



23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

tel: (02) 6243 1111

www.accc.gov.au

Contact officer: [REDACTED]

Contact phone: [REDACTED]

16 September 2019

Economic and Finance Committee
Parliament of South Australia
GPO Box 572
ADELAIDE SA 5001

Dear Chair

Submission to the Parliament of South Australia's Economic and Finance Committee regarding the motor vehicle insurance and repair industry

Thank you for your email dated 4 July 2019 inviting the Australian Competition and Consumer Commission (**ACCC**) to make a submission to the Parliament of South Australia Economic and Finance Committee's inquiry into the motor vehicle insurance and repair industry in South Australia. The ACCC welcomes the opportunity to provide its views on the industry.

The ACCC is the statutory authority responsible for the administration and enforcement of the *Competition and Consumer Act 2010* (**CCA**). The overarching objective of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, with provision for consumer protection, under the Australian Consumer Law (**ACL**).

The ACCC has no direct role in relation to the Motor Vehicle Insurance and Repair Industry Code of Conduct (the Code) which is mandatory in New South Wales and voluntary in other Australian states and territories. However, we do recognise the important role that industry codes play in addressing systemic conduct and industry specific concerns. The ACCC encourages industry to develop codes that will deliver effective compliance with the CCA. Effective industry codes can deliver increased consumer protection as well as reducing the regulatory burden for business. In the course of the ACCC's work, various issues have been brought to our attention regarding the smash repair industry and the relationships between insurance companies and repairers. These issues include concerns that the preferred repairer schemes set up by insurance companies are anti-competitive as they force consumers to only use affiliated repairers which may cause non-affiliated repairers to exit the market. Industry stakeholders report that insurance companies steer consumers to their preferred repairers and may provide false or misleading information about non-affiliated repairers. There are also concerns that insurance companies enforce unfair contract terms and exert pressure on repairers to give lower quotes for repairs, resulting in poor quality work. The ACCC has assessed these issues as they have been brought to our attention. To date, we have not seen information or evidence demonstrating that breaches of the CCA have occurred.

More recently, concerns have been raised with the ACCC in relation to the use of software to estimate repair times in conjunction with transparent hourly rates. The ACCC is considering

these concerns and has not yet formed an opinion as to whether this may contravene the CCA.

There are several provisions of the CCA and Australian Consumer Law (**ACL**) that may apply to the concerns raised. These include prohibitions against engaging in:

- misuse of market power;
- exclusive dealing;
- unconscionable conduct; and
- unfair contract terms.

The ACCC is conscious that the nature of the smash repair industry has changed in recent years and continues to do so. Technological advancements such as anti-locking braking systems, electronic stability control, parking sensors and automatic braking systems in new vehicles is reducing the frequency and severity of car accidents. New vehicles also incorporate digital file codes which requires repairers to have the appropriate diagnostic tools, skills and technical information.

In this sector, the ACCC assesses the majority of concerns brought to our attention and will continue to do so in the future. If the ACCC has previously assessed an issue as being unlikely to amount to a breach of the CCA, we will always reassess if new information is provided or if the industry has changed.

There are three key relationships in the motor vehicle smash repair industry. These include between:

- the insurance company and repairer;
- the insurance company and consumer; and
- the repairer and consumer.

When work is carried out as part of an insurance contract, the contractual relationships that exist are between:

- the insurer and the policy holder; and
- the insurer and the repairer.

Generally there is not a contract between the repairer and the policy holder when repairs are performed through an insurance company.

The relationship between the insurance company and the repairer is generally formed when the repairer tenders to become an affiliated repairer. We understand that insurers generally consider various factors when selecting affiliated repairers. These include repair quality, customer service, cost, current relationship with insurer, capability, competence and an identified need in a particular geographic area.

The relationship between the consumer and insurer involves the insurance companies seeking to provide the most competitive premium and best service to the consumer. Insurers have an incentive to ensure quality work is completed as the consumer may choose to be insured elsewhere if the repair service is not satisfactory. Some insurance companies also offer lifetime guarantees on repairs done under their policies. However, there continues to be concerns raised in the industry about the impact of substandard work undertaken in providing repair services. Substandard repairs can have an impact on the life of a motor vehicle and can also have an impact on the resale value of a motor vehicle. Furthermore these issues may not become evident until years after the repair work has been completed.

From our experience in assessing issues of concern raised in this industry, we understand that generally consumers consider a range of factors when selecting insurance policies. This includes the cost of the insurance premium, the extent of coverage, choice of repairer, the speed at which claims and repairs will be assessed and completed, and a repair process that addresses the consumer's needs.

Furthermore, many consumers do not have existing relationships with repairers and are therefore unlikely to have a preference about which repairer to use, and may rely on their insurer's choice of repairer. Preferred repairer schemes can assist in ensuring the efficient repairs of vehicles. In the event that a consumer does have a pre-existing relationship with a particular repairer, insurance companies provide the option to choose of a repairer at an additional cost to the premium.

In regards to the relationship between the repairer and consumer, as the consumer enters into a contract for insurance with the insurer, the consumer is the customer of the insurance company rather than the repairer. The insurance company then subcontracts the work of vehicle repair to a smash repairer, of whom the insurer is in turn a client. Therefore, the contractual relationship between the consumer and repairer is (in general) non-existent.

Misuse of Market Power

Misuse of market power, which is prohibited under section 46 of the CCA, prevents corporations with a substantial degree of market power engaging in conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market.

Some market participants have alleged that insurance companies are engaging in misuse of market power, by exerting pressure on repairers to charge less for repairs. Whilst such conduct would need to be assessed in the context of the circumstances particular to each case, in our view, this conduct generally is unlikely to constitute a misuse of market power in contravention of section 46 because:

- the conduct is unlikely to have the purpose, effect or likely effect of substantially lessening competition to the extent that:
 - insurers have legitimate commercial reasons for trying to keep the costs of repairs as low as possible, and
 - competition exists between repairers as they compete for preferred repairer tenders.

It is also important to note that in determining whether conduct has the effect or likely effect of substantially lessening competition, it is not enough to show that an individual business in a particular market has been damaged as a result of the conduct, or has had to close its doors. The effect of the alleged conduct on competition in the market for that product or service must be considered.

Exclusive Dealing

Exclusive dealing, which is prohibited under section 47 of the CCA, occurs when one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal, and where the restriction has the purpose, effect, or likely effect of substantially lessening competition.

Some market participants have alleged that preferred repairer schemes amount to exclusive dealing, specifically third line forcing. Third line forcing involves the supply of goods or services, or a particular price or discount, on the condition that the consumer buys other goods or services from a third party, or a refusal to supply if the consumer does not agree to such conditions.

Whilst such conduct would need to be assessed in the context of the circumstances particular to each case, in our view, this conduct generally is unlikely to constitute third line forcing in contravention of section 47.

As stated above, there is no contractual relationship between the consumer and the repairer. It is the insurance company that is the customer of the repairer, rather than the consumer. The consumer has not been forced to acquire additional repairer services by the insurance company, nor have they been required to refuse to acquire other repairer services.

Even if the conduct did fit within the third line forcing provisions, the conduct will only amount to a contravention of the CCA where it is shown to have the purpose, effect or likely effect of substantially lessening competition. This is unlikely for the same reasons discussed above in the context of section 46.

ACL Issues

The ACCC is the predominant regulator of competition issues, however all state and territory fair trading agencies can administer and enforce the ACL. The views below represent the ACCC's views on the alleged ACL issues in the industry, however other ACL regulators, including Consumer and Business Services SA, are able to assess and take action on these concerns.

Unconscionable Conduct

Section 21 of the ACL prohibits unconscionable conduct in connection with the supply of goods or services. Unconscionable conduct is conduct that goes against good conscience as judged against the norms of society. The threshold for conduct to be found to be unconscionable is high. The conduct must be more than simply unfair and involve deliberate serious misconduct which is particularly harsh or oppressive.

Whilst alleged unconscionable conduct would need to be assessed in the context of the circumstances particular to each case, on the information the ACCC has previously assessed, the conduct of insurance companies in their dealings with repairers has not reached the threshold of unconscionable conduct.

As discussed above, insurance companies have commercial reasons for the keeping the costs of repairs low, which in turn benefits consumers. Preferred provider schemes can provide benefits to consumers in the form of timely and efficient repairs, lower premiums, quality assurance and insurer expertise about repair services.

Unfair Contract Terms

Some market participants have alleged that certain terms in contracts between repairers and insurance companies may be unfair under section 23 of the ACL. Based on the information provided to the ACCC to date, we have not identified any terms that raise concerns under the ACL.

Other ACL Issues

Concerns have been raised with the ACCC about the possible issues consumers experience as a result of preferred repairer schemes. These include concerns that insurance companies allegedly attempt to steer consumers to their preferred repairers by providing misleading information about non-affiliated repairers or their rights under their policy. The other primary concern is alleged poor quality repairs.

As discussed above, the contract in these instances is between the consumer and insurance company. Misleading conduct in relation to financial products, which includes insurance, is

covered by the *Australian Securities and Investments Commission Act 2001* (ASIC Act). The Australian Securities and Investments Commission is better placed to consider consumer issues relevant to the provisions of the ASIC Act. Consumers also have access to a simple, low cost method of dispute resolution through the Australian Financial Complaints Authority.

From our experience of considering issues of concern raised in this industry, the ACCC notes that:

- whether consumers are able to choose repairers is generally disclosed in insurance companies' Product Disclosure Statements;
- there are clear benefits to consumers having repairs done through a preferred repairer. These include a timely and efficient repair process where the consumer avoids the burden of independently engaging with repairers, obtaining quotes, managing the payments and recovery of costs from repairers.
- by guaranteeing the preferred repairers a certain amount of work, the repairers may be able to provide cheaper repairs for the insurance company. As discussed above, this assists in maintaining low premiums for the consumer.

In regards to allegations of work being completed that does not meet the consumer guarantee provisions, the ACCC has received minimal reports from consumers raising concerns about repair work completed under insurance policies. To become a preferred repairer of an insurance company, repairers must ensure their rectification rates are below a minimal rate set out in the contract with the insurer. Repairers must also provide quality work to insurance companies to remain competitive against other repairers and retain their status as a preferred repairer. Some insurance companies also provide lifetime guarantees on work completed under their policies. Therefore, there are incentives for both repairers and insurance companies to ensure high quality work and provide a level of quality assurance and protection to the consumer.

Conclusion

While the ACCC does not have a role in administering the Code, we understand that the Code does address some concerns in the market and can have a beneficial impact on the industry. However, as the ACCC does not enforce the code we are unable to comment specifically on its effectiveness in regulating the relationship between repairers and insurance companies or addressing any systemic failures in the industry. The ACCC will continue to assess, on a case-by-case basis, alleged contraventions of the CCA and ACL in the smash repair industry. However we consider that:

- currently there does not appear to be sufficient evidence of contraventions of the CCA or ACL that require ACCC intervention; and
- any detriment or issues that any individual smash repair business is facing must also be balanced against considerations of the benefits to consumers from particular arrangements in the smash repair or insurance industries.

If you wish to discuss any aspect of this submission, please feel free to contact [REDACTED] on [REDACTED] or [REDACTED].

Yours sincerely

[REDACTED]

Mick Keogh
Deputy Chair