MTAA submission to Treasury Consultation Paper on Enforceability of financial services industry codes

MOTOR TRADES ASSOCIATION OF AUSTRALIA

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Introduction: MTAA, codes and financial services

The Motor Trades Association of Australia (MTAA) supports strong competition, consumer protection and pro-competitive environments and is not opposed to the market, consumer and business benefits provided by vertical and horizontal integration.

MTAA's primacy is ensuring through advocacy and representation all participants, particularly small to medium sized automotive businesses, are able to participate without fear, fairly and are not restricted by conduct or behaviours that threaten sustainability or opportunity for growth. Of particular interest and cause of MTAA advocacy activities is the appropriate management of significant power imbalances between large and sometimes dominant market participants and their impact on smaller participants.

MTAA supports the use of industry and government interventions including industry codes of conduct, particularly as automotive sector markets consolidate, and some power imbalances are strengthened in some markets through horizontal and vertical integration. Such intervention must also include prescribed and mandated measures with enforceable provisions where the market fails to respond of its own accord.

MTAA supports Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Recommendation 1.15 that certain provisions of financial sector codes should be 'enforceable code provisions'.

MTAA, Members and specific automotive sector industries have close relationship with prescribed and mandated and voluntary codes including the Franchising Code, the Oil Code, and the Motor Vehicle Insurance and Repair Industry voluntary code. So the Commissioner's observations and as noted in the Treasury Department consultation Paper rang bells of familiarity and ongoing concern for MTAA

> "If industry codes are to be more than public relations puffs, the promises made must be made seriously. If they are made seriously (and those bound by the codes say that they are), the promises that are set out in the code, and are intended to govern the particular relations between the provider and the acquirer of a financial product or financial service must be kept. This must entail that the promises can be enforced by those to whom the promises are made: the customer who acquires the product or service, and the guarantors of loans to individuals and small businesses".[1] – Commissioner Hayne

MTAA in this submission will draw on the experiences with, Codes and specifically the failings of, the Motor Vehicle Insurance and Repair Industry Voluntary Code of Conduct **(MVIRI Code)** to illustrate support for prescribed and mandated codes and enforceable code provisions. MTAA suggests learning from the MVIRI Code, while only concerning a section of the general insurance market, is applicable for the areas under investigation by the Treasury.

[1] FSRC Final Report, p. 12

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1. What are the benefits of subscribing to an approved industry code?

1.1. Page 12 of Treasury's document *Industry Codes of Conduct Policy Framework* states: "There must be evidence that prescription of a code will provide public benefits that will outweigh the costs associated with regulation. Industry should be able to quantify the likely benefits and provide an indication of the estimated compliance costs."

1.2. Page 3 of the Australian Competition and Consumer Commission's (ACCC's) *Guidelines for developing effective voluntary industry codes of conduct* lists some of the following generic benefits and other reasons: "greater transparency of the industry to which signatories to the code belong; greater stakeholder or investor confidence in the industry/business; ensuring compliance with [relevant legislation] to significantly minimise breaches; a competitive marketing advantage; it is more flexible than government legislation and can be amended more efficiently to keep abreast of changes in industries' needs; it is less intrusive than government regulation; industry participants have a greater sense of ownership of the code leading to a stronger commitment to comply with [relevant legislation]; the code acts as a quality control within an industry; and complaint handling procedures under the code are generally more cost effective, time efficient and user friendly in resolving complaints than government bodies."

1.3. The quantified benefits and the costs of any prescribed voluntary or mandatory code will be specific to the circumstances and can change over time. Because undertaking proper cost benefit analysis (CBA) requires specialised skills and experience as well as being time-consuming and expensive, this requirement could unfairly favour more powerful industry participants like car insurer in the general insurance market over a less powerful one like car repairers.

1.4. MTAA suggests this part of the code process should involve an independent entity to not only take submissions from the stakeholder industries (like general insurance and car repairs) on benefits and the costs, but to lead the CBA itself. The most likely candidates are the ACCC, Productivity Commission (PC) or the Parliamentary Budget Office (PBO). An even better option would be to establish a CBA Authority to get more serious about CBA across all policy areas.

2. What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?

2.1. Page 5 of Treasury's Consultation Paper *Enforceability of financial services industry codes* states: "The Commissioner's recommended approach allows industry codes approved by [the Australian Securities and Investments Commission (ASIC)] to include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law. Making promises in codes enforceable by statute ensures that individuals can rely on these provisions…that govern the terms of the contract. … A breach of the code may also allow the ACCC to pursue other regulatory action that would not generally be available to a consumer."

2.2. Treasury also states on page 5: "The Commissioner did not say that every provision in an industry code is to be an enforceable promise. Rather, where a provision is identified by the code as an 'enforceable code provision', then it follows that those provisions should be enforceable and a breach of that provision should have consequences." This seems at odds with page 5 of Treasury's *Policy Framework* which says: "Once a corporation has opted-in, they are legally obliged to adhere

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to the code requirements and can be subject to enforcement action for any breaches in the same way as if the code was mandatory."

2.3. A code, whether it is a prescribed voluntary one or a prescribed mandatory one, should have both legal and regulatory standing. In other words, all provisions of a code should be enforceable through external dispute resolution (EDR), a regulator and/or the courts. Otherwise, what is the point? Contracts should provide circumstance-related detail underneath, consistent with, and subject to, a code. A code should prevail where there is a problem. Thus, the only difference between a voluntary and mandatory code is the former was voluntarily entered in to by the parties and, therefore, should provide greater input from the parties and less from the regulator.

3. What criteria should ASIC consider when approving voluntary codes?

3.1. Pages 11 to 12 of Treasury's *Policy Framework* asks the following criteria-style questions: "Is there an identifiable problem in the industry? Can the problem be addressed using existing laws or regulations? Has industry self-regulation been attempted? Is an industry code the most suitable mechanism for resolving the problem? Is there likely to be a net public benefit?"

3.2. Pages 6 to 13 of the ACCC's *Guidelines* suggest the following criteria-style structure: "purpose of the code; code rules; code administration; independent review of complaints handling decisions; in-house compliance system; sanctions for non-compliance; consumer awareness; industry awareness; data collection; monitoring; accountability; review; competition implications; and performance indicators."

3.3. Page 6 of Treasury's *Enforceability* Consultation Paper sets out ASIC's current and the Commissioner's suggested criteria of: "require subscribers to be contractually bound by the code (either by contracting with the enforcement body or with consumers or both); have an independent person or body that is empowered to administer and enforce the code, including imposing any appropriate sanctions; provide that consumers have access to internal dispute resolution and an appropriate external dispute resolution scheme for any code breaches resulting in direct financial loss; give consumers broad standing to complain about any other code breach to the independent body; a comprehensive body of rules developed in consultation with stakeholders; adequate provisions for dispute resolution, remedies and sanctions; and effective and independent administration – including compliance monitoring."

3.4. The criteria should combine those from Treasury, the ACCC, ASIC and the Commissioner above. The Treasury ones address (at the higher level) whether a code is needed or not, whilst the other three address (at the lower level) what should a code look like. The higher level should include the question: "Is the industry problem caused and sustained by existing laws, regulations, taxes, subsidies or other government interventions (whether as an unintended consequence or not)?" More importantly, the threshold for approving voluntary codes should be much lower, quicker and cheaper than that for mandatory codes. Any criteria should be accompanied by independent and sound CBA.

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4. Should the Government be able to prescribe a voluntary financial services industry code?

4.1. Page 5 of Treasury's *Policy Framework* states: "The key difference between prescribed voluntary and mandatory codes is the way in which they are applied to industry participants. Prescribed voluntary industry codes are only binding on industry participants if they agree to 'opt-in'. … Once a corporation has opted-in, they are legally obliged to adhere to the code requirements and can be subject to enforcement action for any breaches in the same way as if the code was mandatory. Signatories to a voluntary code can subsequently opt-out or withdraw at any stage, and thus cease to be bound by the code. However, corporations will still be held accountable for any breaches of the code that occurred during the time in which they were signatories."

4.2. Pages 3 and 6 of Treasury's *Enforceability* Consultation Paper adds: "As a general rule, government only steps in to prescribe codes (particularly mandatory codes) when they are necessary for supporting the efficient operation of markets or the welfare of consumers, and it is appropriate for the matter to be dealt with in the form of a code rather than the more general law. … The Commissioner also emphasised that it is important to have in place appropriate procedures to support industry to develop voluntary codes, and only have government prescribe mandatory codes where necessary. Equally, in approving a code, the effects on competition should be considered."

4.3. In short, the Government should not be able to prescribe a voluntary financial services (or any) industry code but should be able to prescribe a mandatory financial services (or any) industry code. The key, but not only, factor should be competition throughout the industry supply chain in terms of rivalry, substitutes, entry, supplier power and buyer power (known as the Five Forces). And given that most market failures, such as insufficient market competition that results in inefficient market power, on closer examination are usually the result of government failures that result in for example regulatory barriers to market entry. If there is a low level of power imbalance (exercised), say between general insurance and car repairs, then normal contract and competition laws should be sufficient. If there is a medium level of power imbalance (exercised), then a voluntary code should be encouraged. If there is a high level of power imbalance (exercised), then a mandatory code should be imposed.

4.4. In the specific case of the MVIRI Code, MTAA respectfully suggests that due to a number of factors detailed later in this submission, the voluntary code has failed for much of the same reasons as observed by Commissioner Hayne and the car insurance and repair industry must now have the imposition of a mandatory code.

5. Should subscribing to certain approved codes be a condition of certain licences?

5.1. Page 7 of Treasury's *Enforceability* Consultation Paper states: "[T]he content of codes should continue to be directed to raising industry standards setting out the norms of behaviour which are expected of subscribers." Page 56 of the PC's inquiry report *Smash Repair and Insurance* highlighted: "Many repairers expressed concern that, because of pressure from insurers for repairs to be undertaken at minimal cost, some repairers 'cut corners' by using inferior parts or undertaking inadequate repair work, to the point where quality and safety can be compromised."

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5.2. Page 6 of the PC's study *Business Licences and Regulation Reform* defined a licence as: "A notification which also requires prior approval as a condition for conducting prescribed business activities, and compliance with specified minimum standards." Page 7 states: "Accreditation or certification schemes which amount to non-mandatory licences. They involve prior approval and compliance with minimum standards." Page 8 adds: "A code of practice is an example of a standard without an associated licence. Its provisions may be voluntary or compulsory."

5.3. Page 11 of the PC's *Licences* study reminds: "Some common explanations for the use of business licensing are, broadly: to account for spillover effects or externalities; to address information failures; to restrict competition and enhance market power; and paternalism. The first two involve correcting market failures. The third is a potential outcome of licensing and may or may not be an objective. The last may often be an implicit motive for licensing." Page 15 goes on: "It is sometimes argued that the purpose of licensing suppliers of goods and services is to secure a minimum level of quality or safety to protect some consumers who are gullible, preoccupied or careless or who miscalculate. However, these potential problems may be addressed through means other than licensing…which may carry less danger of unnecessarily entrenching economic power in the hands of licensed suppliers."

5.4. Professor George Reisman makes the following point in his 1998 book *Capitalism – A Treatise on Economics*: "It may well be the case that licensing sometimes does serve, as its supporters often claim, to raise the minimum level of competence and expertise in a field and thus to guarantee to the buyers a higher level of service than they would have received in its absence. But even if this is true, it is not by any means an advantage to the buyers. It merely means, in many cases, that buyers are forced to buy a higher level of service than they want or need and, if they cannot afford the higher level of service, are forced to do without the service they could have had." In conclusion, a CBA-based case needs to be made for linking codes and licences because, at one end of the spectrum, it may be regulatory duplication and, at the other end, it may enforce or raise the market power of the already dominant industry. More importantly, the focus of any code-like assessment should firstly be on identifying and removing any (of the likely) government sources for the original market power of the dominant industry (eg general insurance) over the subordinate industry (eg car repairs) .

6. When should the Government prescribe a mandatory financial services industry code?

6.1. See ***answer 4.3 to question 4 above***.

6.2. MTAA made two submissions to the financial services Royal Commission (FSRC) over the course of 2018. Page 2 of the second MTAA submission to the FSRC reminds that the general insurance industry in terms of car insurance "routinely engage in three different kinds of conduct: 1) adopt system/s of time schedules and hourly rates that does not reflect the real cost of repair (Funny Time, Funny Money) which may motivate unsafe motor vehicle repairs; 2) insert unfair terms in pro forma preferred smash repairer contracts; and 3) mislead or deceive or exert undue pressure on the policyholder to steer the policyholder toward the Motor Vehicle Insurers' preferred smash repairers." Thus, page 13 of the first MTAA submission to the FSRC recommended: "Develop a mandatory prescribed Code of Conduct that is either specific to the automotive insurance

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industry or develop a broader automotive Code of Conduct that incorporates the automotive insurance and repair industry and addresses other automotive industry issues such as fair and equitable access to technical and repair information and automotive franchising arrangements."

6.3. A 2018 Western Australian (WA) Parliamentary Committee report on *Structural Challenges in the Smash Repair Industry* found that: "The Australian car insurance industry is dominated by two large companies – Insurance Australia Group [AIG] and Suncorp Insurance Holdings Limited [Suncorp]. The top four home and motor insurance companies control about 74% of the market. While in other Australian jurisdictions IAG, Suncorp and Allianz dominate the car insurance markets, in [WA] the major insurer is RAC Insurance. … Direct evidence of inappropriate steering behaviours would indicate an abuse of market power. … [D]isagreement remains over the appropriate hourly rate to be paid to tradespeople undertaking different repair tasks." The WA *Repair Industry* report recommends: "[The ACCC] undertake in-depth inquiry into possible anti-competitive conduct and misuse of power in Australia's smash repair industry. … [The WA Government] mandate the Motor Vehicle Insurance and Repair Industry Code of Conduct in [WA]." The WA Government in 2019 supported the first recommendation but only noted the second.

6.4. A 2014 New South Wales (NSW) Parliamentary Committee report on the *Motor Vehicle Repair Industry* found that: "A large proportion of [the NSW smash repair industry's] work, approximately 90 per cent, is supplied by motor vehicle insurers, giving insurance companies a powerful influence in the market. The fact that the two largest players in the motor vehicle insurance market control over 60 per cent of it, serves to further concentrate this power. … In this context, concerns have been raised by a large number of key stakeholders that insurers may put profit ahead of safety, pressuring repairers to repair to a price, not a standard. … Overall, a significant number of vehicles are subject to poor quality repair work and are being returned to NSW roads, potentially increasing safety risks to road users. … [Thus, there needs to be, amongst other things] [a] better balance [of] the power relationship between insurers and repairers and [an] increase [in] the enforceability and effectiveness of the Motor Vehicle Insurance and Repair Industry Code of Conduct." The NSW *Repair Industry* report recommends: "[T]he introduction of a mandatory Code of Conduct for the Motor Vehicle Insurance and Repair Industry, which would include penalties for non-compliance and A) be subject to oversight and enforcement by the [ACCC] … or B) establish an arbitration process for disputes under the Code [including] an independent Industry Ombudsman with powers to act as a court of industry appeal … [or] C) require NSW Fair Trading to mediate disputes under the Code [in certain circumstances] [plus] making the NSW Civil and Administrative Tribunal the final adjudicator in matters involving alleged breaches of the Code [along with] " The NSW Government later in 2014 supported all of these options for a mandatory Code, but had to end up settling for the third one.

7. What are the appropriate factors to be considered in deciding whether a mandatory code ought to be imposed on a particular part of the financial sector by Government?

7.1. See ***answer 3.4 to question 3 above***.

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7.2. Page 2 of the second MTAA submission to the FSRC suggests that appropriate factors, in the particular case of general insurance related car repairs, should address the following conduct: "1) the prohibition, in the *Australian Consumer Law* (ACL) and the *ASIC Act 2001*, on a) conduct that is misleading and deceptive, b) unconscionable conduct and c) unfair contract terms; and 2) the duty of parties to an insurance to act with the utmost good faith implied by the *Insurance Contracts Act 1984* and the Motor Vehicle Insurance and Repair Industry Code of Conduct."

7.3. Page 2 of Treasury's Consultation Paper *Mandatory scheme for the sharing of motor vehicle service and repair information* refers to the ACCC's *New Car Retailing Industry Market Study* highlighting that: "[A] mandatory scheme be introduced for car manufacturers to share technical information with independent repairers, on commercially fair and reasonable terms." The ACCC's *Car Industry Study* itself on page 3 states: "[C]onsumers benefit from competitive aftermarkets and by having a choice of providers to repair and service new cars, and that voluntary commitments to share technical information have not been successful in meeting their aims." The ACCC on page 192 suggests that any criteria "to prescribe a mandatory code to cover the industry" should include: "[T]he relevant Minister [being] satisfied there is a compelling case for intervention, supported by robust evidence [as well as] there is a demonstrable problem affecting industry participants or consumers which the market cannot or will not overcome, and where such intervention is likely to result in a net public benefit."

8. What level of supervision and compliance monitoring for codes should there be?

8.1. The main form of code supervision and compliance monitoring should be through a code's complaints and disputes mechanism. Such a mechanism should allow for and encourage in the following order: 1) informal discussions and negotiations between interested parties on the *merits* of the matter; after trying that 2) formal but private EDR on the *merits* of the matter; after trying that 3) the relevant regulator on the *law and merits* of the matter; after trying that 4) the Australian Financial Complaint Authority (AFCA), Australian Competition Tribunal (ACT) or Administrative Appeals Tribunal (AAT) on the *merits* of the matter; after trying any or all of those 5) a court, with jurisdiction, on the *law* of a matter.

8.2. This should be complemented by an annual, and relatively low burden, monitoring report like that done by the ACCC regarding its (largely successful) light-handed regulation of airports. It includes monitoring prices, costs, profits and quality of aeronautical services and facilities, as well as car parking, at Brisbane, Melbourne, Perth and Sydney airports. It also includes assessing notifications of proposed price increases from Sydney Airport in relation to regional air services and proposed price increases from Airservices Australia, which provides air traffic control and aviation fire-fighting and rescue services to airports and airlines. Airports also remain potentially subject to heavy-handed regulation under the general third party access provisions of Part IIIA of the *Competition and Consumer Act 2010*.

8.3. This should also be complemented by adherence to, and certification under, the *International Standard for Compliance Management Systems* which replaced the *Australian Standard for Compliance Programs* in 2015. These standards are referenced by multiple regulators such as ASIC and the ACCC. In fact, the original *Australian Standard* was initiated upon request by the ACCC.

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The *Australian Standard* divides twelve 12 principles into four key themes of commitment, implementation, monitoring and measurement, and continual improvement. The *International Standard*, on the other hand, refers to seven key themes each with multiple elements. The seven key themes are context of the organization, leadership, planning, support, operation, performance evaluation, and improvement. A compliance management system is defined as a set of interrelated or interacting elements of an organisation to establish policies and objectives and processes to achieve those objectives. This contrasts to the previous compliance program, defined as a series of activities that when combined are intended to achieve compliance.

9. Should code provisions be monitored to ensure they remain relevant, adequate and appropriate? If so, how should this be done and what entity should be responsible?

9.1. As per ***answer 8.2 to question 8 above***, codes should be monitored every year by ASIC with the assistance of the ACCC. Some sort of 'Red versus Blue Team' approach could be included in this process – eg financial stability v market competition. Such a *Red v Blue* approach is currently being explored by the US Federal EPA, as the 'new wave' of world best practice for evidence based policy.

10. Should there be regular reviews of codes? How often should these reviews be conducted?

10.1. There should be a regular review of codes by the PC either: every 3 years, as per the election cycle; or every 5 years, like the PC's review of airport regulation. Some sort of *Red v Blue* approach could be included in this process – eg free market v government intervention.

11. Aside from those proposed by the Commissioner, are there other remedies that should be available in relation to breaches of enforceable code provisions in financial service codes?

11.1. An account of profits (AOP) should potentially be a remedy as well. The AOP remedy is restitutionary in nature because, unlike for instance common law damages, the plaintiff need not have suffered any loss. This was confirmed by the High Court in *Dart Industries Inc v Decor Corporation Pty Ltd* where it was stated that: "The purpose of an [AOP] is not to punish [a] defendant but to prevent [his/her] unjust enrichment."

12. Should ASIC have similar enforcement powers to the ACCC in Part IVB of the Competition and Consumer Act in relation to financial services industry codes?

12.1. Yes.

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13. How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?

13.1. In accordance with standard legal principles, statutory law (like competition) overrides common law (like contract) whenever there is a conflict between the two.

14. Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?

14.1. In principle, the standard for, and impact of, civil remedies and penalties should be lower than that for, and of, any criminal ones.

15. In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?

15.1. See ***answer 8.1 to question 8 above***.

16. To what matters should courts give consideration in determining whether they can hear a dispute following an Australian Financial Complaint Authority (AFCA) EDR process?

16.1. See ***answer 8.1 to question 8 above***.

17. What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?

17.1. See ***answer 8.1 to question 8 above***.

Conclusion: MTAA's policy priorities

The **first-best policy** by government and its regulators, for financial services or any other industry, is to review and remove the government regulatory, fiscal and monetary policies that most likely (and probably unintentionally) made possible the market power for one industry over another.

The **second-best policy** is a prescribed voluntary code where there is a *significant* but not substantial exercise of the market power of one industry over another.

The **third-best policy** is a mandatory voluntary code where there is a *substantial* exercise of the market power of one industry over another. This is a related concept to that in restrictive trade practices of being "engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market".

All three policy levels should be accompanied by independent and sound CBA (**cost benefit analysis**).

Thus, given that the first-best policy has not yet been tried and given that the second-best policy has failed in MTAA's experience, the **third-best policy** is needed in the case of the dominant general insurance industry's relationship with the subordinate car repairs industry (as is now the case with the dominant car manufacturing industry's relationship with the subordinate car repairs industry).

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Appendix 1: Specific example of the need for enforceable provisions

The Motor Trades Association of Australia (**MTAA**) is the national association of participating State and Territory Motor Trades Associations, Automobile Chambers of Commerce and the Australian Motor Body Repairers Association (**AMBRA**). Membership of these organisations, and AMBRA, includes smash repairers. Smash repairers obtain about three-quarters of their income[2] from work for insurers of motor vehicles (**Car Insurers**) and IAG and Suncorp (who currently form a duopoly dominating the Australian market).[3]

In its submission to the Royal Commission MTAA put it that that Car Insurers routinely engage in three different kinds of conduct:

i. adopt a system of time schedules and hourly rates, colloquially known as 'funny time, funny money', that does not reflect the real cost of repair;
ii. insert unfair terms in pro forma preferred smash repairer contracts; and
iii. mislead or deceive or exert undue pressure on the policyholder to steer the policyholder toward the Motor Vehicle Insurers' preferred smash repairer.

MTAA submitted to the Royal Commission the conduct described above amounts to misconduct because it is conduct that is contrary to the law and/or community norms as manifested in the prohibition, in the Australian Consumer Law (**ACL**) and the Australian Securities and Commission Act 2001 (**ASIC Act**), on:

- conduct that is misleading and deceptive; [4]
- unconscionable conduct;[5]
- unfair contract terms;[6]
- the duty of parties to an insurance to act with 'the utmost good faith' implied by the Insurance Contracts Act 1984 (Cth);[7] and
- the Motor Vehicle Insurance and Repair Industry Code of Conduct, (**MVIRI Code**).

MTAA is of the view the misconduct has caused, and continues to cause, detriment to smash repairers and policyholders and the industry at large.

The car insurance and repair industry has been the subject of numerous reviews over time (see **Appendix 3**) but to date the only regulatory response has been to draft the MVIRI Code which is only voluntary.

MTAA, Members and individual businesses experience with the MVRI Code is that had enforceable code provisions been available to a mediator through dispute resolution mechanisms or by the regulator the objectives and need for the code may have been met and the relationship between participants vastly improved.

MTAA contends that having attempted to address documented conduct and behaviours through the voluntary MVIRI Code over a number of years without success, the voluntary code has manifestly failed in its intent. This

[2] Smash Repair and Insurance, Productivity Commission Inquiry Report, No. 34, 17 March 2005 (**PCI Report**), at XIII.
[3] IAG and Suncorp own or underwrite more than 70 per cent of the market brands available in the automotive insurance market.
[4] ACL s 18; ASIC Act s12DA.
[5] ACL s 21; ASIC ACT s 12CB.
[6] ACL s 23; ASIC s 12BF.
[7] Section 13.

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would not have been the case if there had been enforceable provisions and general insurance (including car insurance) was not exempted.

Although the automotive insurance market includes a plethora of providers, IAG and Suncorp own and/or underwrite more than 74% of market brands; which is akin to a market duopoly.

In this context, IAG and Suncorp exploit their dominant market position and the reduced market power of their competitors by controlling times estimators for undertaking repair work and budgetary processes for determining and controlling repair prices. They also increase market share by using their purchasing power and resources to control the supply chain through vertical and horizontal market integration.

By purchasing failing independent repair shops (due to reduced market share and inability to compete), developing their solely owned networks of repair businesses and /or forming alliances with networked chains of repair businesses, IAG and Suncorp control the bulk of the sale, supply and purchase of motor body repair work. By also steering insurance repairs to their preferred repairer networks (as a result of introduced limits on choice of repairer for policy holders) the business sustainability of independent repairers is often untenable.

Dominant insurers are also bulk purchasing parts and imposing their use in vehicle repairs. This exemplifies horizontal market integration and diminishes another revenue stream for repairers. It also exemplifies exclusive dealing designed to reduce competition.

Although it is clear that market mechanisms have failed to protect consumer choice and prevent the emergence of duopoly conditions, there is not an effective regulatory tool to redress this imbalance of market power and protect the integrity of competition within the automotive insurance and repair market.

The Motor Vehicle Insurance and Repair Industry (MVIRI) Code of Conduct is the only mechanism governing the business operations and behaviour of automotive insurers and repair businesses including dispute resolution. However, this is a voluntary industry code and New South Wales is the only state to legislate the code. Consequently, insurers sometimes dismiss the principles outlined in the code and dispute repair estimation costs, unfairly cash settle, and delay vehicle assessments. As a result, consumers are often delayed in receiving their repaired vehicles.

The MVIRI Code has been manifestly inadequate in changing the behavior of Car Insurers. It is the firm view of MTAA, Members and AMBRA that the availability of enforceable provisions and the inclusion of car insurance and a part of general insurance as a financial product are key to addressing this inadequacy.

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Appendix 2: MTA SA's key points

MTA SA has provided input to MTAA, and may have also provided a separate submission as other MTAA Members. This submission should be considered along with MTAA's Members.

MTA-SA has provided the following key points:

a. "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." The MTA SA submission thus recommends that: "[I]ndustry codes should only be voluntary by exception, with predetermined criteria established for application for voluntary status [and] the Motor Vehicle Insurance and Repair Industry Code of Conduct [MVIR Code] specifically be made mandatory as a matter of urgency."

b. "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." Another highlight from this section is: "[I]nsurers have increasingly dismissed the principles outlined in the [MVIR Code] and instead have chosen to dispute repair estimation costs, unfairly cash settle, and delay vehicle assessments."

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

d. "There have been more than 300 internal dispute claims lodged for violations of the [MVIR Code] against insurers in the last two years nationally. This is clear evidence of a failure of the voluntary code to adequately alter insurer behaviour. … The fundamental weakness of the current [MVIR Code] is in the voluntary application of its provisions. … Essentially, the [MVIR Code] is a worthless tool where parties do not act in good faith and in keeping with the intent of the Code."

e. MTA-SA also suggests the abuse of [m]arket power by the two dominant national insurers, which collectively hold more than 70[%] 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." And secondly that: "[F]ailure 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." Thus: "As the [MVIR 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." Noting: "Both the Victorian Small Business Commissioner and the NSW Office of the Small Business Commissioner 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 [MVIR Code]. In NSW, this was achieved through the mandating of the Code by the State Parliament."

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Appendix 3: Previous inquiries and reports

Date	Organisation	Title	Relevant Key Findings
15 March 1995	Industry Commission	Vehicle and Recreational Marine Craft Repair and Insurance Industries, Report No. 43	• Code of conduct needed. • Funny time, funny money should be abandoned. • Internal dispute resolution mechanism to be given greater autonomy or, alternatively, include consumer representative on review panels.
September 2003	ACCC	Discussion of the relationship between the Australian motor/smash repair industry the general insurance sector, Issues Paper	• Issues raised around choice of smash repairer affect consumers. • Dispute resolution processes should be extended to include all smash repairers and suppliers who deal with Car Repairers. • There might be some scope for government intervention if voluntary codes of conduct fail.
17 March 2005	Productivity Commission	Smash Repair and Insurance, Report No. 34	• Car Insurers should enhance transparency of its preferred smash repairer arrangements. • Funny time, funny money should be abandoned. • Car Insurers should clearly and accurately explain choice of smash repairer to policyholders (if insurance policy offers this option). • Car Insurers should not dissuade policyholders from their preferred smash repairer by misleading comments. • If a voluntary code of conduct cannot be agreed upon by the industry a code should be mandated.

END OF SUBMISSION