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Manager, Insurance and Financial Services Unit
Financial System Division
The Treasury
Langton Crescent
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Via email: UCTinsurance@treasury.gov.au

Submission by the Motor Trades Association of Australia Limited (MTAA) into the Review of Extending the Unfair Contract Term Provisions to Contracts of Insurance

This submission is provided as a public submission.

Dear Manager, Insurance and Financial Services Unit,

MTAA appreciates the opportunity to present an automotive industry endorsed policy position on extending unfair contract terms (UCT) protections provided under Australian Consumer Law (ACL) to insurance contracts.

A proportion of these businesses are automotive collision (or motor body) repair businesses that are third party beneficiaries to insurance contracts between insurance companies providing automotive insurance and policyholders.

The interests of the motor body repair businesses are represented by MTAA, state and territory member association's members, and the Australian Motor Body Repair Association (AMBRA) (one of eight MTAA national industry sector committees). Most of the work undertaken by motor body repair businesses is the result of motor vehicle accident claims paid for by insurance companies on behalf of policy holders.

On behalf of its State and Territory Association Members and AMBRA, MTAA is available to assist the Treasury with any additional line of inquiry related to unfair contract terms within insurance contracts or the automotive insurance and motor body repair industry generally.

Please do not hesitate to contact MTAA at [REDACTED] should you require any additional clarity or further information regarding this submission.

Yours Sincerely,

MTAA National Secretariat



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Association of Australia Limited (MTAA) into
Extending Unfair Contract Terms
Protections to Insurance Contracts

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Executive summary of recommendations

MTAA recommends:

- Government further examine the motor vehicle insurance and repair industry to investigate how insurance companies providing automotive insurance exploit their dominant market position to the detriment of consumers / policyholders (policyholders) and automotive collision / motor body repair businesses (repairers); including by imposing Unfair Contract Terms (UCT) within insurance contracts (policies).
- That legislative protection is enhanced. MTAA does not believe current protections adequately protect policyholders, and indirectly repairers, from UCTs from being included within automotive insurance policies, nor do they provide protection from their impacts.
- MTAA asks Government to recognise the following are UCTs:
 - A term that causes *detriment to policyholders* by depriving them of the freedom to choose a repairer to repair their vehicle in the event of a motor accident.
 - A term that causes *detriment to the motor body repair industry* is one which provides the insurer with an unfettered discretion to withhold approval of repairs to be undertaken by the policyholder's chosen repairer.
- MTAA urges Government amend section 15 of the *Insurance Contracts Act 1984 (Cth)* (IC Act) to allow the UCT law (ACTL), contained in the *Australian Securities and Commissions Act 2001(Cth)* (ASIC Act), to apply to contracts regulated by the IC Act.
- MTAA does not support a tailored of 'unfairness' in the UTCL in respect to insurance contracts.
- MTAA does suggest Government amend UCTL to enumerate the kinds of orders a court may make (including identifying types or themes of UCTs) if it thinks fit and include these in legislation (See for example section 243 of the Australian Consumer Law (contained in schedule 2 to the *Competition and Consumer Act 2010 (Cth)*).
- MTAA suggests that a similar list be included in UCTL and could, inter alia, include:
 - an order that the cost of repair be determined by an independent costs assessor; and/or
 - an order that the insurer pay to the policyholder an amount of money equal to the cost of repair.

The Motor Trades Association of Australia

- The Motor Trades Association of Australia (MTAA) is the peak Australian automotive trades association and represents the interests of its State and Territory Motor Trade/ers Associations and Automobile Chambers of Commerce
- MTAA is the voice of 95% of the Australian Automotive supply chain including 69,365 retail motor trades businesses, employing over 379,365 Australians and that contributed \$37.1 billion (2.2% of Australia's GDP) to the Australian economy in 2015/16.
- MTAA with its member organisations are able to gain insights into the operations, issues, concerns and risks of participating automotive industries which include but are not limited to:
 - *New and used car retailing (including service and repair operations)*
 - *New and used motorcycle retailing (including service and recycling / dismantling)*
 - *Farm and industrial machinery retailing (including service and in some cases dismantling and recycling)*
 - *Vehicle body repair (smash repair)*
 - *Independent automotive servicing*
 - *Automotive recyclers, dismantlers and part suppliers*
 - *Service station and convenience stores (franchise and independent)*
 - *Tyre retailing / recycling and re-treading*
 - *Specific service professions including glass, transmission, engine replacement and reconditioning, brakes, steering, automotive electrical and air- conditioning.*
 - *Bus and coach*
 - *Heavy Vehicle maintenance and repair*
 - *Caravans and camping trailers*
 - *Towing*
 - *Vehicle rental*
- A significant proportion of the automotive repair businesses represented by MTAA include automotive collision or motor body repair businesses.
- The national interests of repairers are represented within MTAA by the Australian Motor Body Repair Association (AMBRA) which is one of eight MTAA national industry sector committees (NISCs).

- One of the priorities of MTAA and AMBRA include addressing the commercial relationships between insurance companies that provide automotive insurance (insurers) and motor body repair businesses (repairers) when undertaking vehicle repairs for policy holders after they have been involved in a vehicle collision or accident.

The motor vehicle insurance and repair industry

- The Treasury's proposal paper acknowledges that '(i)nsurance plays an important role in maintaining the financial stability of *both* individuals and the Australian economy'¹ (emphasis added). MTAA advocates that automotive insurance has particular importance for individual motorists and policyholders, the motor body repair businesses and insurance companies providing automotive insurance.
- Automotive insurance is critical to the motor vehicle insurance and repair industry as the majority of work provision to the motor body repair industry is provided by insurers via claims made by policyholders.
- It also provides insurers the opportunity to use their dominant market position to strategically integrate the supply chain. For example, insurance companies have developed preferred and/or wholly owned networks of motor body repair businesses where they often direct or steer their policyholders to have their vehicle repaired in the event of an accident.
- The ability of insurance companies to direct their policyholders to their preferred repairers is contingent on the conditions within automotive insurance policies which is a contract between the policyholder and the insurance company.
- Consequently, UCTs within insurance policies may be used to restrict policyholders' choice on where they can have their vehicle repaired; policyholders' ability to have their vehicle repaired in manner and to a standard acceptable to the policyholder. It may also restrict or place requirements for the vehicle to be repaired, but not necessarily to manufacturer or industry standards (including safety standards), without the knowledge of the policyholder.

¹ The Treasury (June 2016) Extending unfair contract terms protections to insurance contracts-Proposals paper. The Australian Government, accessed 9 August 2018 at https://static.treasury.gov.au/uploads/sites/1/2018/06/t284394_UCT_Insurance_Contracts_Proposals_Paper_Aug.pdf

Current legislative protections

- MTAA advocates that the existing protections provided by the *Insurance Contract Act (1984) (Cth)* to consumers/policy holders are inadequate. MTAA argues that they are inadequate to prevent insurers from exploiting their dominant market position and using UCTs for their benefit, and often to the detriment of policy holders and third parties. For example:
 - MTAA argues that current pre-contractual disclosure requirements do not prevent insurers from embedding UCTs within insurance policies nor do insurance companies highlight or make clear the implications of these terms for policyholders; particularly in the event they make a claim.
 - MTAA argues that current legislative protections provide insurance companies the opportunity rely on the presence of particular UCT terms in certain circumstances to the detriment of policy holders who commonly don't understand the meaning or implications of these terms.

Unfair contract terms in motor vehicle insurance policies

- MTAA argues that insurance companies include UCTs in automotive insurance policies that can cause detriment to both the policyholder and, indirectly, to motor body repair business.
- MTAA advocates that following terms within automotive insurance policies are unfair.

Choice of repairer

- Take, for example, a term which provides that a policyholder *must* have his or her car repaired only by the insurance companies nominated or preferred repairer.
 - Such a term may cause *detriment to the policyholder* by depriving the policyholder of the freedom to choose a repairer. For example, the term may cause significant hardship if the nominated repairer:
 - is some distance away from the policyholder (or otherwise difficult for the policyholder to access); and /or
 - if the policyholder finds the nominated repairer particularly unpleasant to deal with.

- Such a term also causes *detriment to the crash repair industry*. For example:
 - It stultifies competition within the industry and repairers are prevented from competing on merit (i.e. level of service, convenience, reputation, levels of expertise, equipment, capability).
 - It may also undermine the quality of the services provided to the policyholder simply because a nominated repairer may form the view that repairer's client is the insurer rather than the policyholder.

Withholding a repair approval

- For a repairer to undertake a repair to be paid for by an insurer, a contract must be entered into by the motor body repair business and the insurance company. This contract is referred to as a 'repair authority'. Insurance companies sometimes do not provide a repair authority to repairers who they do not have preferred commercial arrangements with, or they may place restrictions on when they do.
- MTAA argues that another example of an UCT within automotive insurance contracts, causing detriment to both the policyholder and repairers, is a term which provides the insurer with an unfettered discretion to withhold approval of repairs to be undertaken by the policyholder's chosen repairer.
- By unreasonably withholding consent for a repairer to undertake a repair, an insurer effectively deprives the policyholder of the opportunity to choose his or her own repairer and thereby undermines competition within the repair industry.
- Alternatively, the insurer's conduct may have the effect of driving repairers to take short cuts or use parts to complete repairs at a cost the insurer is prepared to cover, but which may not reflect the real cost of the repair. Such practices are arguably not in the best interests of the policyholder.

Applying the ASIC Act to insurance contracts

- MTAA considers current legislative protections as inadequate and therefore, MTAA, members and AMBRA enthusiastically support the proposal to amend section 15 of the *Insurance Contracts Act 1984* (Cth) (IC Act) to allow the UCT law, contained in the *Australian Securities and Commissions Act 2001*(Cth) (ASIC Act), to apply to contracts regulated by the IC Act.

Meaning of unfair and terms that may be considered unfair

- MTAA does not consider it necessary to tailor the definition of 'unfairness' in the UTCL in respect to insurance contracts.
- However, MTAA, members, and AMBRA, suggests there is a considerable need for improved clarity. MTAA suggests it necessary to include examples of UCTs in the UCTL that are specific to insurance contracts and in particular automotive insurance policies. These examples could include:
 - terms that permit, or have the effect, of permitting the insurer to unilaterally determine who performs any repair work; and
 - terms that permit, or have the effect of permitting, the insurer to unilaterally determine the cost of any repair work.

Remedies for unfair terms

- MTAA advocates that the court should be empowered to make other orders it thinks appropriate as an alternative to simply declaring an unfair term void.
- MTAA suggests UCTL could even enumerate the kinds of orders a court may make if it thinks fit. See for example section 243 of the Australian Consumer Law (contained in schedule 2 to the *Competition and Consumer Act 2010* (Cth)) which contains just such a list.
- A similar list in the UCTL could, inter alia, include:
 - an order that the cost of repair be determined by an independent costs assessor; and/or
 - an order that the insurer pay to the policyholder an amount of money equal to the cost of repair.

Third-party beneficiaries

- MTAA agrees that the UCTL should be enforceable by both policyholders and third-party beneficiaries.
- Plainly the UCTL is not, and ought not, be enforced by parties merely engaged to carry out repairs on the insured vehicle/property. However, MTAA advocates that repairers are in a unique position to observe breaches of UCTL.
- The MTAA suggests that regulators engage in a dialogue with MTAA, its member state and territory associations and automobile chambers of commerce; the motor body repairer national organisation, AMBRA; and other stakeholders within the industry; to identify Standard Form Contracts that may fall foul of the UCTL.

Conclusion

- MTAA respectfully suggests that current legislative arrangements that allow insurance contracts to be exempt from UCTL, has provided insurers the opportunity to include UCTs within insurance policies and exploit their dominant market position to the detriment of policyholders and repairers.
- MTAA supports Governments proposal to amend section 15 of the IC Act to allow the ACTL, contained in the ASIC Act, to apply to insurance contracts regulated by the IC Act.
- MTAA suggests that by extending UCT Protections to insurance contracts, parties to the contract (including third parties) are offered protections by court determinations of what terms are unfair and what orders it thinks appropriate as an alternative to simply declaring an unfair term void. MTAA suggests that Legislation include examples of unfair terms within UCTL that are specific to automotive insurance.

END OF SUBMISSION