



Friday, 1st August 2014

Unfair Contract Terms Consultation Paper
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Lodge online at www.treasury.gov.au/ConsultationsandReviews/Consultations

Dear Manager,

Response to Extending Unfair Contract Term Protections to Small Businesses

1. Introduction

1.1 The Motor Trades Association Queensland (MTA Queensland or The Association) responds to the Australian Treasury's call for views pertaining to extending unfair contract term protections to small businesses. The MTA Queensland's comments are on behalf of its constituent Divisions and are confined to issues which relate to the interests of the Queensland automotive value chain.

1.2 The Association supports the Coalition Government's policy to extend contract terms to small business. This for our Membership has been a strategic policy goal from the commencement of the Australian Consumer Law process. We formed a view that the Rudd Government had impaired the competence of the legislation to discourage the unfair use of market power by excluding business to business transactions from the reforms enacted in June 2009.

1.3 We welcome the opportunity to submit comments in respect of this important phase of Australian Consumer Law (ACL) development.

2. Context

2.1 Standard form contracts have currency across the Queensland automotive value chain's commercial framework including transactions between the motor

Motor Trades Association Of Queensland

Address Building 8, 2728 Logan Road **Email** info@mtaq.com.au

Eight Mile Plains Qld 4113 **Website** www.mtaq.com.au

Postal PO Box 4530 Eight Mile Plains Qld 4113 **Tel** (07) 3237 8777 **Toll Free** 1800 177 951

vehicle manufacturers or Importers and the franchised dealers and the insurance companies and the automotive collision repair sector. In particular we refer to the agreements between the insurer and the motor vehicle repairer.

2.2 Members in the motor vehicle repair business operate within a tripartite arrangement comprising the following commercial relationships:

- The policy holder with the insurance company,
- The policy holder with the motor vehicle repairer; and
- The motor vehicle repairer with the insurance company.

In this arrangement:

- There is a contract between the insurer and the policy holder in the form of an insurance policy; and
- Generally, two contracts or agreements between the insurer and the motor vehicle repairer which refer to:
 - A standard form contract granting overarching status as an "authorised" motor vehicle repairer; and
 - A specific agreement to repair a motor vehicle in the form of an authorisation to proceed with work up to the approved amount.

2.3 In the contract between the policy holder and the insurer, there are not any terms which may be directly attributable to loss. Generally, this contract may be quite fair and requires a Product Disclosure Statement (PDS).

2.4 In the contracts between the motor vehicle repairer and the insurer, there are terms that may be unfair to both the collision repairer and the consumer/policy holder that result in a direct cost to the consumer and a liability to the repairer. The direct cost to the consumer may be in quality of the workmanship, or paint, or parts, or warranty or safety implications etc. While the repairer has to warrant work completed with components imposed by the insurer which may not be those preferred by the repairer.

2.5 For example: Instructed by the insurer's Assessor or the Assessing Centre, the motor vehicle repairer may be instructed to deliver a completed repair different to the expectation the policy holder formed as a result of the contract and the PDS.

2.6 This is due to the fact that the contract the policy holder has is subordinate to the arrangement the insurer approves with the repairer. The motor vehicle repairer is compelled to obey the instructions of the insurer to maintain guarantee of current and future work. To do otherwise is to be possibly excluded and place the business in jeopardy.

2.7 The insurer imposes cost limits on non-genuine parts. As a general rule this requires the motor vehicle repairer to 'manage costs' such as sourcing reconditioned

or salvaged parts or cheaper non-genuine parts (grey or parallel parts rather than Original Equipment Manufacturer) for the job - which may be unknown to the policy holder. In many instances the motor vehicle repairer is not conforming to the Manufacturer's specification. i.e.:

1. If the motor vehicle is under the manufacturer's warranty and is inserted with a non-genuine part, the part could affect the warrants and guarantees that the motor vehicle is deemed to command.
2. The Insurer is in breach of their duty of care to the policy holder by putting profits before observance of the contract.

2.8 The seminal issue is the tripartite nature of automotive insurance policies which has two parties related to the insurer. The absence of a remedy to unfair terms and conditions in the business to business agreements between the motor vehicle repairer and the insurer results in a loss of consumer benefit. The equity the policy holder has in the motor vehicle can be depreciated because the comprehensive policy is circumvented by the agreement/contract the insurer has with the motor vehicle repairer which imposes cost disciplines which may result in inferior workmanship, unbranded parts and compromises safety.

3. The Problem - in a nutshell

3.1 Insurance companies are selective in appointing authorised repairers and the provision of individual repair contracts. Being appointed an authorised repairer is a precondition of being allocated repair work. Repairers are required to enter into a contract which incorporates minimum quarterly performance requirements. Unless these requirements are met, repairers are threatened with the loss of their authorised status. This is significant both empirically because it threatens business viability and damages reputation because signage is removed creating the perception that a repairer is not at a standard required by the insurer.

3.2 The requirements usually take the form of winning an agreed percentage of repairs every quarter. To ensure this, as a general rule, repairers may have to submit bids which are below cost and involve - in most cases - taking a substantial loss to retain their authorised repairer status.

3.3 Stripped down to its essential, clauses in the contract impose loss making conditions on repairers for that which substantially benefit the insurance companies. Such provisions are inequitable and clearly unfair and are imposed by the dominant party to a contract on a party that is not in a position to resist such unfair terms and conditions.

4. Policy Solution

4.1 The use of standard form contracts has introduced benefits to the economic environment that operates in Australia. Amongst the benefits are cost savings, efficiencies and consistency in the management of commercial risk in transactions. It has allowed for transactions to comply with statutory provisions, safety requirements, and consumer warranties in respect of specific goods and services that are transacted.

4.2 The downside of the standard form contract is that there is anecdotal evidence that it can be misused to impose market power on small to medium enterprises through unfair clauses. In transactions where one party is dominant there is a greater propensity for market power to manifest through the inclusion of unfair terms in standard form contracts. Further, small medium businesses (SMEs), because of their lack of market status through small scale or lower velocity of transactions do not have an ability to defend themselves against such unfair contractual terms and conditions.

4.3 It appears inconsistent that standard form contracts involving final demand and personal use of goods and services that contain unfair terms can be challenged yet those that involve SMEs in business to business transactions with similar contract clauses where the SMEs are in fact quasi-consumer are excluded from similar recourse.

4.4 The MTA Queensland's long term policy has been that unfair contract term protections should be extended to small business and have consistently submitted this policy position through each of the consultation phases commencing with our 2007 contribution to the Productivity Commission's *National Framework for Consumer Policy*.

4.5 The Association has carefully considered Option 3 - Legislative Amendment to extend the existing unfair contract term provisions to small business contracts and have formed the firm view that it provides the essential policy solutions.

4.6 Therefore the MTA Queensland strongly supports Option 3 as an important and necessary reform to Australian consumer legislation.

4.7 In supporting this initiative, the MTA Queensland preference is that the definition of a small business or SMEs be based on the relative positions of the parties to the contract. To date the emphasis has been on absolute definitions based on scale. We strongly support the adoption of one based on relativity. That is an enterprise, irrespective of its size that can be injured by improper imposition of economic or market power in a business transaction with another enterprise, should be considered a small to medium enterprise relative to the enterprise with which it

does business. (E.g. if a \$100 million enterprise is doing business with a conglomerate such BHP Billiton, the \$100 million enterprise is a relatively small business in this relationship.)

4.8 In other words, the use of absolute definitions appears to be inadequate. If a standard form contract with unfair terms can be imposed by a dominant party to a contract then empirically the party that has to accept the unfair terms and conditions should be accorded protection as a matter of equity and should be defined as an SME for the purposes of the legislative reform.

4.9 There may have to be some consideration given to exceptions to a definition based on relativity. These would include statutory contracts e.g. second hand car sales in Queensland require the use of statutory documentation prescribed by legislation. The parties to such statutory contracts should be exempted from recourse under the ACL in respect to unfair term.

4.10 The proposed legislation should also consider the issue of ultimate responsibility for terms and conditions in a contract. E.g. guarantees and product warranties where the contracting party is an intermediary and the manufacturer dictates the terms and conditions of a sales warranty and imposes these on the retailer as a condition of recourse e.g. in the case of franchised car dealers who have the terms and conditions of a new car warranty dictated by the national importer or distributor.

5. The MTA Queensland background

5.1 The MTA Queensland is the peak organisation in the State representing the specific interests of businesses in the retail, repair and service sector of the automotive industry located in Queensland. There are some 14,000 automotive value chain businesses employing in excess of 73,300 persons operating within the State.

5.2 It is an industrial association of employers incorporated pursuant to the Industrial Relations Act of Queensland. The Association represents and promotes issues of relevance to the automotive industries to all levels of government and within Queensland's economic structure.

5.3 The Association is the leading automotive training provider in Queensland offering nationally recognised training, covering all aspects of the retail motor trades industry through the MTA Institute of Technology (MIT). The MIT is the largest automotive apprentice trainer in Queensland employing 26 trainers geographically dispersed from Cairns to the Gold Coast and Toowoomba and Emerald. MIT last financial year accredited courses to in excess of 1500 apprentices and trainees.

6. Conclusion

6.1 We would be please to provide additional comment on any matters in our submission that may require further clarification or amplification.

Thank you for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'K Dewar', with a stylized, cursive script.

Kellie Dewar
General Manager
MTA Queensland