AUSTRALIAN AUTOMOTIVE REPAIRERS ASSOCIATION

(Political Action Committee) Inc

FILE No:
DOC:
MARS/PRISM:

Your Ref: C2004/1520
Contact Officer: Susan Sullivan

24th December 2004

Mr. Scott Gregson
A/g General Manager
Adjudication Branch

Dear Mr Gregson,

Pleas find our submission on behalf of the Australian Automotive Repairer's Association (Political Action Committee) Inc.

I have also sent the original of this submission in the mail for you.

On behalf of the AARA

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Objection to Notification of exclusive dealing
Lodges on behalf of the
Australian Automotive Repairers' Association (Political Action Committee) Inc

Third line forcing is prohibited by these sub-sections s 47(6) and (7). The objective of these sub-sections is to prohibit a supplier of particular goods or services imposing a condition on requiring consumers who want goods or services having to take other, perhaps unwanted, goods or services from a third party in order to get the supplier's goods or service. It is therefore relevant to appreciate that all manner of creative forms of third line forcing are prohibited. Therefore one must look at substance over form.

The "IAG Insurers recognise that some policyholders place significant value on the right to choose which repairer will undertake repairs to their vehicle"[1]. In acknowledging this, the IAG then proceeds to prohibit the policyholder from having a choice of repairer. Where a policyholder chooses to have the work undertaken by their choice of repairer, the IAG prohibits them form acquiring that service. It does this by informing the policy holder that they will cash settle the policy, cancel the policy or not offer a lifetime guarantee or speedy assessments.

In such instances, the policyholder is required to obtain unwanted goods or services from a third party in order to get the supplier's goods or services. These actions do amount to third-line forcing and as such are in breach of the *Trade Practices Act 1974.*

All contracts of insurance except life and personal accidents policies are indemnity contracts and provide the insured with financial protection by providing indemnity against the risk of loss. Indemnity as defined in the English dictionary means "security against damage or loss; exemption from penalty."

Under **Clause 3.4** of IAG's submission, IAG highlights a distinction between 'repairing a vehicle at its expense' and 'indemnifying the policyholder for fair and reasonable cost.'

Clause 3.4 is a nonsense clause. To indemnify an insured means to secure them against damage or loss; without penalty. Therefore, the insured must be placed in the position they were in before the damage or loss was suffered. IAG must repair the vehicle at its expense or indemnify the policyholder for fair and reasonable cost. As the cost of repairs is measured empirically, there should be no difference in the value of repairs where the IAG "repair the vehicle at its expense" or "indemnify the policyholder for the fair and reasonable cost of repairing the vehicle".

However, the inference to be drawn from this clause is that there is a difference in the value of repairs. If there is a difference then this can only be to the detriment of the

[1] Submissions in support of notification of exclusive dealing Blake Dawson Waldron clause 5.7

insured. The insured that receives the lesser of the two amounts must therefore be in a lesser position. For example, if repairs to a vehicle cost $1,500, then how does one justify the difference between "repair the vehicle at its expense" or "indemnify the policyholder for the fair and reasonable cost of repairing the vehicle"? There should be no difference.

- The IAG maintain a network of repairers[2]. The method used by the IAG to maintain there network of repairers, is to use their substantial market and influence to dissuade policyholders from going to the repairer of their choice. Hence repairers are having their goodwill stripped and are losing money therefore going out of business. The intentional reduction in the number of repairers immediately has the effect of reducing the level of competition in the market.

The correct basis of determining the effect that such conduct will have on the consumer is to correctly identify the market. In the present submissions there are two distinct markets. The first is the smash repair market and the second is the motor vehicle insurance market. Although it may argued that competition will increase in the motor vehicle insurance market[3], conversely competition will decrease in the smash repair market. Consumers will have fewer repairers to choose from; therefore as the supply of repairers has decreased, this will have the effect of increasing the cost of repairs.

The IAG argues that their scheme reduces the average cost of repairs; however, they fail to consider the cost of repairs for a consumer who is having private repairs done. For these preferred and Associate Repairers to be profitable they must subsidise the low cost of repairs. This subsidy comes in the form of charging consumers more for their private repairs. As the numbers in the industry decrease, then the cost of these private repairs will increase to the detriment of the consumer.

A simple example of this can be demonstrated by looking at the whitegoods and electrical retail stores market. As the number of competitors has increased, these outlets (Harvey Norman, Bing Lee, Retravision, The Good Guys), have to offer greater discounts and greater services, such as one year interest free loans, or "pay cash pay less" just to name a few. The greater the number of retailers, the greater the competition for the consumer.

However, the IAG believes it is the exception to the rule. The IAG has no incentive to discount premiums. In fact the truth is the IAG threatens repairers by using leverage one against the other. The IAG does not use market forces but uses its substantial market power to threaten the industry. The Trade Practices is there to protect this type of market abuse. What the insurance companies have done is to decrease the level of service and the level of quality to the consumer.

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[2] Clause 3.5 Submission to ACCC by IAG

[3] It should be clearly noted, that the AARA submits that where competition may increase, it is at the cost to the consumer through poorer quality workmanship and repairs.

Therefore, by decreasing the number of repairers they have decreased the competition and the level of services. The insurance companies have implemented a system of false competition amongst the panel beaters as opposed to real competition in the market. [4]

False competition amongst the panel beaters only has the effect of reducing the cost to the insurance company at the expense of quality and service to the client; the effects can only be detrimental to the consumer.

In **Clause 3.6 the** IAG states the criteria they use in appointing ASRs and PSRs. What they fail to highlight is that their major criteria is cost. The IAG made it very clear that their main concern was to reduce the cost of repairs. See annexure 2 and 3.

From **Clause 3.7**, the question must be asked,"What is it that the insurance companies are offering?" Is it a contract of indemnity or is it a contract to repair vehicles? The insurance companies do not provide the insureds with a repaired vehicle; they put them in the position they were in before the accident. The IAG has taken all steps to cloud the real issue,"that is indemnity, not repairs". When an individual takes out health insurance, are the insurance companies providing the medical procedure? Obviously not.

The question that must be asked, is what is the difference between"fair and reasonable cost of repairing a vehicle"and the IAG engaging the repairer to undertake repairs for it?

Clause 4.1 clearly reflects how ludicrous this apparent standard policy is. The IAG is a body that indemnifies not repairs. Under the Insurance Contracts Act, they have an obligation to indemnify the client to the position they were in before the repairs. The Standard Insurance contract must reflect the ICA. The standard policy of insurance must indemnify the client against damage to his or her property not penalise them for choosing their own repairer.

Under tort law, where an individual has suffered damage they must be put into the position they were in before the damage was suffered. Where the insured is not at fault and the insurance company is to recover its cost fully form the third party, then it follows from this, that the insurance company has not indemnified the insured but rather, they have recovered what is rightfully the insured's under the common law of tort.

Therefore it is ridiculous to suggest that an insurance company should be allowed to get away with charging a higher premium to an insured that is not at fault. This in itself prejudices the policyholder and is therefore detrimental to them.

Clause 4.6 is nothing short of"legalised terrorism". It is nothing short of being a disgraceful and undemocratic sanctions being imposed upon the sovereignty of the consumer in an alleged free and democratic nation, but more importantly a free nation. .

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[4] The actions of the IAG may also be seen as being unconscionable under the s51AC of the TPA. See Appendix 1

First and foremost IAG has not supplied any material evidence to show why the extra premium has to be paid. This clause reflects the inability of the IAG to appreciate what a contract of insurance is. The writer states,

> "It is the intention of the IAG Insurers to set the amount of the extra premium To reflect costs and risk so that, from a profitability perspective, the IAG Insurers are indifferent as to whether an insured takes out a Standard Policy or Choice of Repairer Policy".

Firstly the writer of this submission fails to identify what the extra cost is and what the additional risk is. "Risk" is defined as "chance of bad consequences". The risk is the risk of having an accident, not the risk of having a choice.

IAG has employed assessors to assess the estimates given by the repairer. It is the duty of the assessor to ensure that the estimate reflects the cost of the damage to the vehicle. Therefore, there should be no difference in cost between repairers. However, IAG conceded that there is a difference. If the vehicle is assessed and the estimate is authorised by the assessor, there should be no difference in the cost of repairs unless: the IAG concedes that its assessors are not qualified or capable of determining the cost of repairs to a vehicle on a consistent basis.

What the IAG also fails to identify is that its assessors are rewarded for cutting the cost of repairs down. If an assessor wants a "Christmas Bonus" then the assessor must meet his or her target of reducing the cost of repairs down by 5% every month. Therefore the assessor's only incentive is to encourage repairers to lower their average cost. What the assessor is therefore employed to do is not to assess the vehicle but rather it is to "rip off" as much as it can from the estimate.

The reasoning that the IAG has given for charging the extra premium is embarrassing and lacks logic and order. There is only one reason for the extra premium:

> "dictatorial control by a corporate giant, with the intention of using their substantial market power to eliminate repairers from the market and to deprive the consumer of their right to have a choice."

Clause 4.7 clearly demonstrated the IAG mentality;

> "apart from the additional premium, there will be no other expense to insured's..."

The question is why should there be any expense to the insured? Why should the insured have to pay any extra premium when they get absolutely nothing for it? This factor alone is detrimental to the consumer.

If the principle argued in **Clause 4.8** is extended to the medical profession, then what the IAG is saying is when a sick patient goes to a doctor, it is the insurance company that is supplying the medical procedure not the doctor. The doctor is merely a sub-contractor.

Clause 5.1 is nothing short of a lie by the IAG. There is no increase in choice and there is no increase in efficiency. IAG has provided no material evidence to substantiate these claims. Even if there are efficiencies they are being enjoyed by the shareholders and the senior executives of the IAG. The important issue here is the benefit to the consumer; at present there is none.

Clause 5.2 is another attempt by the IAG to deceive the ACCC–this statement is a lie. All repair shops have goodwill. It is this goodwill that the IAG is attempting to destroy. The IAG and the other major insurance companies are doing everything in their power to ensure that a repair shop has no goodwill.

If consumers are not well informed and cannot make an informed decision as to where they want their vehicle to be repaired, **then why is it that the IAG concedes to paying its teleclaim's staff bonuses based on the number of policyholders it can steer away form their choice of repairer and direct them towards PSR shops?**

The truth is obvious. Policyholders do make informed decisions and policyholders do have their choice of repairer. Insureds are loyal to their smash repairers and insured do take great pride in their vehicles and this is reflected in the choice of repairer.

The IAG submits:

> 'Most policyholders, in contrast to the IAG Insurers, are not regular consumers of smash repair services. They are, therefore generally not well-informed consumers of smash repair services. Given the cost of acquiring information, as infrequent consumers there is unlikely to be an incentive for policy holders to become well-informed."

Why is this statement a total fabrication of the truth? The incentive the consumer has to be well-informed is founded on the basis that the insured wants their vehicle back in pre-accident condition. That is sufficient incentive for the consumer to be well informed. The analysis put forward by the IAG lacks substance, coherence and logic. If consumers generally have no idea where to acquire smash repair services, then obviously they would seek advice form their insurer. If this is the majority of the IAG's consumers, then why is IAG spending millions of dollars in the courts, advertising to the public, commissions to their assessors and teleclaim's operators, and submissions to the ACCC in an attempt to persuade them that generally their insured's do not have a choice of repairer and cannot make an informed choice.

What is it that the IAG is implying? These same insureds get married, have children make investments, raise their children, send their children to school, make budgets, build houses, manage their credit cards, go to restaurants etc.etc. etc, why is it when it comes to making a choice in relation to protecting, in most cases their second most expensive asset, these consumers are not able to make a well informed decision?

Is the writer suggesting that the average consumer lacks the intelligence to make an informed decision? Is the writer saying that when its comes to repairs to motor vehicle policyholders are incapable? Why should the smash repair industry be the only industry in the nation where the average consumer cannot make an informed decision?

The fact of the matter is that policyholders can make an informed decision; however the IAG will not admit to this because if they do they would have no argument.

In relation to **Clause 5.4,** the cost of premiums has not come down at all. However shareholder returns has increased. IAG shares have increased due to increased dividends being given to the shareholders. The cost savings are not going back to the insured but to the shareholders. As a mutual, the NRMA offered service and quality to their clients as members were not given dividends. However, now there are no members but shareholders.

Assessors of the IAG assess vehicles for both PSRs, ASRs and unknown repairers. If there is a discrepancy in cost then this cannot be attributable to the repairer, but to the assessors. If there is a difference in costing (it should be noted that no material has been given to substantiate this claim) then the cause is the inexperience of the IAG assessors to assess consistently across the board, or the inability of the IAG assessors to convince repairers to produce cheap work at a cheaper price.

In **Clause 5.5** the IAG argue that their schemes improve customer service, repair quality and reduce average repair costs. IAG lacks all credibility in making these submissions. IAG have not substantiated their claims with any material evidence. Even the order in their submissions is misleading. They put customer service first, then repair quality, then cost. In fact the major criteria in choosing PSRs is cost, cost and cost. In fact it is weighted as, 60% repair cost, 20% quality and 20% customer service. These figures were tendered into evidence by the IAG in the recent court case[5]. The IAG has never looked to high quality, but has weighted its system towards the cheapest repairers.

In making this claim, the IAG works on an assumption. That assumption is that all repair shops work for exactly the same overheads but more importantly that the tradesman themselves all earn the same amount of wages and salaries and that the level of expertise amongst tradesman is the same. However, it must be clearly recognized, that repairing

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[5] *Australian Automotive Repairers' Association (Political Action Committee) Inc v NRMA (1994) 51 ACR 338*

cars is not the same as making hamburgers. There is a high level of expertise required to repair a motor vehicle unlike making a hamburger.

At **Clause 5.6** the IAG continues to base the merits of its arguments on their experience. However, they do not provide any empirical data on how they formulate their opinion. Assuming that PSRs do undertake repairs at a lower than average cost the IAG fails in its argument to correctly identify the reasons for the lower average cost. If the reasoning is that repairers must cut corners and use inferior products, then it is the consumer who is suffering a detriment.

It may be an option for the ACCC to discuss the state of affairs with a number of the major paint suppliers and ask them whether the quantities of quality paint sales has dropped as a result of increase in the purchase of inferior and cheaper paint products. In the experience of the AARA, repairers are using cheaper and inferior products in an attempt to appease the insurance companies and curtail their own demise.

Put simply, do all CEOs of major corporations earn the same amount of money? Do all coffee shops charge the same price for their coffee or food? Do all medical practitioners charge the same consultation fee? Do all butchers charge the same per kilo of meat?

The answer is no. The reason that the answer is no is because people will pay more for better quality food, coffee, medical services and corporations will offer higher salary packages to attract their CEOs. However, when it comes to smash repair industry, the IAG will argue that there is only one cost to repair a vehicle. They will also assume that all tradesmen are identical in skill and expertise, therefore all quality of work should be the same.

Obviously the IAG would like the ACCC and its policyholders and every Australian citizen to believe that they are the exception to the rule.

In **Clause 5.7,** the IAG uses the word "some" to infer that most of their policy holders do not place significant value on the right to choose which repairer will undertake repairs to their vehicle. If it was true that it was only "some" of their policyholders, where the majority did not place this significance on repairs to their vehicle, then why is the IAG is so vehemently pursuing to deprive the rights of their policyholders?

The truth of the fact is that a majority of consumers place great significance and importance on which repair facility will undertake work on their second most expensive investment. The truth of the matter is that most consumers are very well-informed on which repair facility will meet their standards.

The argument posed by the IAG is circular, lacks logic and is embarrassing. If it is some policyholders then the IAG should not require the need to enforce such draconian measures and changes. However, if it is not some but a majority of their policy holders that place significant value on who will repairs the vehicle, then the market has spoken

consumer sovereignty has made its choice and the IAG should not have the right to take away the consumers right of choice.

Paragraph (a) of clause 5.7 has already been argued stating that there is no evidence that PSRs are cheaper when it comes to repair costs. It has already been argued that if there is a difference in the cost of repairs then it is because the assessors employed by the IAG are incompetent and therefore lack the ability to be consistent in their assessing and it is this inefficiency that leads to variable cost of repairs.

Clause 5.8 of the IAG's submission lacks all common sense and is a total insult to the public and to the ACCC. It is a clause that is embarrassing and shows great contempt.

> 'Under the current system, these costs are borne equally by all policy holders..... Policyholders who actively wish to select a repairer do not pay any added premium or higher excess."

First and foremost there is no evidence of these costs, but for opinions by the IAG that amount to nothing more than hearsay. The IAG wants to charge policyholders $69.00 more to have the choice of their repairer. This extra premium is charged whether or not a policy holder makes a claim or not. Where a policyholder pays the extra premium but makes no claim, then they have paid more and received nothing more. However, where the policyholder does not make a claim is this extra premium refunded? Off course not. This is just a con by the IAG to use its muscle in an uncompromising and unconscionable manner.

Secondly, if the extra cost is only $69.00, then the IAG can always deduct $69.00 from the repairers invoice at the end of the job.

Thirdly, a consumer should not have to pay any extra premium when the accident is not their fault but can be recovered from a third party. In the wisdom of the IAG, they are asking the ACCC to grant then the right to charge not for extra risk, which is what insurance companies do, but rather to charge for a choice. This in itself is ridiculous, especially when there is no added risk and the IAG argue that they have qualified and capable assessors to ensure that the costs of repairs reflect the true and fair cost of the damage.

Fourthly, what the IAG is saying in effect is that non PSRs cost them $69.00 more per repair. So for a $10, 0000.00 repair proposition, the IAG argues that it would cost a non-PSR $10,069.00 to do a $10,000.00 repair. Common sense will tell you that the $69.00 is not being charged to cross subsidise the other policy holders, but rather it is there to discourage consumers from exercising their right of choice. Further more, it is a blatant attempt by Australia's largest insurance company to eliminate smash repair facilities around Australia; put simply destroy small business.

Section 6

The AARA submit that the notified conduct will have detrimental effects on competition in the market. The IAG fail to argue that a majority of their PSRs are disgusted in the methods employed by the IAG to push the cost of repairs down. The IAG fails to inform the ACCC that every 3 months PSRs are asked to drop their price by at least 5%, and if they don't they threaten the repairer by turning off the amount of work directed to them.. The repairer has no choice but to cut corners and produce an inferior quality of work to meet these demands or alternatively work at a loss for the IAG, but subsidise the lower repairs by charging consumers extra on the private work.

IAG only discusses competition amongst its preferred repairers. This competition is forced upon them by unprofessional means producing inferior standards of work.
The IAG side steps the real issue. That is the consumer. The consumer now must contend with cheaper repairs, poorer quality work, and a vehicle that has a diminished value. The consumer loses its freedom of choice and the right to make an informed decision on the best repairer for their vehicle not the cheapest repairer. The saying "if you pay peanuts you get monkeys". The IAG chooses to avoid this position when it comes to the repairers they choose. The IAG is not alone when the only motivation they have is to cut costs and to cut corners.

It would be a shameful day if the IAG was given the authority to deplete the only freedom that is left in this nation, and that is the freedom of choice.

On Behalf of the AARA

Annexure 2

Repairers Association (Political Action Committee) Inc v NRMA Limited. These extracts highlight the correct and real basis adopted by at least the IAG in choosing their preferred repairers.

Mr Levet, Counsel for the applicants was cross-examining Mr Van de Weide who is a preferred repairer and appeared as witness for the NRMA.

MR LEVET: Mr Van de Weide you are a Preferred Repairer, is that correct? --- Yep.

your business in fact holds the status of Preferred Repairer? --- Yep.

It is obviously a benefit to your business for you to be a Preferred Repairer? --- That's correct.

What category of Preferred Repairer are you? --- I have been gold, I have been silver and currently I was just put down to bronze last Friday.

There are incentives for you to maintain a high level of performance, presumably if you maintain an excellent level of performance you are at the gold level, for a few little problems you go to the silver level, a few more little problems the bronze level and I suppose the threat is that to someone, I'm not suggesting you, but to someone that wasn't performing at that level then they would become an Associate rather than a Preferred Repairer? --- Not that I am aware, I thought that they would go to red, if that's the way it works.

So there is another level below bronze? --- *I think there is, yes.*

You haven't got to that level? --- I think that you get a warning and I don't know a couple of breaches and you are out. I don't know where you go from there whether you become an Associate Repairer or not, I don't know.

There are a number of things - a number of criteria for instance that you are assessed against, aren't there? --- *Yes.*

You are assessed for instance in respect of the time it takes you to do jobs? --- ***I don't think that's made a difference at the moment, we are not marked against time.***

Okay, you are assessed against the quality of the job? - ***Quality.***

Your are assessed against the satisfaction of the customer? - -- ***Yep.***

You are assessed against the cost of the repairs? --- ***Yep.***

That's actually quite a big one isn't it? --- ***Yep, I think it is 60 per cent and 20 per cent in the other two.***

So the biggest single thing that you are assessed against is the amount of the total cost to you of the work? --- *Yep.*

MR DOUGLAS: Your Honour I have just been told apparently that those weightings are in fact part of the confidential material, not too confidential at the moment I regret to say

(Mr Douglas QC was counsel for the respondent. It is appropriate at this time to point out the following. Firstly, if insurance companies argue that the objective of their schemes is to promote quality and service, then why is it that 60% of the performance criteria used is cost?

Secondly, why is this information confidential when they argue that their practice and procedures are transparent? Why is it that the customer is not informed that the difference between a preferred repairer and other repairers is that the preferred are happy with doing cheaper jobs? Why is the word cheap substituted for the word competitive?)

Mr Levet: You're aware that if a Preferred Repairer doesn't perform at the level of a Preferred Repairer, that ultimately they may cease to be a Preferred Repairer and might become either an *Associate Repairer or indeed an Unauthorised Repairer*? --- That's right, yes.

That's been made clear to you? --- Yes.

And when you have discussions with persons from NRMA relating to your ongoing performance you talk about all the criteria against which you're measured don't you? --- Yeah.

You would, understandably, attempt to retain a Preferred Repairer status? --- Yes.

Which is of commercial benefit to you? --- That's right.

It would be of further commercial benefit to you were you to become a silver or gold repairer again? --- That's right.

You get benefits such as quicker payment, for instance, at the upper echelons don't you? --- ***Yes.***

That's a commercial benefit to you? --- That's right.

At the upper echelons you get benefits of self-assessment? -- ***Yes.***

That's a commercial benefit isn't it? --- Yes.

If you can start on a person's car more quickly you can get the job done quickly and more likely to get the job aren't you? --- ***That's right.***

What was the measured criteria which caused you to go from gold to silver? --- ***What was criteria?***

Yes. Were there problems - - -? --- And why it got reduced?

Yes? --- ***Basically cost.***

So you went from gold to silver because you couldn't maintain their cost levels? --- ***That's right, my average repair cost.***

You went from silver to bronze for the same reason? --- ***Yes***

So really when any car is being dealt with its in effect a third way arrangement, isn't it? ***You, the customer and the NRMA? -- Yes.***

Part of the scheme as you understand it, the Preferred Repairer Scheme, *is to control costs? ---* ***Yes.***

Persons who control costs better are rewarded within the scheme, aren't they? --- ***Yes.***

Your understanding was that once after the three rounds were concerned it happened and the number of Preferred Repairers had been allocated that *after that not every Tom, Dick or Harry could become a Preferred Repairer but just simply by keeping his costs down? ---* **That's it yes, as I understood, yes. Or unless they were looking for more repairers which we don't know nothing about it but NRMA's needs needs more or not I don't know.**

In fact because of the smaller group of repairers you've been able to more or less preserve your profit margins by whilst reducing your costs increasing the volume? --- Yes.

So the deal as far as you're concerned is costs get lower, the volume gets higher and one off sets the other? --- ***Probably up to***

a point, yes.

*It's still pretty hard isn't it to maintain NRMA's expectations so far as the costs of delivering a job? --- **Yes, it's not easy.***

*You put in fair prices to the NRMA? --- **Yes.***

You don't put in prices that in any way inflate it, do you? --- *No.*

*When you didn't meet their costs targets when you got reduced from gold to silver, you don't think, do you, that the costs that you could put in resulted in you being reduced or inflated, did you? --- **No, I haven't changed my quoting practice right through from gold to silver to bronze.***

*You still haven't changed your quoting practice? --- **No, not at all.***

*So, as far as you're concerned at every stage long the way you have put in a competitive assessment? --- **Yes.***

From time to time that assessment hasn't been in accordance with the NRMA's desires? --- On an individual they've been fine. On a total sume my average repair costs has gone up.

*So if you are maintaining good quality and put in fair and competitive tenders for each individual job, if the price has gone up a bit, that's reflected over the overall average isn't it? --- **Yes.***

There would be a benefit to you in getting back to being a gold repairer, wouldn't there? --- That's right.

You'd like to do that, wouldn't you? --- Yes.

*Tell me, given that your pricing policy has remained constant throughout the time you've been a preferred repairer and given that the major factor seems to have been price, what plan have you got in terms of improving your performance against their criteria to get back up to gold? --- **Just become more efficient.***

*Get your prices down? --- **Efficient.***

*That's basically what it boils down to isn't it? --- **Yes.***

Do you regard yourself as efficient? --- Yes.

Have always been efficient? --- Become more efficient.

It is clear from this evidence given by Mr Van Der Weide that the primary consideration is cost. Where you are cheap, then you are rewarded, however, where you are not cheap you are penalised.

Mr Levet cross-examining Mr Pemberton a witness for the NRMA.

MR LEVET: Now Sir, your are the claims manager are you not, for the respondent? --- That's correct.

You have the conduct of litigation on behalf of the respondent? --- Could you please explain, I don't understand.

*Are you the person who instructs Blake Dawson Waldron in the present proceedings? --- **That's correct.***

*Do you have the sole responsibility at the respondent for that task? --- **The primary responsibility.***

*Okay, the buck stops with you? --- **Correct.***

In fact you've heard evidence - were you in court when your last witness gave his evidence? --- Correct.

You heard his evidence? --- Yes I have.

You heard his evidence that about 60 percent of the waiting was on as to whether one moved between the various levels of repairer *was based on price or cost indicators? --- **That's correct.***

*That was truthful evidence wasn't it? --- **That's correct.***

*So the cost advantage to you of the preferred repairer scheme is really the overriding consideration. I'm not suggesting that's improper at all but was certainly the overriding consideration wasn't it? --- **It is a serious consideration, yes.***

*A very major one? --- **A major one.***

*It would be number one on the list of considerations? --- **Clearly.***

By limiting the number of Preferred Repairers you encouraged competition between them to be amongst their ranks didn't you? --- We actually - part of the relationship is to ensure that they get more volume, yes.

*So, basically the deal is they lower their prices, they are ensured of more volume, in essence, isn't it? --- **That is part of it, yes.***

That you would say, a special status between you and them? -- Indeed.

And you try and make it a desirable thing for them to attain Preferred Repairer gold status? --- Yes.

And there are financial benefits to them so doing? --- Yes.

Annexe 3

And those financial benefits would be a lot less were the status less exclusive, wouldn't it? --- I am not sure I understand the question.

Well, what you are saying to people is, do our work and do it cheaply and we make sure you get lots of it, in essence, isn't it? ***--- That is part of the proposition, yes.***

It is clear from these transcripts that the overriding consideration for choosing a preferred repairer is cost. Mr Levet: *Well, what you are saying to people is, do our work and do it cheaply and we make sure you get lots of it, in essence, isn't it?* ***--- That is part of the proposition, yes.***

Annexure 1

Mr Pemberton is the assessing mana and was a witness for the NRMA he is being cross-examined by Mr Bruce Levet for the AARA.

Mr Levet: You certainly encourage people to go to Preferred Repairers, don't you? --- ***We attempt to influence the customer, yes.***

You suggest, or cause to be suggested to customers. Have you ever caused that to be done? --- ***Historically we had a range of different arrangements. For example, way back in part of the times at the beginning of this there were those circumstances, yes.***

Is that a yes or a no? --- Yes.

..... *When was the last time when you, as Claims Manager, permitted or authorised your employees or teleclaims operators to engage in persuasion of that type?* --- ***They still try and persuade the customer to go to a PSI.***

Do you now or would you now permit a teleclaims operator suggest to a client that they would get their vehicle repaired faster they went to a Preferred Repairer? --- ***Yes***

Would you permit a teleclaims operator to suggest now to a customer who had gone, say, to an Associate Repairer and *was seeking to have that Associate Repairer do a job, would you permit a teleclaims operator to say to that customer, look, there are some advantages to going to a Preferred Repairer, if you go to a Preferred Repairer it would be assessed immediately.* Would you permit that to be said? --- ***Yes we would.***

Would you permit it to be said by a teleclaims operator now to a client who had gone to an Associate Repairer that if the client remained with that Associate Repairer that there may very well be delays in assessment that wouldn't occur were the client to go to a Preferred Repairer? --- ***Yes.***

You see what you've agreed to is that you countenance your employees or agent saying to people who want to go to an ASR, look, there could be delays getting your vehicle assessed, if you go to a PSR that's not going to happen, that's what effectively is said, isn't it? --- ***Generally, yes.***

Annexure 1

Commonwealth Consolidated Acts

TRADE PRACTICES ACT 1974 - SECT 51AC

Unconscionable conduct in business transactions

(1) A corporation must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or
(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
(b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the *supplier*) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the *business consumer*), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and
(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
(g) the requirements of any applicable industry code; and
(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

(i) any intended conduct of the supplier that might affect the interests of the business consumer; and
(ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
(k) the extent to which the supplier and the business consumer acted in good faith.

(4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the *acquirer*) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the *small business supplier*), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the small business supplier; and
(b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
(c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier or a person acting on behalf of the small business supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
(e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
(f) the extent to which the acquirer's conduct towards the small business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like small business suppliers; and
(g) the requirements of any applicable industry code; and
(h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code; and
(i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier:

(i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and
(ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier); and

(j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the goods and services with the small business supplier; and
(k) the extent to which the acquirer and the small business supplier acted in good faith.

(5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with:

(a) the supply or possible supply of goods or services to another person; or
(b) the acquisition or possible acquisition of goods or services from another person;

by reason only that the first-mentioned person institutes legal proceedings in relation to that supply,

possible supply, acquisition or possible acquisition or refers to arbitration a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition.

(6) For the purpose of determining whether a corporation has contravened subsection (1) or whether a person has contravened subsection (2):

(a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
(b) the Court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

(7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(8) A reference in this section to the acquisition or possible acquisition of goods or services is a reference to the acquisition or possible acquisition of goods or services by a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of $3,000,000, or such higher amount as is prescribed.

(10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of $3,000,000, or such higher amount as is prescribed.

(11) For the purposes of subsections (9) and (10):

(a) subject to paragraphs (b), (c), (d) and (e), the price for:

(i) the supply or possible supply of goods or services to a person; or
(ii) the acquisition or possible acquisition of goods or services by a person;

is taken to be the amount paid or payable by the person for the goods or services; and
(b) paragraph 4B(2)(c) applies as if references in that paragraph to the purchase of goods or services by a person were references to:

(i) the supply of goods or services to a person pursuant to a purchase; or
(ii) the acquisition of goods or services by a person by way of purchase;

as the case requires; and
(c) paragraph 4B(2)(d) applies as if:

(i) the reference in that paragraph to a person acquiring goods or services otherwise than by way of purchase included a reference to a person being supplied with goods or services otherwise than pursuant to a purchase; and
(ii) a reference in that paragraph to acquisition included a reference to supply; and

(d) paragraph 4B(2)(e) applies as if references in that paragraph to the acquisition of goods or services by a person, or to the acquisition of services by a person, included references to the supply

of goods or services to a person, or the supply of services, to a person, as the case may be; and
(e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

(12) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

(13) Expressions used in this section that are defined for the purpose of Part IVB have the same meaning in this section as they do in Part IVB.

(14) In this section, *listed public company* has the same meaning as it has in the *Income Tax Assessment Act 1997* .

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