SUBMISSION

Parliament of South Australia
ECONOMIC AND FINANCE COMMITTEE

Inquiry into the Motor Vehicle Insurance and Repair Industry in South Australia

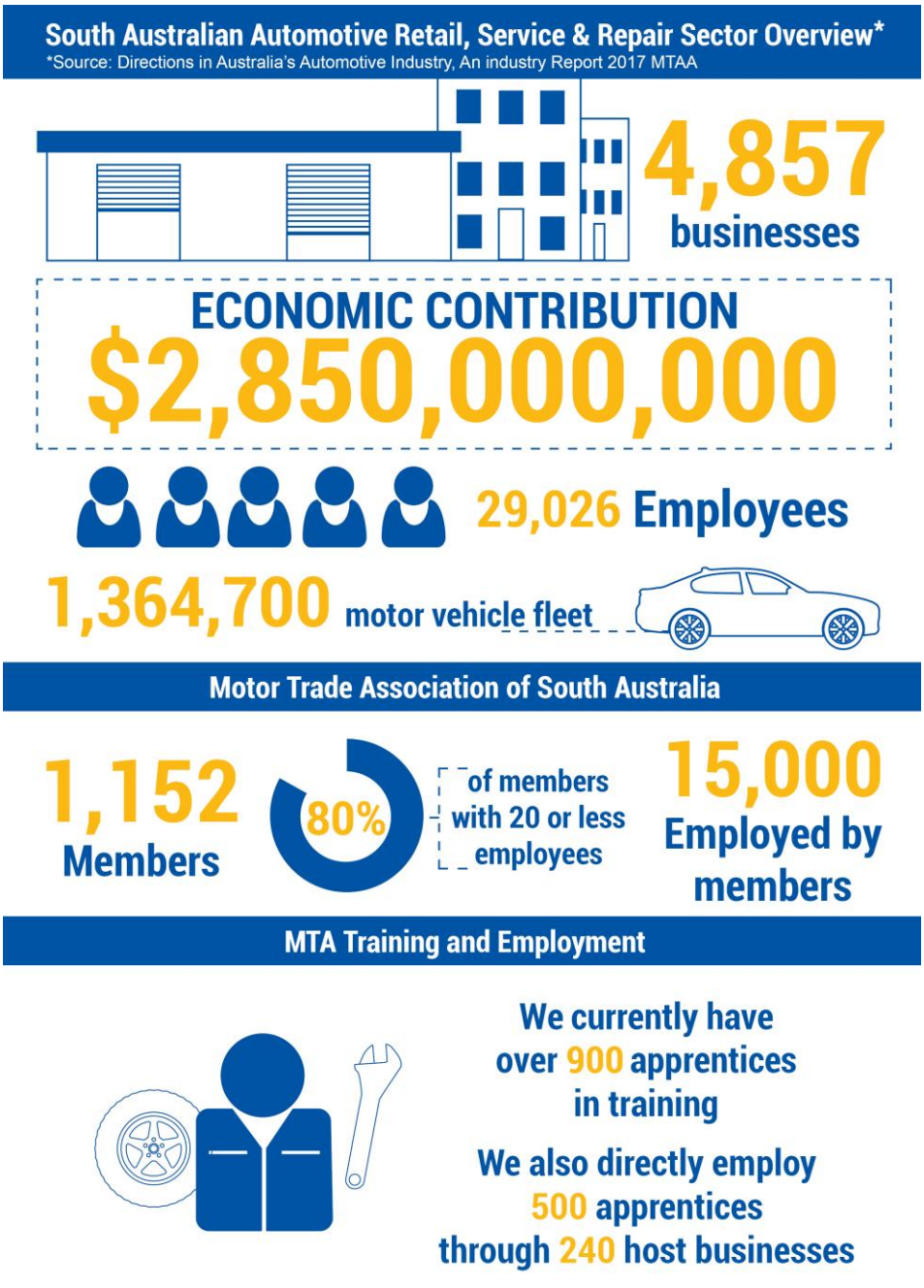
6 September 2019

1. Contents

2. About Us

The Motor Trade Association of South Australia (MTA) is the only dedicated employer organisation representing the interests of automotive retail, service and repair businesses in South Australia.

The MTA Group Training Scheme comprises both our Registered Training and Group Training Organisations. It is the automotive industry's own training provider and is the largest employer of automotive apprentices in South Australia.



3. Executive Summary

On 3 July 2019, the Parliament of South Australia Economic and Finance Committee resolved to inquire into, and report on, the *Motor Vehicle Insurance and Repair Industry in South Australia*.

The following submission has been prepared by the Motor Trade Association of South Australia (MTA) in response to the Terms of Reference of the Inquiry and outlines the views of the MTA and the Members of the Body Repair Specialists Division.

The MTA welcomes the Inquiry, as it has been our experience that collision repairers have been experiencing pressure from insurance companies since being first identified in 1995. The MTA anticipates that the Inquiry will shine a light on practices within the industry which will hopefully lead to improvements in the relationship between collision repairers and insurance companies and fulfilling obligations to the consumer.

Primarily, the MTA is concerned about potential insurer misconduct and misuse of market power in relation to the collision repair industry. The IAG and Suncorp entities constitute over 70 per cent of the national insurance market; placing great power in the hands of two companies. We consider it possible that this may exacerbate include breaches of Australian Consumer Law, unconscionable conduct and unfair contract terms.

Examples of behaviour that are repeatedly encountered by our Members include:

- Insurer's and / or their agents inappropriately steering customers to their preferred repairer network, circumventing choice of repairer policy obligations;
- Insurer's arbitrarily setting repair allowances and altering a repairer's cost estimate, placing pressure on repairers to adequately repair vehicles and return them to pre-accident condition;
- Insurer's using "funny time, funny money" to convert a repairer's estimate to their preferred estimation methodology, failing to consider a repairer's estimate in a fair and transparent manner;
- Insurer's using a "two quote model" to force a cash settlement or shift work to the insurer's preferred repairer network; and
- Insurer's requiring repairers to use non-authorised genuine parts, without consumer knowledge.

The 2017 *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 based on mutual respect and understanding. The Code is a voluntary national Code of Conduct that applies to all smash repairers and insurance companies that are signatories to it.

Whilst the Code proposes best industry practice, it has several fundamental failings:

- it is voluntary;
- there are no penalties for breaches of the Code (even where legislated) and needs to be addressed;
- the Code contains loose and undefined terms; and
- the dispute resolution process under the Code is expensive and non-binding on future behaviour.

The Code has attempted to address the conduct and behaviours outlined above, however, due to its voluntary nature, it is the MTA's view that it has manifestly failed in this intent, with the end victim being the consumer and small business market participants.

Accordingly, the MTA recommends that the Code be legislated in South Australia to ensure that the intentions reflected in the voluntary Code are made legally enforceable, with appropriate penalties for non-compliance.

The MTA views the Inquiry as the first major step towards creating a fair and functional relationship between insurers and collision repairers, whilst appropriately protecting consumers.

4. Background

The MTA is of the view that central to the committee's considerations during the Inquiry will be the operation, and effectiveness, of the Motor Vehicle Insurance and Repair Industry Code of Conduct (the Code) in governing the motor vehicle repairer and insurer relationship between car insurers motor body repairers and consumers as policyholders, and to report on how the breakdown of the relationship is impacting South Australian Small businesses and consumers for recommendations necessary to protect consumer interests.

The Code is a voluntary Code of Conduct that proposes the best industry practice of both insurers and collision repairers. The Code is a culmination of several Government reviews that examined the relationship that exists between the smash repair industry and the insurance industry. In particular, the Australian Government Productivity Commission's inquiry into the relationship between the Australian motor vehicle smash repair industry and the motor vehicle insurance industry. The Commission's Final Report on *Smash Repair and Insurance* was issued on 17 March 2005 (the Report)[1].

The Report called for the establishment of a voluntary Code of Conduct to model best practice conduct between repairers and insurers. The terms of the Code were established and agreed to by a Government taskforce that included key motor vehicle insurers and smash repair industry representative

[1] Productivity Commission Inquiry Report: Smash Repair and Insurance

bodies. The Code was officially launched on 29 June 2006, and legislated in New South Wales.

Relevant to the Inquiry, in 2017, dispute resolution mechanism existed, but was not robust to deal with the issue of potential code breaches and was enhanced through increased mediation options and the introduction of determination as a further cost effective dispute mechanism before potential legal avenues.

5. Current Position

The MTA is of the view that it is critical that there exists a transparent, informed, effective and cooperative relationship between smash repairers and insurance companies. The mandating of the Code in South Australia, including an enforceable mediation process, will greatly assist in achieving this outcome. An effective solution is identification of the break points or areas impacting an effective and consumer / small business / insurer relationship that removes these and provides enhanced mechanisms to ensure small business competitiveness and consumer rights including the jurisdictional mandating of the Code.

The current voluntary Code has been a useful tool to improve the visibility of insurer conduct, however, with loosely defined and interpreted Terms of Reference and no enforcement or penalties for breaches, the Code can be difficult, if not impossible, to enforce.

The MTA is of the view that the Code needs to be mandated, to stabilise competition in the marketplace. The parliamentary committee is asked to consider the following submission and recommendations so as to properly govern the conduct of both insurers and collision repairers.

Additionally, the MTA is of the view that the Code is not without its limitations and flaws. There will need to be a review of the conditions provided for in the Code to ensure it remains relevant to both the needs of industry and insurers and provides surety for consumers in relation to the correct repair of their vehicles.

The MTA submission will show that insurers must be held accountable for enforcing unfair terms and conditions and arbitrarily changing estimates. The MTA is of the view that the Code cannot be mandated without the ability to have matters referred to and mediated by an independent or regulatory authority.

Currently in South Australia, the Resolution Institute and the Small Business Commissioner are approved mediation providers under the Code. The MTA is of the view that under a mandated Code, the Small Business Commissioner should be the authority to which disputes are referred to for determination. The MTA is of the view that the powers of the Small Business Commissioner under the Code should allow for the Commissioner to compel parties in dispute to provide materials relevant to the complaint, to attend compulsory

mediation, and be increased to provide binding determinations to resolve industry disputes and lasting lessons for industry.

While the Australian Financial Complaints Authority (AFCA) is able to consider consumer complaints regarding their treatment by an insurer, AFCA is unable to determine upon complaints by a repairer against an insurer, on the basis that there is no contract between the insurer and repairer. Whereas, the Small Business Commissioner has the power to deal with disputes that involve a business (the repairer) that believes it has been treated unfairly in their commercial dealings with another business (the insurer) in the marketplace.

Ultimately, it is the MTA's desire that the Code operates in a way that ensures consumers are treated fairly, and are receiving the level of insurance coverage and choice they were told they would receive at the time of agreeing to and paying for their policy, and as outlined in their Product Disclosure Statement (PDS). Ancillary to this, there should be penalties for those insurers and businesses that do the wrong thing by their customers.

It is the MTA's strong concern that the interface between the motor vehicle insurance and repair industries is, on occasions, creating circumstances that fall below community expectations and taking advantage of vulnerable and disadvantaged consumers. Change is urgently required to ensure fairness and transparency for all.

6. Examples of Insurer Behaviour

As discussed above, the current voluntary Code is the only mechanism governing the business operations and behaviour of automotive insurers and repair businesses, including dispute resolution. However, as this is a voluntary Code, it is the MTA's experience that insurers sometimes dismiss the principles outlined in the Code and dispute repair estimation costs, unfairly cash settle, delay vehicle assessments, and have a conflict of interest in determining the best outcomes for consumers in delivering their service obligations to policy holders.

The MTA views such insurance company behaviour as unfair and anti-competitive, compromising the integrity of market competition to the detriment of consumers and business. Such behaviour results in the lowering of workmanship quality, safety concerns and deception which previous Inquiries have warned can result in consumer detriment and lessening of competition in the market place.

The next pages identify two examples of insurance company behaviour regularly encountered by MTA Members.

EXAMPLE 1: ARBITRARILY CHANGING REPAIRER ESTIMATES

Following a motor vehicle accident, a Customer approaches a Collision Repairer for a professional opinion on how to fix their vehicle.

The Repairer produces an estimate to repair the vehicle and, due to the volume of work repairers do for insurers, the Repairer submits the estimate of the cost to repair the Customer's vehicle directly to the Insurer, rather than giving it to the customer to lodge with their claim.

The Insurer then conducts their own assessment of the vehicle, often from their Head Office location, utilising photos of the damage to determine their allowances for the necessary repair. The Insurer may also physically inspect the vehicle.

The Insurer then decides whether they believe the costs outlined in the Repairer's cost estimate meet their approval. It is common practice for the Insurer's assessor to adjust the Repairer's estimate. If the Repairer's estimate does not meet the Insurer's cost benchmarks the assessor highlights changes to the Repairer's estimate based on their own methodology and sends it back to the Repairer stating the authorised 'allowances'.

The Code states that if an Insurer adjusts a Repairer's estimate, they must not make any unreasonable or arbitrary adjustments (Section 6.3 of the Code). They can direct the Repairer to change the methods or parts on how the vehicle should be repaired, as long as they put those instructions in writing (Section 7.4 of the Code) and accept liability if any claims arise as a result of following those instructions (Section 7.5 of the Code).

It is the MTA's experience that the affected repairers don't consider the Insurer's 'allowances' realistic or appropriate to cover all obvious damage to achieve the necessary repairs in order to return the vehicle to pre-accident condition and not suffer a loss in resale value.

EXAMPLE 2: STEERING

The MTA is aware of numerous examples of 'steering' behaviour by insurance companies. Complaints include coercion, bullying, intimidation, harassing, and taking advantage of vulnerable or disadvantaged consumers in to not using their chosen Repairer, even when there is a 'freedom of choice' provision in their policy.

'Steering' can be done in many ways, including:

- the offer of incentives to Insurer call centre staff to direct Customers to a particular repairer;
- advising the Customer they will be provided with a taxi or hire car for using an Insurer's preferred repairer, in circumstances where the Customer's policy covers them for this service regardless of repairer;
- completion of the assessment faster by using a preferred repairer (as the insurance company can deliberately slow the process by taking an extended time to have their assessor assess the claim or by delaying the approval of the claim); or
- the Insurer stating they won't guarantee the repair undertaken by the Customer's chosen Repairer, in circumstances where the Customer's policy guarantees the repair in any event.

The MTA is also aware of Insurers making incorrect and disparaging remarks about a Customer's choice of Repairer to try and persuade them to use the insurer's preferred repairer.

This behaviour, which is in breach of the principles of the Code and Australian consumer law, has resulted in a significant amount of lost work for many collision repairers, whilst also placing the Insurer's preferred repairer under a great deal of pressure to undertake the repairs for the lowest cost price. Additionally, this behaviour puts pressure on the repair industry as a whole.

Provision of evidence based materials to the Inquiry by the MTA

The MTA has an extensive collection of primary source evidence of arbitrarily adjusted repair estimates, formal repairer and customer complaints in respect of insurer behaviour, and pro forma correspondence from insurers summarily dismissing issues raised by repairers under the Code.

The MTA would welcome the opportunity to provide any evidence in this regard to the Inquiry that may be considered useful by the Committee in its investigations, deliberations, and anticipated recommendations, regarding the establishment of legislation to protect consumer interest. As a starting point, select evidence has been provided in Appendices to this submission.

APPENDIX A provides three examples of repair estimates prepared by repairers, based upon their experience and expertise to estimate the necessary repairs. Each of the estimates also include the assessment by the insurer, or the insurer's representative (the assessor), and demonstrates to the Committee insurer behaviour described above. That is, on the basis that the estimate doesn't meet the insurer's benchmarks, the assessors have adjusted them, "marked them down" to meet the insurers 'allowances'.

The insurer does this, notwithstanding:

- the provisions of the customer's policy of insurance that gives them an entitlement to choose their own repairer; and
- clause 6.3 of the Code which provides that the *"Insurer may not unreasonably or arbitrarily alter the Repairer's estimate…"*

The MTA requests that the Committee note and investigate this insurer behaviour with regards to rates, parts, times, and inclusions/exclusions during the Inquiry.

7. Response to Term of Reference 1

Whether insurers and repairers respectively authorise and carry out repairs with the objective of restoring safety, structural integrity, presentation and utility of the vehicle, complying with relevant Australian law and fulfilling their obligations to the policy holder.

This Term of Reference relates directly to Example 1 outlined above.

Following a motor vehicle accident, typically, an insurance policy holder, will either call their insurance company to arrange the repair of their vehicle, or take their vehicle to a crash repairer for repair. If not for the insurance claim, the repairer and the customer would typically agree on the recommendations for repairing the car. However, in the case of an insurance claim, the repairer will send their estimate to the insurer on behalf of the customer. An insurance assessor will be appointed to the claim.

The customer expects that the insurer will work with the repairer to act in 'utmost good faith' to complete the repair, so that they can get their vehicle back on the road as quickly as possible and with a minimum of inconvenience. The intention of the Code is to embrace current legislation that expects the insurer to act in utmost good faith under section 13 of the *Insurance Contracts Act 1984*.

Section 4.1 and 4.2 of the Code describes the expectations of insurer and repairer relations. These are:

4. INSURER AND REPAIRER RELATIONS

4.1 Repairers:

(a) will provide estimates and carry out repairs that are in accordance with:

(i) the documented manufacturer's technical specifications including those supplied by other Industry recognised authorities; or

(ii) any lawful mandatory specifications and/or standards; or

(iii) methods that are consistent with standard Motor Vehicle warranty conditions; or

(iv) current Industry practice; while having regard to the age and condition of the Motor Vehicle.

(b) will in their dealings with Insurers in relation to Repairs:

(i) prepare estimates that provide for an appropriate scope of Repairs, ensuring 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 and/or its agent;

(ii) not dismantle a Motor Vehicle for the purpose of preparing an estimate or report unless requested or authorised to do so by the Insurer; and

(iii) not hinder or prevent the Insurer or Claimant from seeking to obtain an alternative estimate.

(c) may take clear digital images of the vehicle and all damage on the vehicle estimated in accordance with any CAC prescribed guidelines. The CAC may develop guidelines associated with the taking, submission, storage, data security and supply of digital images.

(d) will not commence any insurance Repair without having the relevant Insurer's agreement and authorisation to proceed, excluding emergency repairs subject to a customer's PDS.

4.2 Insurers will:

(a) not require Repairers to provide estimates, or carry out repairs that are not in accordance with:

(i) the documented manufacturer's technical specifications including those supplied by other Industry recognised authorities; or

(ii) any lawful mandatory specifications and/or standards; or

(iii) methods that are consistent with standard Motor Vehicle warranty conditions; or

(iv) current Industry practice; while having regard to the age and condition of the Motor Vehicle.

(b) in their dealings with Repairers in relation to Repair work:

(i) provide Repairers with relevant details relating to the insurance claim that the Repairer reasonably requires in order to prepare an estimate or undertake the Repair, including their Parts Policy, details of Sub-let Repairs and payments by Customer including any excess or contribution charges;

(ii) consider estimates in a fair and transparent manner, and will not refuse to consider an estimate on unreasonable or capricious grounds;

(iii) pay the agreed amount for all work completed, that has been authorised or requested by the Insurer;

(iv) not remove a Motor Vehicle from a Repairer's premises without notifying the Repairer in advance and in writing, and compensating the Repairer for any legitimate or reasonable towing or storage costs associated with the Motor Vehicle and in compliance with relevant law; and

(v) not knowingly ask Claimants to drive unsafe or unroadworthy Motor Vehicles.

(c) in non-Event periods, consider estimates and commence assessor communication with the Repairer within:

· for the period commencing 1 July 2017, an average of five (5) working days per repairer from the system receipt of the repairer's estimate subject to 4.2(d) and the reasonable availability of the vehicle and /or the customer's availability.

(d) If the time period in clause 4.2(c) cannot be achieved for an estimate/s due to vehicle location, repair complexity, periods of high volume or staffing shortages, the repairer must be notified of the delay and the reason for the delay, and a new assessing timeframe agreed.

In practice, the MTA has observed that the following issues and areas of concern arise when a repairer is trying to serve their customer's basic need to have repairs carried out under guarantees provided by Australian Consumer Law, ensuring repairs are completed with due care and skill to restore the safety, structural integrity, presentation and utility of their vehicle.

The concerns that usually arise that compromise completing these objectives are:

- incomplete assessment;
- arbitrarily setting repair allowances;
- applying "funny time, funny money";
- cash settling claims; and
- using non authorised genuine parts,

often without the customer's knowledge or consent. (Refer to APPENDIX A, Example A-2.)

Precedent set by Australian Financial Complaints Authority

On 1 July 2019, the Australian Financial Complaints Authority (AFCA) considered a matter that related directly to a combination of these issues listed above (refer Case number: 620915), and determined that the insurer hadn't fulfilled its obligations to the policy holder[2]. The South Australian government must recognise further recommendations such as those proposed by the MTA to enhance legislative provisions to provide adequate consumer protections.

The AFCA determination included a 'choice of repairer' benefit. The complainant provided her insurer with a quote from her chosen repairer in the amount of $5,654.40. The insurer stated that the quote was excessive and unreasonable, and obtained a quote from another repairer in the amount of $2,430.31. The insurer sought to cash settle the customer on the lesser amount.

In this case AFCA determined that the insurer had not fulfilled its obligations under the policy. AFCA found that the effect of the 'choice of repairer' benefit is that the complainant is entitled to have her car repaired by her chosen repairer, and the insurer is liable for the reasonable costs charged by that repairer.

AFCA's determination sets a strong precedent for the requirement for insurers to settle a claim in accordance with a chosen repairer's reasonably quoted costs, and supports the MTA's and repairers' long held views in this area.

Sadly, however, it is the repair industry's experience that insurers view such determinations as isolated outcomes, and will continue to force the tactics outlined above upon consumers unaware of their rights and where repairers are fearful of 'pushing back' for fear of reprisals and loss of future work. The MTA is aware of many threats made to repairers and examples of stand over tactics as a result of raising their complaints about the nature of this activity, and has urged Members to use the opportunity that the Inquiry presents and provide their own submission in this regard.

One common example is the threat to repairers that if they put in an IDR they will never see another <insurer> job again.

The current impact and concerns regarding the Insurance Industry's practices, with regard to repairers and consumers, will now be considered below. These concerns highlight the need for a mandated, legally binding, Code of Conduct.

[2] AFCA Determination, Case number: 620915

Current industry practices that fail to fulfil an insurer's obligations to a policy holder

1. Incomplete assessment

The establishment of preferred repairer networks has not only created the ability to steer customers to preferred repairers but created the opportunity for certain repairers to 'low-ball' estimates and appear to lower the cost of repairs for comparison purposes against the wider industry.

Section 6.1(b) of the Code of Conduct requires repairers to provide estimates that are comprehensive, complete and inclusive of all obvious damage. However, the practice of 'low balling', as recognised by the Parliament of New South Wales' STAYSAFE committee[3], fails to adhere to this requirement.

'Low-balling' occurs when a smash repairer submits an incomplete quote to win work with the intention of submitting a variation on the quote during the course of repairs. In these situations a repairer provides a supplementary estimate, 'supps', in addition to the first claim.

This is evidence of the claim that low-balling by the second competitive estimate allows the insurer to make life difficult if the customer has chosen their own repairer versus following the insurer's instructions to take it to their preferred repairer. Furthermore, the low-balling by a second competitive estimate is the opportunity to demonstrate to the customer that their chosen repairer's estimate is excessive, and push the position that it will be much easier for the insured if they follow their insurer's advice.

2. Insurer's arbitrarily setting repair allowances

The MTA has serious concerns surrounding the ability of crash repairers to adequately repair vehicles given the pressures routinely placed on them by insurers.

Of most concern, as previously stated, is the insurer arbitrarily setting repair allowances that the repairer does not consider realistic to achieve the necessary repairs to return a car to pre-accident condition and not suffer a loss in resale value or vehicle integrity.

Another concern is that the customer is unaware of the impact of the arbitrary assessment and doesn't want to increase the time it takes to get them back on the road. Therefore, they don't challenge their insurer. Additionally, if the consumer does choose to complain, the general insurance code of practice doesn't provide timely resolution time frames for complaints of this nature.

The MTA is aware that there is a price point created by insurers called 'average repair cost' which the insurers operate through their preferred

[3] Parliament of NSW STAYSAFE Committee Report

repairer network to drive down the average cost of repairs depending on how much pressure they can apply to the market at any given time. The MTA understands that insurer's monitor their repairer network to ensure their partnered repairers stay within the control lines. This 'average repair cost' model is the basis of the insurer's allowances and the foundation of their business agreement.

Average Repair Cost Monthly Tracking Sheet

REPAIRER NAME:
REPAIRER TARGET COST (ex GST): **$1,800**

CURRENT COST RESULT (ex GST): **$3,161**

#	PARTNER REPAIRER INPUT			CALCULATION		
	Claim Number	Date Submitted	Final Invoice Amount (Ex GST	Cumulative Amount	Average Cost	Variance to Target
1			$1,708	$1,708	$1,708	-$92
2			$1,586	$3,294	$1,647	-$153
3			$1,318	$4,612	$1,537	-$263
4			$1,649	$6,261	$1,565	-$235
5			$6,327	$12,588	$2,518	$718
6			$5,289	$17,877	$2,980	$1,180
7			$6,242	$24,119	$3,446	$1,646
8			$1,202	$25,321	$3,165	$1,365
9			$4,060	$29,381	$3,265	$1,465
10			$3,173	$32,554	$3,255	$1,455
11			$6,431	$38,985	$3,544	$1,744
12			$4,136	$43,121	$3,593	$1,793
13			$2,117	$45,238	$3,480	$1,680
14			$467	$45,705	$3,265	$1,465
15			$4,923	$50,628	$3,375	$1,575
16			$3,820	$54,448	$3,403	$1,603
17			$1,959	$56,407	$3,318	$1,518
18			$770	$57,177	$3,177	$1,377
19			$2,192	$59,369	$3,125	$1,325
20			$4,845	$64,214	$3,211	$1,411
21			$1,943	$66,157	$3,150	$1,350
22			$2,344	$68,501	$3,114	$1,314
23			$2,731	$71,232	$3,097	$1,297
24			$4,871	$76,103	$3,171	$1,371
25			$2,929	$79,032	$3,161	$1,361
26						

The MTA asks that the Inquiry establish whether it is reasonable to apply the same model that is used within the confines of the preferred repairer cohort over all repairs across the industry? The cost pressures derived by the lowest repair cost benchmarked by the insurer leads to pressure on the whole industry to meet the same price point as the insurers dictate for their preferred repairer network.

As outlined in Example 1, following the submission of a repairer's estimate, the insurer may physically inspect the car or assess photos sent by the repairer (Concerns regarding the use of photos for assessment purposes will be considered later in the submission).

The insurer will provide an assessment of cost to repair, but often a dispute arises because the repairer claims the insurer or assessor hasn't even considered the repairer's estimate. MTA raises another concern in relation to this issue under the Second Term of Reference.

The repairer claims the insurer is not considering their estimate because the insurer has already established their 'allowances', and labels the customer's choice of repairer as "uncompetitive" or "too expensive".

It is not uncommon for the insurer to produce their own estimate based upon the insurer's *'preferred estimation methodology'*, and make an assessment based on photos (Section 6.2(a) of the Code). Insurers also translate the repairer's estimate to their methodology and mark down the repairer's estimate to reflect their allowances based upon their average repair cost model, utilised through their preferred repairer network.

An example of an insurer generated estimate is provided in APPENDIX B. In this case items were deducted from the estimate without any communication with the repairer, until a dispute was lodged. It should also be noted that the quote was generated by the insurer using data (photos) that were supplied electronically, rather than viewing the damage in person.

Whilst previous Inquiries have determined that preferred networks may provide advantages for consumers and competition in the market place, the benefit of time and collected evidence now demonstrates that preferred networks have been misused to have the effect, or likely effect, of limiting competition in the marketplace which is detrimental to consumers, and the community as a whole (as discussed in Term of Reference Four).

There is absolutely no doubt that there are repairs being carried out, that as a result of the low average cost of repairs enforced by insurance companies, are below standard and certainly do not meet the expectations of consumers. Repairers are, in general, doing their best to complete quality repairs for consumers but the downward pressure by insurers to reduce the average cost of repair has the unwelcome consequence of, generally, short cutting the repair process.

It should also be noted that, if the repairer can achieve a repair within the assessor's allowances then the repair authorisation, repair agreement and Code of Conduct (Section 7 of the Code) requires the repairer to be liable for any issues of workmanship, quality, timeliness, and guarantees.

The reality is that the average consumer would be hard pressed to be able to identify a substandard repair given that most of the work lies under the obvious outer layer of the repaired section which may not be visible to the uninformed consumer.

Additionally, repairers continue to report to the MTA their frustration at insurer's general refusal to pay for pre and post repair scans of a vehicle. Scanning the electronic system of a vehicle retrieves current and stored diagnostic trouble codes from the vehicle's electronic control units and modules.

For example, the MTA is aware that Insurance Australia Group (IAG) (which includes SGIC in South Australia) will only consider pre and post scanning subject to certain conditions. In particular, the insurer will only pay for a pre-scan if the vehicle manufacturer publishes a repair method (on Australian letterhead) that requires a pre-scan, or where IAG publish the vehicle details under the "Mandatory Vehicle Scan" list found on the NTAR (New Times and

Rates) website, related to the agreed method of repair. Currently there are only ten models of Holden vehicles on the list, with no other manufacturers vehicles listed. (See APPENDIX C, Examples C-1 and C-2.)

Furthermore, an MTA Member is currently dealing with a situation where the insurer, Allianz, has refused to pay for a scan at the completion of the repair to check for any error codes that may exist. The assessor refused to pay for the scan, advising that a scan would only be paid for if there were any warning lights on the dashboard post repair. The repairer has advised the MTA that due to the complexity of modern vehicles, even the simple act of replacing a headlamp can create error codes that cannot be seen on the dashboard. The only way to be sure that there are no problems is to connect a scan tool.

If a vehicle's computer has stored a fault code it is a necessary part of the repair process to fix it. However, this takes extra time, and insurers arbitrarily say they won't pay for it. In many circumstances this can result in a failure to restore the vehicle to pre-accident condition.

The MTA advises that many recognised industry training organisations including I-Car recommend following OEM procedures. I-Car provides training to industry under a license agreement with manufacturers to provide post qualification skills enhancement, education, training and information to the entire industry.

I-Car highlights the importance of these procedures in an article titled battery disconnect considerations[4] stating that many OEM's have special precautions that need to be taken even when disconnecting the battery.

Furthermore, Toyota states precautions from disconnecting a negative battery cable to re initialise safety and comfort features including lane departure, pre-collision, intelligent clearance sonar, parking assist and panoramic view monitor system using scan tool calibration.

The website oem1stop.com[5] lists Manufacturer Position Statements for popular Australian makes including Ford, Hyundai, Mazda, Jeep, Kia, Lexus, Toyota, Nissan, Subaru, Mercedes Benz, Honda, Volvo, Fiat, and more.

Unfortunately, these position statements are ignored by IAG because their policy states they will only pay for scans where the Australian Supplier provides a written permission statement.

APPENDIX D provides further information about the importance of pre and post repair scans.

If the insurance industry fails to understand that there needs to be a balance between shareholder returns and consumers paying for and receiving quality

[4] I-CAR Battery Disconnect Considerations

[5] oem1stop Position Statements

repairs from appropriately remunerated repairers, then the consumer will be the end victim, and will only find out years later when trading or returning their vehicle where a closer examination is more likely to point out the obvious faults or shortcomings of the repair.

The Code doesn't provide adequate protection for the repairer to insist that their estimate is utilised so as to meet the community standard expected, over the insurer's allowances to minimise costs.

3. The use of "funny time, funny money"

Repairers are increasingly trying to move towards the use of real time, real method (discussed below) and a realistic rate when quoting the cost to repair a vehicle. However, insurers continue to nominate their 'preferred estimation methodology' and convert the repairers estimate to their preferred program.

As a consequence of the repairers not using the insurer's methodology or accepting their rate, the insurer will mark the repairer's estimate using "funny time, funny money" (FTFM) to isolate fairness and transparency away from the repair objective. This potentially encourages fraud and misconduct, 'smoke and mirrors', and fails to deliver the expectation of the Code since its implementation and purpose to serve.

The term "Funny time, Funny Money" has been considered in many previous inquiries and industry investigations. In 1995, an Industry Commission report into the Vehicle and Recreational Marine Craft Repair and Insurance Industries[6], noted at page 68 that the term FTFM is a repairer name for times and rates used by insurance assessors that is totally unrealistic and defined as:

> *"...a time component of between two and three times the real repair time to compensate for the unrealistic hourly rate which, although never acknowledged by insurers, is generally accepted by their assessing staff in negotiations on the cost of repair although there is a large area in such a fiction for disputation."*

Many repairers contend that their remuneration is not sufficient to allow them to earn a satisfactory return on funds employed.

The MTA supports the use of recognised Original Equipment Manufacturer (OEM) repair procedures for repairing a vehicle on the basis that the manufacturer has a recommended times guides for removing and replacing their parts. Generally, there is no disagreement between insurers and repairers about the use of OEM methods. Additionally, repairers refer to the time guides provided by OEM's as 'Real Time'.

[6] INDUSTRY COMMISSION Report: Vehicle and Recreational Marine Craft Repair and Insurance Industries

However, in many cases there may not be methods and times for repair because the manufacturers record their methods for building the car, not repairing it from damage. In many cases there are no repair methods available and the consumer relies on the training, qualifications and experience of a repairer to provide an opinion on what is the best way to undertake that repair.

In providing an estimate of cost to repair, the MTA understands that repairers, and rightly so, provide a quote based on the 'real time' to repair collision damage. However, as a consequence of FTFM, insurers routinely ignore real time estimates and apply their allowances to determine the cost of repairs.

In considering the concept of 'real time', it is also necessary to consider the term 'real money'. Determinations made by the Small Business Commissioner's in Victoria[7] and New South Wales[8] have found that rates to undertake repairs in excess of $100 per hour were commercially reasonable. FTFM hourly rates are between $24 and $28 per hour. Additionally, insurer's preferred estimation methodologies provide so called 'real rates' between $54 and $85 per hour, which the industry considers further versions of FTFM and cannot change if they use the insurer's preferred methodology (these are discussed further below).

The widely applied FTFM concept has been given much consideration in previous inquiries and, in particular, by the Productivity Commission in the Report[9].

In 2005, the Productivity Commission concluded, at page 86, that in competitive markets, prices reflect both demand and supply conditions, and that supply, in turn, reflects cost of production (including some margin for profit), and thus, prices in such markets reflect costs. However, in the market for smash repairs, where a FTFM system is being used, prices (or allowances) fail to reflect true costs.

The Productivity Commission found that FTFM:

> "…*enhances the ability of insurers to use their negotiating strength to place downwards pressure on price irrespective of repairers' costs. As a system of ambit claim, it is subject to manipulation by both insurers and repairers, with the latter especially vulnerable."*

Furthermore, that:

> *"…serious negative transparency effects that detract from the commercial relations between insurers and repairers are apparent. This lack of transparency is also a problem for consumers and for other third parties including repairers that are not involved in FTFM,*

[7] Page 7 VIC Code Determination
[8] Page 101, point 211 NSW Code Determination
[9] Page 82 Productivity Commission Inquiry Report: Smash Repair and Insurance

competing insurers who eschew the system and government regulators."

The Productivity Commission also concluded, what the MTA knows in practice to be true, that in circumstances where allowances provided for by insurers on the basis of FTFM do not adequately reflect repair costs, repairers can be biased towards, for example, using replacement parts rather than panel beating (or vice versa), or cutting down on the quality of materials used. All ultimately at a cost to the consumer.

The insurer FTFM quoting system was also examined by the Parliament of New South Wales' STAYSAFE Committee[10] in 2005. The Committee finding at page 82 that:

"4.21 The 'funny time, funny money' quoting system is an inappropriate system, for a number of very important reasons:

- *it is very misleading, especially to anyone outside the motor vehicle smash repair industry or the motor vehicle insurance sector (e.g., smash repairers will use odd expressions such as 'a 15-minute hour');*
- *repairers will tend to use lower quality materials, such as lower-grade paint;*
- *it increases the ability of insurers to force prices down irrespective of repairers' costs;*
- *it does not reflect the particular costs faced by individual repairers; and*
- *the structure of the repair task is biased, as the system artificially inflates or deflates particular cost elements at the expense of others (Productivity Commission, 2005)."*

Despite these findings 14 years ago, FTFM remains widely used in South Australia. FTFM is preferred by insurers where the repairer doesn't agree to use the insurer's 'preferred estimation methodology' (code section 6.1) Insurers continue to arbitrarily assess the repairer's estimate to FTFM without valid justification for doing so.

The MTA is of the view that whilst the Code considers it reasonable for the insurer to assess the estimate in their own method, it is unreasonable to disregard the repairers estimate and rates altogether, and fails to consider the repairers estimate in a fair and transparent manner.

In this regard, the MTA notes AFCA's determination in the case outlined above. In that matter, the effect of the choice of repairer benefit was that the complainant could choose who repaired her vehicle, but that the insurer would determine how much it pays for the repairs. That is, the insurer's liability under the policy depends on the insurer's discretion.

[10] Parliament of NSW STAYSAFE Committee Report

Importantly, AFCA found that where a contract includes a term that depends on one party's discretion, it is an implied term of the contract that such discretion will be exercised reasonably and in good faith. AFCA found in that case that the insurer is liable for the reasonable costs charged by the chosen repairer.

Industry use of FTFM

One of the dominant insurers requires the repairer to use one estimating quoting platform to calculate repair costs, or submit their own estimate via that system. The Insurer sets the rate and intellectual property rights contained in a repairer's estimate. The platform converts the repairer's estimate to the insurer's preferred estimating methodology then sends the assessed estimate back to the repairer via the platform.

Another of the dominant insurers prefers to use another system which was developed by them following the development of the Code in 2006, setting the rate between $77 and $85 per hour. They also are limited by their capacity to determine real times from one research centre that only does select tests on up to 30 vehicles per year (discussed below).

The first insurers reliance on their platform sources OEM times from 54 research centres around the world, but limited to times that are provided by OEM's for the removal and replacement of undamaged parts (as described above), and with no provision for damage or age, or consideration of the environment in which the repairer needs to complete the work, such as the inclusion of a bull bar or accessories fitted to the vehicle.

It is the MTA's experience, that while repairers accept the time guides from OEM's as a guide only, insurers are inflexible to accept a repairer's rate in excess of their own 'preferred' rate or provide reasonable allowances for repair times.

The NSW Code determination brought this issue to the fore in determining that the insurer had breached the Code because they relied on their preferred system to assess the claim damage rather than the repairer's estimate because it wasn't prepared using the insurers preferred estimation methodology[11].

It is important to note that under close examination from the NSW determination that many OEMs have said they provide very little in terms of actual repair times. In other cases the times are times taken to manufacture and fit – not necessarily the repair time. MTA's understanding is in some cases this is work undertaken by these research centres at the behest of car insurers. Central to this is that everyone would agree that every repair is different just as every accident is different generating different damage and repair profiles. While the systems are useful tools they cannot be at the expense of the real time assessment of each repair.

[11] Page 101, point 211 NSW Code Determination

As mentioned, the second Insurers system is based on times guides derived from one facility in New South Wales. Repairers have advised the MTA that while the rate used by one insurer is higher than other insurers (between $77 and $85 per hour), repairers claim their time guides are still far from accurate, incomplete and creating the same result as FTFM.

This system is also very limited in the breadth of variants of vehicle makes and models and scope of repairs on which time guides have been created. As a consequence many vehicle makes, models and variants are not accurately represented in their times guide.

The committee should also observe any movement by insurers to adopt similar pricing, methodology and policy going forward to ensure the very terms of reference this committee is investigating remains competitive and independent of each other.

4. Insurers cash settling claims

The MTA observes 'cash settling' as another option for the insurer to isolate the customer's preferred repairer from competing fairly in the market. The use of market power to threaten cash settlements, or shift work from repairers, is a powerful tool used to control repairers who are totally dependent on insurers as well as question the customer's certainty about insisting on their own repairer.

In 2014, the Legislative Assembly of New South Wales' Select Committee on the Motor Vehicle Repair Industry[12] found (finding 6.30) that, *inter alia*, cash settlements are being used by the insurance industry as a disincentive to use a non-preferred repairer.

The NSW Select Committee noted, at page 56, that insurers regularly use a 'two quote model' to force a cash settlement. That is, while insurers' policies are said to offer a choice of repairer, if an insured's nominated repairer quotes at a price an insurer does not agree is competitive, the insurer can require a second quote from a repairer that the insurer chooses to determine "reasonable cost". If a customer insists on his/her choice of repairer, the insurer will cash settle the claim by providing the customer with that "reasonable cost". It is the MTA's view that this is regularly occurring in South Australia.

The MTA has long held the view that provisions inserted in insurance policies that allow this behaviour to occur are "unfair" as defined by section 24 of the *Competition and Consumer Act 2010*, as it results in a significant imbalance in the parties' rights and obligations.

With regard to the issue of cash settling and the use of a two quote system, the MTA draws your attention to the determination in the AFCA matter

[12] Legislative Assembly of NSW Select Committee on the Motor Vehicle Repair Industry

considered above. The Authority found that the existence of two quotes does not prove that the higher quote is unreasonable. Furthermore, that where there is no evidence that the higher quote from an insured's preferred repairer is unreasonable, the insurer is required to settle the claim in accordance with that quote.

5. Requirement to use non authorised genuine parts

The Parliament of New South Wales' STAYSAFE Committee recommended (Recommendation 29) that insurers be required to inform policy holders when recycled (second hand) or non-genuine parts are to be used in the repair of a damaged motor vehicle.

It is the MTA's experience that consumers are being misled, or simply not informed, by insurers regarding the parts used to repair their vehicle to pre-accident condition.

The MTA has an example of a repairer's quote that has been adjusted by an assessor to use non-genuine parts. Whilst the provisions of the policy allow for use of non-genuine parts the customer is not informed by the insurer those parts are being used. In this example the insurer calls them genuine parts, but they are not. They are not sourced from Authorised OEM suppliers, rather they are sourced from an independent supplier.

In this example the customer was steered to a preferred repairer and told their choice of repairer was too expensive.

In 2014, the Legislative Assembly of NSW Select Committee on the Motor Vehicle Repair Industry[13], at page 40, considered that only genuine parts should be used for vehicles that are under manufacturer's warranty as it is recognised that the use of non-genuine parts invariably void manufacturer's warranty.

The Committee was of the view that consumers should be notified by their insurer when a non-genuine part is used on their vehicle, if the vehicle is under a manufacturer's warranty as this would be considered a change in the contract agreed to by the respective parties. The Committee considered that it is the role of the assessor to ensure that the non-genuine part is fit for purpose and complies with Australian Standards.

There is no evidence that the Committee's concern with regard to consumers being notified about use of parts other than those recommended by the repairers has been implemented by insurers, to ensure transparency and fairness in meeting community expectations.

[13] Legislative Assembly of NSW Select Committee on the Motor Vehicle Repair Industry

Potential Misconduct

It is the MTAA's view along with other state and territory associations and AMBRA that behaviours and conduct in these areas could amount to misconduct in that it is contrary to the law, as well as community expectations, manifested in the prohibition, in the Australian Consumer Law and the *Australian Securities and* Commission Act 2001 (ASIC Act), on:

- conduct that is misleading and deceptive;
- unconscionable conduct;
- unfair contract terms;
- the duty of parties to an insurance policy to act with 'the utmost good faith' implied by the Insurance Contracts Act; and
- the Code of Conduct.

The MTA agrees with the MTAA view that the actions and behaviours has caused, and continues to cause, detriment to smash repairers and policyholders and the industry at large.

Whilst the Code has attempted to address the conduct and behaviours outlined above, its voluntary nature has resulted in it manifestly failing in this intent.

8. Response to Term of Reference 2

The 2017 Motor Vehicle Insurance and Repair Industry Code of Conduct (the Code), its governance structure, the application of the Code's dispute resolution process, in particular the overall effectiveness of the dispute resolution mechanisms in regulating the relationship between collision repairers and insurers and in protecting consumer interests.

It is the MTA's position that the voluntary nature of the Code makes the effectiveness of its dispute resolution process doubtful.

The MTA is of the firm view that the Code should be mandated to ensure that the intentions reflected in the voluntary Code are made legally enforceable. This approach has already occurred in New South Wales where the Code was enshrined in legislation in 2006 and updated in May 2017.

The MTA recognises that the current Code is not without its limitations and flaws, and there will need to be a review of the provisions of the Code to ensure that what is ultimately legislated meets the needs of both the repair and insurance industries, but also providing surety for consumers in relation to the expectations required by other relevant legislation, such as Australian Consumer Law, Insurance Contracts Act, General Insurance Code of Practice and the Acts Interpretation Act to essentially underpin the definitions of common terminology.

The legislation should also ultimately provide for a binding mediation process, overseen by the same independent authority in each case. The Small Business Commissioner would be the most appropriate authority to have alleged breaches of the Code referred to for review and determination.

Presently, the MTA is aware that repairers have attempted to resolve disputes on many occasions using the internal dispute resolution procedure (IDR) provided for by the Code (Clause 11.2). However, there exists a conflict of interest in that the insurer is the entity that decides whether or not they have breached the Code.

Repairers routinely advise the MTA that insurers are flatly refusing to accept that they have breached the Code in any circumstances. Repairers who raise a dispute receive arbitrary, template style responses, denying any breach of the Code.

Repairers have advised the MTA that they consider lodging disputes a waste of time, and it is their view that the Code has “no teeth” because the insurer is the “judge, jury and executioner” and serves no benefit in providing prompt response to protect the consumer’s interest.

Insurers are aware that repairers/small businesses don’t have time to spend hours in mediation to invariably achieve the same result they’ve already got. Both parties can walk away having achieved nothing but a small dent in the bigger company’s time and resources and a large hole in the small businesses time and resources for a non-binding decision.

MTA’s across Australia have recorded in the vicinity of 800 IDR’s from different jurisdictions. MTA South Australia has up to 100 unique IDR’s and at different stages tried lodging additional IDR’s to address IDR’s not responded to or ignored. What we have learnt from these IDR’s is that the main areas of complaint are around ‘steering’ (explained below) and repairer estimates being adjusted.

In circumstances where repairers do ultimately seek an independent review of an alleged breach of the Code, the difficulty often arises that the determination provider assigned by the Resolution Institute may not have an adequate level of understanding of the issues to adequately determine on the case.

For example, as previously mentioned, in a South Australian Determination the Resolution Institute appointed a determination provider who lacked understanding of the Code. In the MTA’s view, the determination provider subsequently failed to address the repairer’s complaint in his decision finding the insurer had not breached the Code. Yet, he noted in the last paragraph of his decision that the insurer should have communicated with the repairer when the repairer submitted their estimate.

In particular, the repairer’s complaint was that the insurer failed to consider their estimate in accordance with section 4.2 of the Code, or refused to

consider the estimate on unreasonable grounds. In which case the repairer lodged their dispute and relied on the Code dispute resolution process to acknowledge that section of the Code and their complaint.

The determination provider notes that where the customer has a preferred repairer the insurer should have communicated more directly with the repairer, and is not merely a dispute about the differences in the cost of repair between the insurer's preferred repairer and the customer's repairer, but relates to communications between the insurer and the repairer to ensure that the vehicle is properly repaired.

Ultimately, most small businesses simply don't have the time or resources to seek a determination in relation to a small job. The costs of seeking legal opinion and support on their dispute frequently far exceed the dispute value. Most small businesses consider that wasting time and money on legal disputes is spending far too much time and energy on negative priorities.

The MTA is also aware that insurers are treating the determination findings, such as that recently provided by AFCA and considered above, with lip service and describing them as "isolated outcomes". This means that outcomes from the determination are not translating to lessons for industry; the insurers treat them in isolation because no penalties exist to enforce the Code provisions.

This is evidenced by the way insurer's continue to treat repairer's estimates after the New South Wales determination, highlighting insurers' reliance on their preferred estimation methodology and the Victorian determination highlighting the insurers' arbitrary allowances for rates.

The Code Administration Committee that oversees the effectiveness of the Code is currently experiencing blockages and stalling because of these determinations and disagreement between representatives over putting customer interests first. Naturally, you would expect a Committee comprising of three representatives from industry and three from insurers to have competing interests in facilitating what's best for the consumer in the administration of the Code. The lack of regulatory framework and penalties to guide the Code in its objective to uphold other relevant legislation is the cause of the Code's ability to govern effectively.

Attached in APPENDIX E are a number of IDR examples, with responses from insurers.

Commonly, the IDR's most unresolvable disputes relate to the concerns outlined above[14], including incomplete assessment, arbitrarily setting repair allowance, applying FTFM, cash settling claims, using non authorised genuine parts, and concerns about consumer choice. Unfortunately, the majority of disputes fall outside of a contractual arrangement with the repairer, leaving

[14] Concerns noted on Page 12

the code of conduct in-effective in providing adequate dispute resolution for repairers.

It should also be noted in these examples that than an imbalance of power is created where the insurer makes a determination of whether or not they have breached the code. This is evidence of the urgent need to provide the South Australian Small Business Commissioner with stronger powers in the determination of dispute resolution matters.

It is the MTA's hope that the Committee will, in light of the objectives of this Inquiry, take action on these long standing industry issues (explained above and supported by the evidence in the appendices), to strengthen the Code in South Australia.

At a minimum, the Code should be strengthened to protect consumers and to prevent businesses from falling short on providing the necessary repair to ensure consumers vehicles are restored to pre-accident condition and suffer no loss in resale value.

9. Response to Term of Reference 3

Consumer choice, consumer protection and consumer knowledge in respect of contracts and repairs under insurance policies in general, but with particular regard to choice of repairer, cash settlements, transparency and fairness in assessment of non-partnered repairer estimates and the efficacy and safety of web-based assessments.

It is the MTA's experience that ultimately consumers have little control over where their vehicle is taken following a motor vehicle accident. Despite having insurance cover that provides for a choice of repairer, their vehicle will often end up with a repairer chosen by their insurer, thus removing any ability for the consumer to receive their entitlements under the provisions of their policy.

It is the MTA's view that the major insurance providers are using their market dominance to direct consumers to their own repair networks and in doing so are limiting consumer choice as to how a vehicle is repaired and by whom.

Furthermore, as discussed above, insurers are imposing their preferred estimation methodology on independent repairers forcing them to meet the expectations of a preferred repairer. Many independent repairers are unable to operate under these conditions and are being forced from the market, thus further reducing choice.

As discussed above, it is also not uncommon for insurers to "encourage" consumers to accept cash settlements that are below an independent repairer's quote, but in line with the partnered repairer's quote, to repair their vehicle. The MTA considers this a predatory practice which is unscrupulous, unethical and acts to the detriment of both consumers and non-preferred

repairers. Importantly, such behaviour was found by AFCA to be contrary to the insurer's obligations under the policy under consideration in that matter.

The MTA is aware that it is current practice for an insurer to inform the repairer that they need to "negotiate" or that the insurer will move the car (considered below) to another repairer of the insurer's choice. The repairer has to consider either accepting the assessment or competing for the job based on a 'low-ball' quote in favour of the preferred repairer. In some cases, the competitive estimate is prepared by the insurer in determining their allowances.

An MTA Member recently lodged a complaint with AFCA in respect of this behaviour by insurers. Unfortunately, we have been advised that AFCA can't resolve these disputes for repairers on the basis that there is no legal relationship between the repairer and insurer. AFCA can only investigate this behaviour if a customer (who has a contractual relationship with the insurer) lodges a complaint via the internal dispute resolution process, and subsequently progresses the matter to AFCA for determination (as occurred in the AFCA matter outlined above).

In the context of the objective of this term of reference, the repairer and the insurer have no agreement other that the insurer's 'Repair Authority' which sets out the terms and conditions on which the repairer may be authorised to repair the customer's vehicle.

The legal relationship between consumers, repairers and insurers was examined by the Western Australian Economics and Industry Standing Committee's Inquiry into the Smash Repair Industry [15], but is largely misunderstood by industry. In view of the large volume of repairs by the industry, it has become common practice for the repairer to deal with the insurer about allowances not the customer.

The customer has the expectation via one agreement with the repairer to undertake the repairs necessary to restore the integrity, presentation and utility of the vehicle to pre-accident condition and not suffer any loss as a result of the accident. They also have a separate agreement (and expectation) with the insurer as to the extent of coverage offered by their policy on which they chose that insurer to cover the loss as a result of any accidents.

Often the customer relies on their repairer (whom they've chosen for their own reasons) and their insurer (whom the customer expects would act in 'utmost good faith') to work together to have the car repaired so they can get their car back on the road quickly and with minimum inconvenience. The customer may be vulnerable and disadvantaged by not having a car to go to work or cause significant disruption to their usual activities.

[15] Figure 2.1 page 18 WA Economics and Industry Standing Committee Smash Repair Industry Report

If the insurer and repairer can't come to agreement on the insurer's allowances to repair the vehicle, the MTA is aware of a number of tactics, some which have already been considered above, which are used by the insurer to meet their financial objectives and minimise costs. These include:

- Steering
- Second "competitive" estimates
- Move the car
- Funny time, funny money

The use, and impact, of second "competitive" estimates and funny time, funny money, have already been considered above. The MTA provides the following comments with regard to steering and move the car tactics:

Steering

The MTA has been provided with numerous examples of 'steering' behaviour by insurance companies where the insurer effectively coerces, bullies, intimidates, or harasses a vulnerable or disadvantaged consumer not to use their chosen repairer even when there is a 'freedom of choice' provision in their policy.

This can be done in many ways including the offer of incentives to call centre staff to steer policy holders to preferred repairers, or the offer of a taxi or hire car for using an insurer's preferred repairer, often in circumstances where the insured in entitled to this service regardless of which repairer they choose.

Insurer's also offer completion of the repairs faster by using a preferred repairer, or the insurance company can deliberately slow the process by taking an extended time to have their assessor assess the claim or delay the approval of the claim.

The MTA is aware of examples of insurers making incorrect and disparaging remarks about a customer's choice of repairer to try and persuade them to use the insurer's preferred repairer. Furthermore, the MTA has heard claims that insurer's steer the customer by stating they won't guarantee the repair undertaken by the customer's chosen repairer if they are not a 'recognised, authorised, preferred, partnered' repairer. MTA has some examples of this being recorded but anecdotally believes it happens "all the time".

Such insurer behaviour, whilst in breach of the voluntary Code of Conduct and Australian Consumer Law, has resulted in a significant amount of lost work for many collision repairers while placing the preferred repairer under a great deal of pressure to undertake the repairs for a low cost price.

This has been examined by previous Inquiries to the extent that the Productivity Commission considered it wasn't necessary to introduce anti-steering legislation to protect consumer choice and the New South Wales

Select Committee recommended penalties should be imposed by failing to meet this obligation.

Now, with the benefit of time, and a number of examples to demonstrate that this is still a problem, we can see that this complaint requires attention by this Inquiry. Serious measures need to be considered such as introducing anti-steering legislation, which explicitly prohibits an insurer from steering an insured towards a particular repairer and penalties as a result of insurer's not giving their policy holders the right to choose, in circumstances where their PDS provides for a choice of repairer.

The MTA and industry are prepared to present a number of examples of this consistent behaviour, some of which are so serious that they should be investigated by the Australian Competition and Consumer Commission (ACCC). Some examples were presented to, but not addressed by, the Banking and Finance Royal Commission, and remain to be investigated by the appropriate authority.

Repairers claim most customers are 'steered' at the point of making a claim, in circumstances where the insurer has direct contact with the customer and has the opportunity to promote how quickly the repairs can be undertaken at the preferred repairer, and minimise inconvenience to get them back on the road sooner.

If the Inquiry were to examine a random sample of the call centre scripts of tele claims staff of insurers on some of the examples available, and evidence of customer complaints of steering, they would learn that the scripts contain procedures on how to manage the customer, overcome objections and use other tools to succeed in moving the accident damaged vehicle where the insurer has control over minimising costs.

Industry considers that while a reasonable level of invitation to treat is acceptable, conduct that leads to coercion, inappropriate or misleading and deceptive conduct is not only against the law but specifically what this Inquiry has asked to investigate.

APPENDIX E provides an example of steering, including a Statutory Declarations from the customer stating that they were coerced by the insurer. Yet, the insurer either:

1. Denies any breaches of the Code; or
2. Claims the relevant section of the Code is indisputable under the provisions of the Code of Conduct

The imbalance of power reflected by these determinations is evidence that repairers and consumers have no choice other than to accept the insurer's determination to control repair costs. Government intervention to restore the balance of power is urgently required.

Move the Car

If the repairer's estimate does not meet the insurer's allowances and they are unable to reach agreement the insurer may insist on moving the car to a preferred repairer to complete the repairs for the assessed amount, in which a partnered repairer must comply with the terms of their preferred repair agreement.

In explaining this to the customer the insurer will label the repairer's estimate as "excessive" or "uncompetitive". As previously stated, the insurer will also state how quickly the repairs can be affected at their preferred repairer, and how it will minimise inconvenience as well as reminding the policy holder of all the benefits associated with using their preferred repairer.

APPENDIX E also provides a Statutory Declaration where the customer has stated the insurer labelled their choice of repairer as 'excessive or uncompetitive' yet the insurer states in their reply that they have determined they are not in breach of the Code.

As discussed above, the determination in the AFCA matter found this behaviour to be inappropriate and contrary to an insurer's obligations under the policy of insurance.

Consumer knowledge and consumer choice

The MTA is of the view that some insurance companies are likely to have breached section 13 of the Insurance Contracts Act, which stipulates utmost good faith provisions in their dealings with the insured. MTA Members have observed insurer practices that may constitute misconduct or conduct falling below community expectations, in circumstances of failing to adhere to choice of repairer guarantees and fair and equitable cash settlements to policy holders. In particular, with regard to PDS's that include a consumer's freedom to choose their own repairer.

The MTA is also concerned that the conduct of insurers is such that they are inadequately funding collision repair work or under funding the consumer by providing them with reduced cash settlements. This behaviour in turn compromises the resale value of a vehicle after an accident, where a lower value repair is conducted, while also failing to return the vehicle to pre-accident condition, as stated in their PDS.

Furthermore, since the Productivity Commission Inquiry, insurance companies have steadily increased the provision of choice from a free inclusion in most policies to an additional cost option. The latest insurer to do so being the NRMA and RACV/IAG products provided in Victoria, New South Wales and the Australian Capital Territory, which introduced consumer choice as a premium cost policy 'add-on' in 2017.

While their South Australian subsidiary has not introduced the additional cost option, they ultimately treat their customers in the same manner by using the tactics considered above. That is, where the customer is ultimately given no choice of repairer, despite their PDS stating that they do, the customer is effectively paying for an option they don't receive.

The MTA is also aware of circumstances in which a consumer lodges a claim, only to find out that the PDS has changed and they no longer have a choice of repairer.

During the Inquiry into WA's Automotive Smash Repair Industry, by WA's Economic and Industry Standing Committee, the Chair of the Committee sought to clarify IAG's evidence regarding choice of repairer, asking, *"Just to clarify, when you say 'we work with every repairer', you mean in your preferred network?"* IAG gave evidence[16] that they provided their customers with the freedom to choose and a lifetime guarantee for repairs, irrespective of repairer.

IAG responses around questions regarding whether different conversations had with customers depending on whether they were requesting to have their car repaired by a repairer in the insurer's preferred network, or by a repairer of their choice warrants further review. In reading the transcript from the hearing it is our opinion that IAG steers their policy holders into using their preferred network of repairers, by making them believe that they will receive quicker service, a better quality of repair and a lifetime warranty on the repairs that they would not receive by choosing their own repairer.

MTA SA understands that steering customers to preferred suppliers is not in itself illegal and that you don't have necessarily a problem with that per se BUT the real issue is, and as pointed out 14 years ago in the PC Report, it is now the commonplace extension of diminishing the expertise and other characteristics of alternative small business suppliers that is in the view of MTA SA illegal and detrimental to SA consumers and small business.

Furthermore, during the hearing in WA[17], Suncorp was also questioned about the conversations it has with its customers at the time of making a claim, and whether there was any difference in conversations, or whether aspersions were cast about referrals towards preferred or non-preferred repairers. Suncorp in our opinion was similarly evasive in its responses, giving evidence that they provide a lifetime guarantee regardless of the repairer, but 'in the same breath' essentially admitting to behaviour that amounts to telling a customer they can choose their own repairer, but that they cannot guarantee the outcome.

---

16 At page 2 & 3, IAG Transcript of Evidence from the Inquiry into WA's Automotive Smash Repair Industry

17 At page 9 -11 Suncorp Transcript of Evidence from the Inquiry into WA's Automotive Smash Repair Industry

Attached at APPENDIX F are a Statutory Declaration and Consumer Complaint that evidence the behaviour, queried by the WA inquiry, that insurers are denying occurs.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[18] has sought to improve PDSs and consumer understanding of their entitlements by, amongst other things, reducing their complexity and improving consumer understanding. Unfortunately, despite the Royal Commission's recommendations in this regard, the MTA is of the view that this won't address the behaviours that insurers employ to mislead customers and exploit their consumer rights.

MTA and MTAA will continue to advocate that these practices are not only falling below community expectations but are un-ethical, unlawful, and require further investigation by agencies to ensure that consumer rights and obligations are protected as intended by the statements of the previous inquiries highlighting their concerns about these issues.

MTA hopes that the examples provided during this inquiry will prompt the South Australian government to address these with urgency as they have already been given the opportunity to re-instate choice from the recommendations 10, 11, and 12 of the NSW Select Committee inquiry where Anti Steering legislation was first considered, but the committee gave insurers the chance to correct evidence then, that these practices were and still are falling below community expectations.

10. Response to Term of Reference 4

The business practices of insurers and repairers, including the effect of lessening competition through vertical integration into the market, the transparency of those business practices and implications for consumers.

It is clear from the matters considered above including those referred to by previous inquiries that the major insurance providers effectively exploit their dominant market position and the reduced market power of their competitors by controlling 'allowances' for completing repair work.

Given the significant market share of the major insurers, it is not difficult to see that they also control the flow of body repair work. Insurers can direct repair work to their preferred network of repairers, effectively cutting the majority of independent smash repair businesses out of the supply chain and in doing so call into question the ongoing viability of these businesses, subsequently lessening competition in the market place. There can be little doubt that this exemplifies misuse of market power.

The industry is also starting to see the emergence of greater levels of vertical integration with insurers either owning or seeking to control repair businesses

[18] Royal Commission Report

and the supply of parts to smash repairers, partnered or not. Independent smash repairers will be unable to compete and this may result in many exiting the industry, further reducing competition. Once this occurs, there will be nothing to stop insurers from setting repair costs at a higher level which will be passed on to consumers by way of higher insurance premiums.

Small business motor body repairers are now experiencing the full blown impact of a vertically and horizontally integrated insurer preferred network.

Industry is already seeing insurers demanding premium payments by at fault parties to third party claims. Examples include charging their own rates to third parties in excess of $95 per hour and charges for parts and consumables not disclosed on the third party invoice or ordinarily paid to any other repairer. The letter of demand simply requires the third party to pay the charges requested in order to prevent legal action being taken against them in relation to the accident.

Examples are provided in APPENDIX G. The MTA would welcome the opportunity to present further evidence of this nature to the Committee.

In his 2011 Doctoral Thesis, *Historical Overview of the Collision Repair Industry in Australia and Transfers of Power Through Rationalization*[19], Dr Graham McDonagh noted that rationalisation swept through the insurance industry with mergers and acquisitions starting from the late 1990s, and by 2005 three insurers, IAG (including SGIC), Suncorp and Promina held approximately 92% of the motor vehicle insurance market. Now there are only two major insurers, a duopoly that controls automotive insurance.

Dr McDonagh asserts[20] that when insurers claim that the cheapest repair prices provide customers with better quality repairs with costs that are fair and reasonable, it is propaganda and puff. This view is supported by the decision in the NSW Supreme Court of Appeal case, *Stocovaz v Fung [2007] NSWCA 199* that rejected AAMI's argument that their view of a fair and reasonable repair price was almost two-thirds cheaper than it actually cost.

It is Dr McDonagh's view[21] that the general premise tendered by insurers that the lowering of costs through competition leads to improving quality and offers benefits for consumers, is a "contradiction unto itself". Unfortunately, the largest insurers who practice price suppression as their major strategy are the only ones who benefit.

MTA is primarily concerned that the continued reliance of insurer determined times and rates, allowances and treatment of all repairers as the same as treatment of preferred repairers has a significant effect on lessening

[19] Historical overview of the collision repair industry in Australia and transfers of power through rationalization , at page 205.
[20] At page 208. Historical overview of the collision repair industry in Australia and transfers of power through rationalization
[21] At page 222. Historical overview of the collision repair industry in Australia and transfers of power through rationalization

competition in the marketplace. The effect or likely effect of lessening competition through an insurer controlled market eliminates competition and builds empires in which the insurers are already creating for themselves through their own repair centres, hubs, and ownership of the supply chains.

11. Response to Term of Reference 5

As outlined above, it is acknowledged that the current Code is not without its limitations and flaws, and there will need to be a review of the provisions of the Code to ensure that what is ultimately legislated meets the needs of both the repair and insurance industries, in addition to providing surety for consumers.

In this regard, the MTA notes the current 'loose' drafting of the Code, and accordingly, the necessity to tighten up the drafting when incorporating the Code into legislation.

For example, section 4.2(b) of the Code provides that insurers, in their dealings with repairers in relation to repair work, are required to *"consider estimates in a fair and transparent manner, and will not refuse to consider an estimate on unreasonable or capricious grounds".* The interpretation of the terms underlined above is subjective and thus unclear. In the NSW Determination the definition and meaning of those terms was examined and the Acts Interpretation Act was relied upon to determine the dispute.

Additionally, there exists a conflict of interest in that the insurer is the entity who, in the first instance, decides whether or not they have breached the Code. That is, insurers self-assess whether they have acted fairly, transparently and reasonably. As identified above, it is routinely the case that insurers are flatly refusing to accept that they have breached the Code in any circumstances. This represents a clear imbalance in power that has been mentioned throughout this submission flowing from a Code that was intended to place repairers and insurers on an equal footing.

Ultimately, while the MTA supports market competition and its ability to decrease inefficiencies, increase productivity, promote innovation and improve business practices, and is not opposed to the consumer and business benefits that can be provided by vertical and horizontal integration. The most important consideration for the MTA is market fairness, and ensuring markets have strong competition by different competitive business models. To that end, the MTA advocates South Australian Government intervention when the integrity of market competition is compromised due to unfair, unscrupulous and anti-competitive behaviours.

In this regard, it would be the MTA's recommendation that any legislation ultimately enshrining the Code in South Australia should be reviewed and updated at least periodically to include lessons learned from determinations and any relevant case law.

12. Recommendations

MTA would ask the Committee to examine the material within this submission with the view of investigating these issues noted in a manner that explores financial and economic impact on society as a result of insurer and repairer relations. The current situation is in urgent need of change, and MTA welcomes the Parliamentary Committee stepping up to identify government intervention to protect consumers and businesses from unfair, uncompetitive practices that fall below community expectation.

In particular, MTA would ask the committee to implement policy to protect fairness and business confidence in South Australia by:

1. Abolishing all known variations of Funny Time, Funny Money.
2. Having concern for the industry wide application of Average Repair Cost models and 'allowances' as lessening Competition in the marketplace.
3. Tighten and mandate the industry Code of Conduct to include consumer rights at law.
4. Increase provisions of the Small Business Commissioner to enforce the Code in line with other jurisdictions and demonstrated by AFCA with Consumer contracts.

As well as protect consumers from further decline of choice, quality and safety of repairs by:

1. Introducing legislation to protect consumer choice by the evidence presented within this submission and warned by previous inquiries.
2. Introduce legislation to ensure consumers have opportunity to make well informed decisions about any changes to repairs by insurers.
3. Improve access and timeliness to services in helping consumers in times of need and whilst they are most vulnerable.

MTA and its Members in South Australia would welcome the intentions of the South Australian Parliament to work collaboratively in achieving these outcomes for the benefit of public interest.

13. Provision of additional evidence

The examples provided in the Appendices to this public submission have been supressed to remove any identifiers, to ensure confidentiality of the specific examples mentioned.

The MTA would welcome the opportunity to provide further information or collected evidence in relation to this submission and to clarify any aspect of it.

Furthermore, MTA representatives are available to give any further information required by the Committee during a public hearing.

14. Submission Contact

For further information relating to this submission please contact:

Paul Unerkov
CEO
punerkov@mtaofsa.com.au
08 8291 2000

15. APPENDICES

APPENDIX A:

Examples of repairer estimates that have been unreasonably or arbitrarily altered by an insurer, contrary to Clause 6.3 of the Code of Conduct.

- Example A-1
- Example A-2
- Example A-3

APPENDIX B:

Example of an insurer generated quote, together with the original repairer prepared quote.

APPENDIX C:

Evidence regarding pre and post scanning of vehicles.

- Example C-1: IAG Pre and Post Repair Mandatory Vehicle Scan List
- Example C-2: IAG Question and Answer – Pre/Post Scan

APPENDIX D:

Futures Collide Conference Presentation – Battery Disconnect Procedure slides.

APPENDIX E:

Internal Dispute Resolution examples, with responses from insurers.

APPENDIX F:

Statutory Declaration and Consumer Complaint, evidencing consumers being steered to an insurer's preferred repairer network.

APPENDIX G:

Example of an insurer third-party demand letter.