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Unfair terms in insurance contracts: Options Paper
Corporations and Financial Services Division
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Dear Sir / Madam

Unfair Terms in Insurance Contracts: Options Paper

The Motor Trades Association Queensland (MTA Queensland) responds to the Australian Competition and Consumer Commission's, the Australian Securities and Investment Commissions and State and Territory Consumer Protection Agencies' invitation for submissions to the draft publication *Australian Consumer Law: A guide to unfair contract terms*.

Our responses reflect our membership who constitute a significant link in the automotive industry value chain and are enunciated below.

The Consumer Protection Framework has been a strategic policy matter that MTA-Queensland has participated in by way of contribution to the Productivity Commission's *National Framework for Consumer Policy* and by provision of submissions to harmonise laws or processes and codifications intended to maintain equity in competition.

We welcome the opportunity to submit comments to this important phase of Australian Consumer Law (ACL) development and support the continuing harmonisation of legislation that applies to insurance contracts.

MTA Queensland is of the view that potential disadvantage or loss to consumers as a result of insurance contracts could be averted if the ACL defined automotive repairers as "consumers" for the purposes of the unfair terms and conditions in contract provisions of the ACL.

Comments

1. MTA Queensland considered each of the options and it is clear that they do not directly apply to the automotive industry value chain.

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2. MTA Queensland notes that the critical determinant “is the actual or potential disadvantage on loss suffered by consumers as a result of insurance contracts containing contract terms that are harsh or unfair”.
3. The focus of this submission is from the perspective of our members in the automobile collision repair sector and their business relationship with both the consumer/policy holder and the insurance company (Insurer).
4. Members in the automobile repair business operate within a tripartite arrangement comprising the following commercial relationships:
 - the policy holder with the insurance company,
 - the policy holder with the automobile repairer; and
 - the automobile repairer with the insurance company.
5. 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 automobile repairer. These refer to:
 - A standard form contract granting status as an authorised automobile repairer (e.g. NSR “Network Smash Repairer Scheme”); and
 - An agreement to repair an automobile in the form of an authorisation to proceed with work up to an approved amount.
6. 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).
7. In the contracts between the automobile repairer and the Insurer, there are terms that maybe unfair to both the automobile repairer and the consumer/policy holder that result in a direct cost to the consumer. This direct cost to the consumer may be in quality of the workmanship, or paint, or parts, or warranty or safety implications etc.
8. For example: under instructions of the Insurer’s Assessor or the Assessing Centre, the automobile repairer may be required to deliver a finished repair job different to the expectation of the policy holder, formed as a result of the contract and the PDS.
9. 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 automobile repairer is compelled to obey the instructions of the Insurer to maintain guarantee of current and future work. To do otherwise is to be “blacklisted” and place the business in jeopardy.
10. The Insurer imposes cost limits on replacement parts. As a general rule this requires the automobile repairer to “cut costs” such as sourcing second hand parts or cheaper

non proprietary parts for the job – unknown to the policy holder. In many instances the automobile repairer is not conforming to the manufacturer's specification. i.e.:

- a. If the automobile is under the manufacturer's warranty and is inserted with an unbranded part, the unbranded part could affect the warranties and guarantees that the automobile is deemed to command.
- b. The Insurer is in breach of their duty of care to the policy holder by putting profits before observance of the contract.

Seminal Issue

11. Considering automotive insurance, the seminal issue is the tripartite nature of automotive insurance policies which has two parties related to the Insurer.
 - a. The absence of a remedy to unfair terms and condition in the business to business agreements between the automobile repairer and the Insurer results in a loss of consumer benefit. The equity the policy holder has in the automobile can be depreciated because the comprehensive policy is circumvented by the agreement/contract the Insurer has with the automobile repairer which imposes cost disciplines which may result in inferior workmanship, unbranded parts and compromises safety.
 - b. The contract between the Insurer and the automobile repairer may infringe the PDS forming part of the Insurance policy that protects the consumer's valuable asset and may result in a loss in consumer value.
- 13 The automobile repairer also loses as he/she is required to either accept the job as per the assessors demands including cost cutting measures or reject the work. If the automobile repairer does not agree, the business may lose authorised repairer status.
 - a. If the repairer accepts the work and installs unbranded or second hand parts conforming to instructions from the Insurer, the automobile repairer has to accept liability for a warranty that is sometimes for the life of the motor vehicle.
- 14 In the instance of tripartite agreements where automotive insurance policies are involved, the solution is that there must be both:
 - a. a remedy in the form of strengthening insurance policies for consumers; and
 - b. some regulation of the arrangement between the Insurer and automobile repairer to ensure that the obligations and understandings of the PDS of the insurance policy is not negated by the provision of the overarching agreement between the Insurer and the automobile repairer – that is the generic agreement between business to business and the specific agreement to repair the motor vehicle that is the subject of the insurance policy.

- 15 We submit that automobile repairers in these circumstances are consumers. The absence of business to business unfair terms and conditions in contracts in the ACL is disadvantageous to automobile repairers in business dealings with insurance companies.
- 16 Alternately, this situation could be resolved by the ACL defining automotive repairers as “consumers” for the purposes of the unfair terms and conditions in contract provisions of the ACL.

General Comments

16. The agreements between the Insurer and the automobile repairer are changing the repair industry to the consumer’s disadvantage. For example:
- a. Policy holder’s relationships with an automobile repairer have been subordinated by the insistence that a repair job be done at a specified automobile repair outlet rejecting the repairer of choice. The goodwill that existed in terms of a business relationship between a consumer/ policy holder and an automobile repairer is now nonexistent.
 - b. The Assessing Centre “steers” a policy holder to a specific repairer which is a “favoured repairer” who does the job for a “lower average repair cost”. This is achieved by using second hand parts or not repairing the vehicle to the documented manufacturer’s specification. In many instances, cost methodologies introduced have the capability to void warranties and erode the policy holder’s investment.
 - c. Insurers use “predatory tactics” which are the tactics behind the contract but as the automobile repairers are reliant on the Insurer’s work they comply with these practices. Anecdotally, only 20% of policy holders / consumers understand the mechanical detail or cost of a repairing a vehicle, thus lower quality work is unobserved.
 - d. The Industry’s Code of Conduct is voluntary in all states other than NSW and may contribute to the “circumvention” of the contract by the Insurer in dealings with the policy holder.
 - e. The automobile repair business viability is threatened and the ability to service consumers is being undermined by the Insurer’s drive for its own profits. In some instances automobile repairers are employing contractors who may not necessarily have any public risk policy or indemnity insurance instead of maintaining its own workforce.
 - f. Policy holders who have the view they have choice under their contract in fact have no choice and similarly automobile repairers have no choice as they are reliant on insurers for insurance business. Conversely, Insurers are not reliant on a particular repairer as they have many choices. The insurance oligopolies are dominating the automobile repair business at every stage to the detriment of both the automobile repairer and consumer/policy holder.

Background

By way of background, MTA Queensland is the peak organisation in the State representing the specific interests of 2,500 businesses in the retail, repair and service sector of Australia's automotive industry. It is an industrial association of employers incorporated pursuant to the *Industrial Relations Act* of Queensland.

The Association, comprising 12 separate divisions represents and promotes the issues of the automotive industries to all levels of government and within Queensland's economic structure. There is a high propensity for the automotive value chain to comprise small to medium enterprises.

The MTA Queensland divisions are each representative of a specialist area of the State's automotive industry.

- Australian Automotive Dealers' Association of Queensland;
- Queensland Farm and Industrial Machinery Dealers' Division;
- Queensland Motorcycle Industry Division;
- Automotive Engineers' Division;
- Queensland Tyre Dealers' & Retreaders' Division;
- Engine Re-conditioners' Association of Queensland;
- Rental Vehicle Industry Division;
- Service Station & Convenience Store Association of Queensland;
- National Auto Collision Alliance;
- Used Car Division;
- Automotive Under Car Division; and
- Auto Parts Recyclers' Association of Queensland.

In Queensland, the automotive trade's value chain post Global Financial Crisis (GFC), generates in excess of an estimated \$11 -12 billion annually, directly employing more than 40,000 people and contributes significantly to both Queensland's and the nation's economy.

The Association is the leading automotive training organisation in Queensland offering nationally recognised training, covering all aspects of the retail motor trades industry.

Thank you for your consideration

Yours sincerely



Richard Payne
Principal Policy Director