is able to demonstrate that all reasonable steps have been taken to recover the loss through normal legal channels. The Fund is administered by Fair Trading and the maximum claim that can be made is \$30,000 (this will be raised to \$40,000 when the new Act commences).

The Act does not regulate insurers and they are not required to be licensed or employ a licensed tradesperson if they do not carry out the repairs themselves. Insurers generally employ vehicle assessors, who negotiate with the repair business over the repairs on behalf of the insurer. Assessors were previously required to hold a licence under the Act, however, this licensing category was deregulated in 1996. At this time, assessors are regulated by two other laws including the Motor Vehicle Insurance and Repair Industry Code of Conduct and the *Road Transport Act 2013*. Vehicles repaired under insurance contracts on behalf of a consumer are covered by the Act and insurers or consumers could provide evidence to Fair Trading that a repair was not carried out to the appropriate standards. Fair Trading can investigate the evidence to determine if action should be taken against the repairer.

Regulation of insurance products

Insurance contracts and arrangements between customers and insurers are regulated by the Commonwealth through the *Insurance Contracts Act 1984*, the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*.

The *Insurance Contracts Act 1984* is the primary legislation and it excludes remedies under other legislation on the basis that the Act's consumer protections should be the sole source of remedies in relation to insurance contracts. As such, the unfair contract term protections in the Australian Consumer Law do not apply to insurance contracts and Fair Trading does not govern insurance contract disputes between insurers and consumers.

The primary regulators are the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission, and insurers must belong to an external dispute resolution service which assists to resolve consumer complaints. Fair Trading would direct a consumer with a complaint about their insurance contract to the Financial Ombudsman Service. The Service handles complaints about general insurance (including car insurance) banking, credit, loans and debt collection, life insurance, superannuation, financial planning, insurance broking, stockbroking, investments, managed funds, timeshares, finance and mortgage broking. The Service covers complaints where the value of the claim is \$500,000 or less.

Office of the Small Business Commissioner

In addition to the provisions available under the Code, motor vehicle repairers in dispute with an insurer can also approach the Office of the Small Business Commissioner (OSBC) to assist in the resolution of a dispute. The OSBC provides a central point of contact for small businesses to make complaints about their commercial dealings with other businesses and about their dealings with government agencies. The OSBC facilitates the resolution of disputes involving small businesses through mediation and other appropriate forms of alternative dispute resolution. This service provides procedural and strategic information to help parties resolve their issues at the earliest possible point. There is assistance with negotiation as well as informal and formal mediation processes.

Concerns have been raised with the OSBC by some motor vehicle repairers about their perception of a lack of enforceability of the Code and the manner in which insurance companies specify the parts to be used, the time to be allocated and cost to be charged on repair jobs. The complainants argue that the above conduct is impacting upon the sustainability of their business, the quality of the work delivered and ultimately compromising the safety and quality standards of the industry more broadly. At this stage, the OSBC has not received from industry sufficient evidence to form a view of the veracity of these complaints. The Parliamentary Inquiry presents an opportunity for those with concerns to submit further evidence to substantiate these claims.