



# Submission to the Review of Unfair Contract Term Protections for Small Business



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## 1. Executive Summary

- 1.1. The Motor Trades Association of Australia Limited (MTAA) and its State and Territory motor trade association and automobile chamber of commerce members, have long advocated for, and continue to support, principals that protect smaller businesses from unfair contract terms (UCT) and conditions.
- 1.2. Since the introduction of the *Small Business and Unfair Contract Terms Act 2015*, MTAA and Members have experienced an increase in the number of complaints, concerns, and requests for analysis and investigation of standard form contracts by automotive sector business constituents nationwide. These contracts contain provisions, or present in their entirety, as ‘take it or leave it’ contracts –particularly in franchised environments.
- 1.3. MTAA and Member investigations have primarily focused on franchisor agreements between car, motorcycle, and farm machinery manufacturers (franchisors) and dealers (franchisees); car insurers and motor body repair businesses (preferred supplier agreements, authority to repair or similar documents); and contracts between motor body repairers and paint, tool and parts suppliers; tyre retailers and tyre manufacturers; and independent mechanical service and repair businesses with tool, parts and equipment suppliers.
- 1.4. In some specific cases, MTAA has sought independent legal advice in regard to some contracts and provisions, which, in the view of MTAA may have potentially breached requirements of the *Competition and Consumer Act, Australian Consumer Law, and / or Small Business and Unfair Contract Terms Act*.
- 1.5. In addition some disputes between MTAA Member business constituents and other parties, in some automotive industries, have proceeded to mediation and in two recent cases, to determination, where the findings of those cases have also pointed to potential unfair terms and conditions.
- 1.6. Armed with this analysis and advice MTAA has referred to regulators examples of Unfair Contract Terms and provisions including deficiencies and potential breaches of UCT, the Competition and Consumer Act (CCA) and Australian Consumer Law (ACL).
- 1.7. MTAA refers the inquiry secretariat to previous submissions made by the MTAA to:
  - a. The Treasury investigations into Extending Unfair Contract Terms Protections to Insurance Contracts;
  - b. The Joint Parliamentary Committee Inquiry into the Franchising Code of Conduct including evidence provided by business constituents to public hearings of this inquiry;
  - c. The Australian Competition and Consumer Commission (ACCC) New Car Retailing Market Study;
  - d. The previous review of the Franchising Code of Conduct by Alan Wein, and

- e. The recently released Regulatory Impact Statement by the Industry Department into Franchise relationships between car manufacturers and new car dealers

These submissions also touch on unfair contract terms and conditions peculiar to automotive sector industries and are available on the MTAA website or by contacting the MTAA.

- 1.8. MTAA and Member findings into these investigations have also provided a powerful insight into the effectiveness of the current *Small Business and Unfair Contract Terms Act*.
- 1.9. While welcoming unfair contracts protections for Small Business, MTAA and Members are of the view that current legislation has proven to be ineffective in the automotive sector.
- 1.10. MTAA would respectfully suggest here has been no benefit or change in behaviours for most automotive sector industries and businesses within them. Indeed if the level of complaint and concern from MTAA member business constituents is a guide, then the situation has become worse.
- 1.11. This can be attributed to increased awareness of UCT legislation by MTAA member organisations since the introduction of the legislation and behaviours of powerful and sometimes dominant market participants.
- 1.12. Key analysis by MTAA and Members of case studies presented by a variety of automotive businesses and of those presented by MTAA to regulators reveals confirms the legislation is vague and complicated, and requires the use of courts to make key determinations before substantive matters can be addressed. MTAA respectfully suggests that until the following are addressed, large tracts of automotive small businesses will not be able to access the intended protections.
  - a. Significant inequality and power imbalance in the relative bargaining power between small and large firms in the automotive sector.
  - b. Headcount and monetary thresholds are relative to the respective sizes of the organisations involved. Current thresholds preclude many automotive businesses from accessing the legislations intended protections.
  - c. Current definitions of what constitutes an unfair contract term are too reliant on judicial interpretation and adjudication.
  - d. The significant power imbalance that hallmark many automotive industry relationships (car manufacturers and dealers; car insurers and repairers) prejudices and precludes small automotive businesses from properly seeking redress through legal or other mechanisms.

1.13. Given the incapacity of most automotive small businesses to mount serious legal challenge to unfair contract terms because of the costs, time and resources required, and resulting lack of legal precedent; MTAA respectfully suggests that most automotive businesses resign themselves to accepting take it or leave it terms, even when clearly detrimental, because to do otherwise may result in repercussions, retribution, or at worst, see the closure of the business.

### Suggested changes

1.14. MTAA and Members suggest there are several factors that must be addressed as part of this review and provide some recommendations for further consideration as a means of extending the intended protections to thousands of automotive businesses. These include:

- a. UCT's should be made illegal. Appropriate penalties should be gazetted and enforced by the ACCC. This would act as an incentive to change business practices, increase good faith negotiations and also bring the UCT laws in line with other provisions of the CCA.
- b. The complete abolition of monetary and headcount thresholds. Current small business definitions are too restrictive and exclude many automotive businesses including car, motorcycle and farm machinery dealers.
- c. There is a lack of clarity surrounding the legal coverage of standard form contracts, and small business may benefit from an appropriate legal definition and more detailed guidance materials to help determine whether they fall within the protections of the UCT regime.

1.15. In addressing these factors , MTAA promotes the following:

- a. **Change the embedded presumption or emphasis in current legislation that the small business seemingly has to be the party to show cause or prove a UCT is detrimental.** MTAA suggests legislation could be amended to recalibrate presumption or emphasis to the potential for likely misuse of bargaining power by a larger and / or dominant market participant, and where there is demonstrated substantial power imbalance.
- b. **This would shift the onus to the larger market participant to prove that it had not used its relative bargaining power to impose UCTs, regardless of whether presented in 'take it or leave it' circumstances or not.**
- c. **Make and incorporate amendments to the legislation that:**
  - i. Recognises the relative bargaining disparity between negotiating parties, and / or

- ii. Place the onus on the larger party that they have not imposed UCTs, irrespective of take it or leave it provisions, and / or
  - iii. If small business threshold definitions are to be maintained, then the small business definition should be bought in line with definitions adopted by AFCA and the Australian Small Business and Family Enterprise Ombudsman Act 2015. I.e. A small business is defined on a headcount of less than 100 employees with the monetary threshold still removed, and / or
  - iv. If point three above is adopted, then consideration should be given to adding dispensation provisions that would enable a business such as a new car dealership that may have more than 100 employees to access the protections. This would mean that such businesses, when compared to the power / influence of a multinational car manufacturer, would be regarded as small and be able to access the intent of the legislation; and
  - v. Such amendments to apply to current agreements instead of those signed after the commencement, as many of the agreements used in automotive industries roll over.
- 1.16. Such changes would reduce the cost to smaller businesses for seeking legal remedies and allow for greater data to be collected on how prevalent UCTs are without imposing a financial cost on small business. It is MTAA's view that this would straighten pathways for the development of case law.
- 1.17. With these changed foundations, MTAA is of the view that genuine negotiations in good faith will be facilitated.
- 1.18. The MTAA and Members accept these are substantial changes to the current Unfair Contract Term protections. However, we believe these will be effective in providing greater protections to more businesses in automotive industries and small businesses more generally.



## 2. Recommendations

### The MTAA recommends:

1. **UCT's should be made illegal.** Appropriate penalties should be gazetted and enforced by the ACCC.
2. **The complete abolition of monetary and headcount thresholds.** Current small business definitions are too restrictive and exclude many automotive businesses including car, motorcycle and farm machinery dealers.
3. **Shift the presumption or emphasis in current legislation from small business challenging and / or proving detrimental UCTs onto the larger party to show how they are not imposing UCTs.**
4. **Incorporate new amendments that:**
  - a. Recognises the relative bargaining disparity between negotiating parties, and / or
  - b. Places the onus on the larger party that they have not imposed UCTs, irrespective of whether 'take it or leave it', and / or
  - c. If small business threshold definitions are to be maintained, then the small business definition should be brought in line with definitions adopted by AFCA and the Australian Small Business and Family Enterprise Ombudsman Act 2015. I.e. A small business is defined on a headcount of less than 100 employees and the monetary threshold is still removed, and / or
  - d. If point (c) above is adopted, then consideration should also be given to adding dispensation provisions that would enable a business such as a new car dealership that may have more than 100 employees to still be able to access protections. This would mean that such businesses when compared to the power of a multinational car manufacturer would be regarded as small and be able to access the intent of the legislation; and
  - e. Such amendments to apply to current agreements instead of those signed after the commencement, as many of the agreements roll over.
5. **Provide improved legal definition and additional rules and guidance materials** to assist all parties determine whether they fall within the protections of the UCT legislation.
6. **In regard to the motor body repair industry specifically:** Consideration be given to:
  - a. Empowering courts to make other orders it thinks appropriate as an alternative to simply declaring an unfair term void.
  - b. That UCTL could even detail 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.
  - c. A similar list in the UCTL could, inter alia, include:
    - i. an order that the cost of repair be determined by an independent costs assessor; and/or
    - ii. An order that the insurer pay to the policyholder an amount of money equal to the cost of repair.

### 3. MTAA and Member organisations in context

- 3.1 The Automotive sector and the multiple industries within it, are undergoing unprecedented structural adjustment brought about by external global influences including automation, the rapid application of advanced technology, increasing influence of increasingly larger and consolidated market participants, and changes to consumer purchasing behaviours.
- 3.2 Modern motor vehicles are now highly complex, integrated, and increasingly inter-connected products. Increased safety, efficiency, environmental, mobility and connectivity outcomes are being achieved with increasing reliance on computerisation, often with multiple third party Original Equipment Manufacturers (OEMs) creating and supplying technologies particularly in advanced systems and sub-system integration.
- 3.3 MTAA Limited is the national association of participating State and Territory Motor Trades Associations and Automobile Chambers of Commerce Members, and discrete national industry associations that exist under the MTAA umbrella providing unparalleled coverage and access to the nation's automotive and related businesses.
- 3.4 MTAA and members represents and is the national voice of the 69,365 retail motor trades businesses which employ over 379,365 Australians that contributed \$37.1 billion to the Australian economy in 2015/16; which equates to 2.2% of Australia's GDP. <sup>1</sup> The vast majority of these businesses are small and family owned and operated enterprises.
- 3.5 MTAA member constituents include automotive retail, service, maintenance, repair, dismantling recycling and associated businesses, that provide essential services to a growing Australian fleet of vehicles fast approaching 20 million (expected by 2020) and growing annually by 2.1%<sup>2</sup> that has rapidly advancing technological systems and capabilities.
- 3.6 MTAA Limited Members have almost all industries (more than 95%) of the automotive sector represented as business member constituents. This allows MTAA Limited Members the ability to understand the operations, issues, concerns and risks of participating automotive industries including but not limited to:
  - *New car retailing (including service)*
  - *Used car retailing (including some who service)*
  - *New and used motorcycle retailing (including service and recycling / dismantling)*
  - *Vehicle body repair (smash repair)*
  - *Independent automotive servicing*
  - *Service station and convenience stores (franchise and independent)*

<sup>1</sup> Australian Automotive Directions Industry Report, August 2017

<sup>2</sup> Australian Automotive Directions Industry Report, August 2017



- *Auto recyclers, dismantlers and part suppliers*
- *Farm and industrial machinery retailing (including service and in some cases dismantling and recycling)*
- *Tyre retailing, retreading and recycling*
- *Towing*
- *Bus and coach*
- *Heavy vehicle*
- *Specific service professions including glass, transmission, engine replacement and reconditioning, brakes, steering, automotive electrical and air- conditioning*
- *Vehicle Rental*

3.7 Most MTAA Limited members are also automotive sector training providers and possess extensive operations and facilities in apprenticeship training and skills development and post trade qualifications. In many jurisdictions MTAA Members are the largest employers of automotive apprentices and trainees.

## 4. Current Unfair Contract Term (UCT) protections application in automotive industries

- 4.1. Unfair Contract Terms were extended to protect small businesses from 12 November 2016. While applauding the legislation MTAA and Members remained concerned that many automotive businesses would be excluded from the protections such as car, motorcycle and farm machinery dealerships. Since the introduction of the legislation this has proven to be the case.
- 4.2. In guidance materials issued the following definitions were provided:
- a. A "small business" means a business with less than 20 employees.
  - b. The unfair contract terms apply to standard form contracts (e.g. Provided on a "take it or leave it" basis) with a value of:
    - i. less than \$300,000 for contracts of less than 1 year;
    - ii. Less than \$1 million for contracts of more than 1 year.
  - c. Whether a contract term is unfair will be assessed by reference to the following:
    - i. Does the term cause a significant imbalance in the parties' rights and obligations under the contract?
    - ii. Is the term reasonably necessary to protect the legitimate interests of the party advantaged by the term?
    - iii. Would the term cause detriment to a party if relied upon?

- d. Types of terms that may be unfair include:
- i. terms that enable one party (but not another) to avoid or limit their obligations under the contract
  - ii. terms that enable one party (but not another) to terminate the contract
  - iii. terms that penalise one party (but not another) for breaching or terminating the contract
  - iv. Terms that enable one party (but not another) to vary the terms of the contract.
- e. Ultimately, only a court or tribunal (not the ACCC) could decide that a term is unfair.

- 4.3. The UCT legislation was also designed to cover a small businesses covered by industry codes. This is an area where MTAA, Members and their business constituents have found significant issues.
- 4.4. For example a small business such as a car dealer whose agreement with a car manufacturer is covered under the Franchising Code; or a small motor body repair business whose agreements or authority to repair with Car Insurers are covered by the voluntary Insurance and Smash Repair Industry Code of Conduct; have proven to be largely ineffective with regard to UCT legislation.
- 4.5. Of particular concern is that current legislation permits if a contract term is required or expressly permitted by that code, the unfair contract term provisions don't apply to that particular term. MTAA has concerns that this enables terms to be included by larger more powerful parties to a contract, in the knowledge that the other weaker party is unlikely or cannot contest terms, or fear retribution or reprisal if contested.
- 4.6. MTAA Members have taken steps to test the veracity of this concern using repair authorities provided by some Car Insurers to vehicle smash repair businesses to cover the authority to undertake repair work. Invariably it has been shown that some terms within the repair authority provided by some Car Insurers are unfair and likely in breach of UCT provisions.

## Automotive dealership agreements

- 4.7. In the case of new motor vehicle dealerships; recent dealership rationalisation activities by some car manufacturers have resulted in what MTAA believes is potential misconduct and breaches of UCT and other consumer and competition laws and regulations, particularly in regard to termination or non-renewal of agreements. However dealers, including those who have sought relief through courts and / or mediation, have failed to have proper redress as headcount and monetary thresholds have prevented access to UCT protections.

- 4.8. Unfair contracts and unfair conduct remains a critical matter for the automotive sector and specific industries such as retailing. Due to a lack of capacity and bargaining power, dealers enter agreements that can contain oppressive contractual clauses, or which permit some manufacturer/distributors the potential to engage in opportunistic and / or exploitative conduct.
- 4.9. The long-term result of sometimes oppressive clauses means that the manufacturer/distributor can use the contractual provisions to the detriment of the dealer during the course of its business relationship. Dealers are in a weak bargaining position once they have entered into a dealer agreement and have invested capital in the realm of many millions of dollars in the franchise; they possess little hope of redress, because they have entered a binding contractual agreement.
- 4.10. In order to invest such capital, dealers obtain finance through the banks and finance companies, which is secured not only against the business assets of the dealership but also the personal assets of the dealership owner/s. In this sense, all the dealer's personal assets are often at risk through personal guarantees and other securities.
- 4.11. Accordingly, potential opportunistic and/or exploitative conduct by manufacturer/distributors under the dealer agreement - for example, non-renewal, or termination, of the franchise agreement, detrimentally affects dealers, consumers and communities alike.
- 4.12. If a motor vehicle dealership is terminated, then all business and personal assets are at risk. Furthermore, the employees of the dealership are likely made redundant. The fact that the dealer has all his, or her, assets tied into securing finance for their dealership means that they are very unwilling to do anything that is likely to jeopardise their franchise. As a result a dealer faces financial pressure to agree to the manufacturer's conduct and requirements contained in dealer agreements - even if that conduct is oppressive or unreasonable - rather than risk repercussion by opposing the manufacturer or querying or questioning conditions and / or clauses in the agreement (contract).
- 4.13. In most cases the dealer has little or no opportunity to negotiate the terms; the larger party (in this case some car manufacturers) have demonstrated ongoing reluctance to negotiate or vary terms of concern; and that the contract it is offered on a 'take it or leave it' basis.
- 4.14. It is the view of MTAA that some motor vehicle manufacturers (including motorcycle and farm machinery):
- a. Has all or most of the bargaining power in the transaction.
  - b. Prepared the contracts before any discussion occurred between the parties about the transaction.

- c. Requires small automotive businesses including dealers to either accept or reject the terms of the contract in the form in which they were presented.
  - d. Do not provide any real opportunity to negotiate the terms of the contract, and
  - e. Do not take into account the specific characteristics of the other party or the particular transaction or circumstances.
- 4.15. The onus for the small business to take concerns to court is cost and resource prohibitive and largely excludes almost all automotive businesses because of the power of the larger party to the contract and their ability to prolong investigations and legal proceedings. Mediation has proven to be largely ineffective for dealers and MTAA is aware that some automotive businesses have attempted to gain determination on UCT, but have not been able to access protections because of not meeting headcount or monetary thresholds.
- 4.16. MTAA is of the view that some of the terms found in automotive business contracts are unfair as they:
- a. Cause a significant imbalance in the parties' rights and obligations;
  - b. Are not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
  - c. Cause financial or other detriment (such as delay) to a small business if it were relied on.
  - d. Are not necessarily transparent in potential outcomes.
- 4.17. MTAA agrees that the fairness of term must be considered in the context of the contract as a whole, but strongly suggests the introduction of other mechanisms other than legal proceedings to determine whether a term is unfair. This could be through an extension of powers to the Commonwealth Small Business Ombudsman, jurisdiction Tribunals and Small Business Commissioners or other mediation / determination processes.
- 4.18. MTAA recognises the rights of franchisors to terminate or not renew agreements (contracts), but it is the provisions of the terms and the manner in which they are executed which is cause of sometimes significant distress.
- 4.19. For example many dealer agreements can contain a term that states that the franchisor can terminate the agreement at any time without cause (i.e. even if the franchisee hasn't breached the agreement). The agreement can also state that if the agreement is terminated, the franchisee will not receive any compensation. MTAA is of the view such a term is likely to raise concerns as it is unlikely that such a term is necessary to protect the franchisor's legitimate interests. Unfortunately dealers cannot access protections because they do not meet headcount or monetary thresholds.

- 4.20. Another potential term of concern revolves around the relationship between the main agreement (contract) and any operations / procedures manuals that are included or referenced. While a term that merely reflects that an operations / procedures manual forms part of an agreement is not likely raise concerns regarding UCTs; what is of concern is the way in which compliance with clauses within these subsidiary documents can, and are, used as rationale for termination or non-renewal by some car manufacturers. Even if dealers could access UCT protections, there would still be a significant lack of clarity regarding that status of clauses in these documents and their relationship with UCT protections. MTAA is of the view that if part of the overall contract, then is an operations or procedure manual that is subsidiary to the dealership agreement, and contains UCTs, should equally be able to be challenged under UCT protections.
- 4.21. The experience of MTAA and members is that dealers are caught in a vice where protections that might be afforded other businesses through the Franchising Code of Conduct, UCT Legislation and more generally under the ACL are not able to be fully accessed by dealers.
- 4.22. Parliament's investigations into the Franchising Code is timely from the Automotive sector's perspective given recent recommendations of the Australian Competition and Consumer Commission (ACCC) New Car Market Study that further investigations be undertaken into dealer agreements; particularly in relation to putting a greater onus on manufacturers to honour consumer guarantee and statutory warranty obligations and the role of dealer agreements in this activity. This inquiry is equally relevant in providing greater protection for automotive industry dealers.
- 4.23. MTAA considers it imperative that cross portfolio investigations and inquiries are considered by the review as there is concern whether these separate pieces of work, that may have a bearing on each other, are not necessarily known or being coordinated across Government.
- 4.24. The following is just a small sample of the repercussions that have occurred over the years and continue to be reported to MTAA and Members.

**Reported problems resulting from to questioning or challenging dealer agreements, UCTs, or provisions in them by dealer councils or individual dealers**

- ❖ Significant constraints in approach to consultations on the basis that objections to particular clauses including UCTs may damage the relationship with the manufacturer/distributor, which may result in adverse consequences to the dealership at a later date.
- ❖ Some consultations have resulted in sudden 'warranty audits' being carried out, by the manufacturer, on a dealer business due to complaints regarding certain provisions, requirements or expectations in the dealer agreement including UCTs.



- ❖ Little evidence of a preparedness by some franchisors to genuinely engage in real negotiation, in good faith; and
- ❖ On a number of occasions where a dealer council has suggested that the discussions take place under collective negotiation under the Competition and Consumer Act, that approach, or process, has been rejected by the manufacturer franchisor.

4.25. As a result of the above and the existence of unfair contract terms, MTAA is aware that a number of dealer agreements frequently contain clauses that have resulted in examples of the following conduct:

#### **Examples of conduct resulting from challenging dealer agreement UCTs**

- ❖ Non-renewal of long standing and high performing dealerships;
- ❖ Non-renewal of 3 dealer agreements, two of 23 years duration, in circumstances where the dealer constructed improvements to 2 dealerships, as well as the full development and construction of a new dealership facility;
- ❖ Non-renewal of a dealer agreement, after only 2 years' operation and without the opportunity to make a return on the capital investment made by the dealer;
- ❖ Non-renewal, with no reasons provided, of dealer agreements in relation to family dealerships that have operated for over 40 years;
- ❖ Renewal terms of only one year due to the dealer having a strong contractual claim against a manufacturer/distributor;
- ❖ Rejection of multi-franchise applications for reasons that are anti-competitive;
- ❖ Industry "dumping" of vehicles, which make it very difficult to operate a financially viable dealership;
- ❖ Unilateral variations to dealer policy / procedures and other UCTs that form part of the dealer agreement; and
- ❖ Unreasonable refusal to permit a dealer to sell its dealership to another dealer.

4.26. In the motorcycle, farm and industrial machinery and outdoor power equipment sectors, the behaviour and recourse for franchisees are considerably even more pronounced as they usually lack the Dealer Council model and are usually left to deal with powerful manufacturers as individual small businesses.

#### CASE STUDY MOTORCYCLE RETAILING

- ❖ Across the Australia MTAA and Members fielded reports from professional dealers of long-standing (some in excess of 30 years), with considerable history with some of the brands and sound performance compliance, were informed that their franchise agreement would not be renewed.
- ❖ It is recognised that it is the right of the franchisor to change arrangements, including not renewing the franchise, but in some circumstances, there was little to no warning and negotiations were fraught with disputes.

4.27. MTAA is concerned that none of the efforts to date have addressed the potentially unfair power imbalance that favours manufacturers to the detriment of dealerships and proposes a more comprehensive approach to policy formation and regulatory protection.

4.28. MTAA repeats its call for motor vehicle including car, motorcycle, and farm, industrial and outdoor power equipment dealers and other deemed appropriate to be afforded the same coverage and level of UCT protection.

### The motor vehicle insurance and repair industry

4.29. MTAA provided a submission to recent investigations looking into the extension of unfair contract term protections to the insurance industry and refers the review team to this submission for additional information.

4.30. MTAA suggested in this submission 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.

4.31. Consequently, it is MTAA's view that UCTs within insurance policies may be used to restrict policyholders' choice on where they can have their vehicle repaired; and 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.

- 4.32. MTAA argued existing protections do not prevent Car 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:
- a. MTAA continues to argue that current pre-contractual disclosure requirements do not prevent insurers from embedding UCTs within insurance policies and nor do insurance companies highlight or make clear the implications of these terms for policyholders; particularly in the event they make a claim.
  - b. MTAA also suggested 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 terms.
- 4.33. MTAA suggests it is not inconceivable some Car Insurers include UCTs in automotive insurance policies that can cause detriment to both the policyholder and, indirectly, to motor body repair business.
- 4.34. MTAA would argue some terms already could be seen to be against the intent of legislation and could provoke unfair contract term protections. For example:
- a. Some car insurance policies contain a term which provides that a policyholder *must* have his or her car repaired only by the car insurers' nominated or preferred repairer.
  - b. 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:
    - i. is some distance away from the policyholder (or otherwise difficult for the policyholder to access); and /or
    - ii. If the policyholder finds the nominated repairer particularly unpleasant to deal with.
  - c. Such a term also causes *detriment to the crash repair industry*. For example:
    - i. 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).
    - ii. 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

- 4.35. For a repairer to undertake a repair to be paid for by a car 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.
- 4.36. 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.
- 4.37. 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.
- 4.38. 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:
- a. terms that permit, or have the effect, of permitting the insurer to unilaterally determine who performs any repair work; and
  - b. Terms that permit, or have the effect of permitting, the insurer to unilaterally determine the cost of any repair work.
- 4.39. MTAA on behalf of members and some of their constituents have also obtained legal advice regarding terms found in some repair authorities provided by some car insurers to repair businesses. MTAA is of the view based on this legal advice that some terms are likely to be in breach and therefore access to protections should be afforded.
- 4.40. Again the cost, resources and time required to mount a legal challenge in regard to such terms has precluded not for profit organisations such as MTAA and its members from pursuing this action, leaving only good faith negotiations as the only means of redress. At the time of writing this submission there is no full resolution to the UCTs in these repair authorities.

- 4.41. What has occurred in late 2018 however and through two lengthy mediation and determination processes, instigated through the voluntary Insurance and Smash Repair Industry Code of Conduct, are findings supportive of MTAA and Members contentions in regard to the actions and practices of some insurers.
- 4.42. **Potential additional remedies for motor body repair businesses**  
MTAA suggests that specific to other suggested improvements to the legislation, in regard to motor body repair industry issues the court should be empowered to make other orders it thinks appropriate as an alternative to simply declaring an unfair term void.
- 4.43. 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.
- 4.44. A similar list in the UCTL could, inter alia, include:
- a. an order that the cost of repair be determined by an independent costs assessor; and/or
  - b. An order that the insurer pay to the policyholder an amount of money equal to the cost of repair.

## 5. Conclusion

- 5.1 MTAA welcomes the opportunity to contribute to participate in this review and remains available at any time should the review team wish to pursue matters raised in this submission further, or to access other confidential information that has been provided to other inquiries.
- 5.2 As industries within the automotive sector continue to consolidate and changes continue to influence businesses and their operations, the bottom line remains that consumers should still feel confidence in an economy where competition is strong, new entrants are encouraged, small businesses are able to flourish, and they have the opportunities to grow into bigger businesses, - without harmful and detrimental impacts, and with access to protections which ensure these fundamentals.

END OF SUBMISSION