



# POSITION STATEMENT

## **ENFORCEABILITY OF FINANCIAL SERVICES INDUSTRY CODE**

**12 APRIL 2019**

## **Basis of response**

The Motor Trade Association of South Australia believes that Industry Codes of Conduct play an important role in building consumers trust and confidence in the operation of complex markets, particularly where prescribed dispute resolution procedures can demonstrate effective regulation and enforcement of code provisions.

This consultation arises from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry findings in relation to the conduct of insurers generally.

The MTA and its national body MTAA, made numerous representations to the Commission regarding the potential misconduct of insurers in respect of the collision repair industry.

We have stated that the Motor Vehicle Insurance and Repair Industry Code of Conduct is the only mechanism governing the business operations and behaviour of the conduct of automotive insurers and collision repair businesses. However, this is a voluntary industry code.

Consequently, insurers have increasingly dismissed the principles outlined in the code and instead have chosen to dispute repair estimation costs, unfairly cash settle, and delay vehicle assessments.

## **Deficiencies with Voluntary Industry Codes of Conduct**

There have been more than 300 internal dispute claims lodged for violations of the Code of Conduct against insurers in the last two years nationally. This provides clear evidence of a failure of the voluntary code to adequately to alter insurer behaviour.

Both the Royal Commission and the Western Australian Parliamentary Inquiry *'Western Australia's Smash Repair Industry: Structural Challenges'*, have made adverse findings against the insurance industry. These findings apply directly to their relationship and behaviours involving collision repairers over an extended period of time.

The current Motor Vehicle Insurance and Repair Industry Code of Conduct is a voluntary code of conduct that has now been mandated in NSW and is being considered in Parliament in Victoria. Western Australia is to follow suit shortly as a result of the recommendations of a Parliamentary Inquiry.

When enforceable, a Code provides an important and binding understanding between the parties and their respective rights and obligations, establishing a common ground and a basis for more formal regulation of the relationship.

The fundamental weakness of the current Code is in the voluntary application of its provisions. This enables the insurers to exit the dispute resolution process at a time of their choosing. In South Australia, this is often at the point when the process moves from an internal mechanism in which the insurers investigate allegations of breaches against themselves, and make their own determination, to an external one where a repairer disagrees, which cannot be determined in any enforceable way by the Office of the Small Business Commissioner. Essentially, the Code is a worthless tool where parties do not act in good faith and in keeping its intent.

Further, Clause 11 of the Code specifically excludes clauses one through three for the purposes of dispute resolution procedures. These three clauses deal with the introduction, scope and application of the code, which underpin the implementation clauses detailed thereafter.<sup>1</sup>

Unsurprisingly, insurers' internal investigations typically result in a determination that if there is misconduct or adverse findings against the insurer, these actions either do not meet the threshold for the Code's application, or that the actions relate to one of the excluded three clauses and therefore is not subject to the Code – even when insurers admit that misconduct has occurred.

The mandating of the Code of Conduct is imperative if there is to be a binding and effective mechanism to eliminate misconduct between insurers and collision repairers.

The NSW determination provided a lengthy report for the benefit of future disputes that highlights the need for the code to be used in its entirety when considering disputes for resolution.

This position is supported by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report in which:

- Recommendations 4.9 and 4.10 call for the required imposition of mandatory industry codes, specifically in relation to insurance, rather than the continuation of voluntary codes.<sup>2</sup>
- The position is further supported by the Recommendations of the Western Australian Parliamentary Inquiry *'Western Australia's Smash Repair Industry: Structural Challenges*.

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<sup>1</sup> Motor Vehicle Insurance and Repair Industry Code of Conduct, May 2017, Clause 11, page 16.

<sup>2</sup> *Final Report*, Financial Services Royal Commission, Status of Industry Codes, 2019, p33.

- Recommendation 2 calls on the State Minister to "...to mandate the Motor Vehicle Insurance and Repair Industry Code of Conduct in Western Australia."<sup>3</sup>

We note that Recommendation 3 calls for the State Government to "...consider the role of the Small Business Commissioner as part of the process for the introduction of legislation mandating the Motor Vehicle Insurance and Repair Industry Code of Conduct in Western Australia."<sup>4</sup>

The conduct of insurance companies in relation to South Australian collision repairers has resulted in significant detriment to these repairers whose livelihoods are impacted by what appears to be the insurer's desire for increasing profits at the expense of local family owned collision repair businesses.<sup>5</sup>

## **Why Industry Codes of Conduct should be mandated and enforceable**

The South Australian Office of the Small Business Commissioner is currently playing a crucial role in the assessment of the impact of this misconduct and mediating disputes between insurers, repairers and vehicle owners.

Both the Victorian Small Business Commissioner<sup>6</sup> and the NSW Office of the Small Business Commissioner<sup>7</sup> have made determinations with adverse findings against the Insurers involved. This has been possible in those two jurisdictions because they each had powers to enforce the provisions of the Code.

In NSW, this was achieved through the mandating of the Code by the State Parliament, and in Victoria, the Small Business Commissioner is an Approved Determination Provider under the Code. These determinations also provide further evidence that misconduct of the insurers is both widespread and in violation of the Code.

As the Code is not mandated either at a Federal or South Australian level, there is no capacity within our jurisdiction for the Code to be enforced or for behaviour changing penalties to be applied. In addition, because the dispute process effectively ends with the insurer's own determination there are very few adverse findings. This dramatically understates the prevalence of misconduct within insurance groups.

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3 Western Australia's Smash Repair Industry: Structural Challenges, Parliament of Western Australia, 2019, iv

4 Western Australia's Smash Repair Industry: Structural Challenges, Parliament of Western Australia, 2019, v

5 'IAG acts on claims cost as margin takes hit', Insurancenews.com, 28 August 2017.

6 Victorian Small Business Commissioner, Determination, Peter Moloney, 16 October 2018.

7 NSW OSBC DRU 18-0001 Code expert determination

The negative impacts upon not only collision repairers but also consumers and can be characterised as:

- Not allowing the customer to choose their own repairer in accordance with their policy, in circumstances where a consumer is advised in one clause that they have the right to choose, only for this right to be effectively removed by the subsequent insurer conduct used to deter or coerce a policy holder into having no 'real' choice but to accept the insurers preferred repairer.
- The abuse of market power by the two dominant national insurers, which collectively hold more than 70 per market share, in order to impose unfair contract terms through the use of 'take it or leave it' provisions, and the failure to assess repairers estimates in a fair and transparent manner.
- As the two major insurers manipulate or 'steer' so much of the workflow as a direct result of their market share, failure to agree to these unfair contract terms places a crash repairer in an impossible position. They either lose a substantial part of their business to a competitor by not agreeing to the terms of the contract, or accept that they will have to perform insurance work at below cost in many instances, making their business ultimately unsustainable and exposing the repairer to rectification claims if the customer rejects the assessed and authorised scope of repairs.

It is critical to note that the use of unfair contract terms is widespread by insurers in their agreements with Collision Repairers and results in considerable market pressure by funnelling workflows away from uncontracted workshops towards their own contracted ones, and then setting price and repair time limits that are below the cost of repair and do not accord with OEM specifications. Consumers are then left with limited options to exercise Choice of Repairer Rights.

We note that Royal Commission Recommendation 4.7<sup>8</sup> calls for the exemption from Unfair Contract Terms in relation to insurance contracts, which is relevant to collision repairers when they are placed in 'take it or leave it' situations regarding repair pricing and repair time methodologies which have consistently proven to be lower the cost of repair.<sup>9</sup>

The continued market manipulation faced by many collision repairers, and the findings of two independent inquiry's, confirm the detrimental effect on the collision repair sector and the reduction in choice and potential increase in cost for the consumers in the longer term.

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<sup>8</sup> Final Report, Financial Services Royal Commission, Application of Unfair Contract Term provisions to insurance contracts, 2019, p308.

<sup>9</sup> IAG Repair Terms of Authority, Advice from IAG to Collision Repairer, 20 February 2019.

Recent events, including the *Hayne Banking and Finance Royal Commission*, the Western Australian Parliamentary Inquiry and the determinations of the Victorian Small Business Commissioner and the NSW Office of the Small Business Commissioner provide overwhelming evidence of insurer misconduct.

We consider that, in light of these outcomes and the recent determinations by a provider appointed by the resolution institute (Marcel Alter) for a South Australian repairer,<sup>10</sup> it has been effectively substantiated that these are issues that are impacting on South Australia today.

## Policy Position and Recommendations

1. Industry Codes of Conduct can be effective mechanisms to regulate market operations and relationships when they are consistently applied and for which breaches carry substantial deterrents in terms of financial penalties and enforceable undertakings.
2. As the major focus of concern relates to companies that have a national and even international presence, it is appropriate that the Commonwealth and its agencies take a leading role in regulating the markets in which they operate.
3. We do not accept the assertion implied on page three of the discussion paper that no code is worse than having an ineffective code. The ability to pick and choose, when certain provisions can be applied by the parties in question means that dispute resolution can be costly, time consuming and ultimately ineffective in addressing consumer concerns or code compliance. An unenforceable code has no greater strength than no code at all, where one of the parties is not prepared to be voluntarily bound by it.
4. The MTA recommends that industry codes should only be voluntary by exception, with predetermined criteria established for application for voluntary status.
5. The MTA recommends that the Motor Vehicle Insurance and Repair Industry Code of Conduct specifically be made mandatory as a matter of urgency.

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<sup>10</sup> Marcel Alter, Approved Determination Provider Determination made pursuant Motor Vehicle Industry Code of Conduct, 7 January 2019

## **Submission Contact**

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