Collision Repair Association

CRA

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PROTECTING BUSINESSES & CONSUMERS FROM UNFAIR COMMERCIAL PRACTICES

Introduction

Collision Repair Association (CRA) welcomes the opportunity to make a submission on the Discussion Paper and appreciates being given additional time to submit this document.

For the reasons set out below, CRA supports the making of new laws to protect both consumers and businesses from unfair conduct and unfair contracts. CRA's submission, however, focuses on unfair conduct and contracts as they affect our members' businesses, leaving others to make submissions on protecting interests of consumers, although logically both groups should be covered.

About CRA and the Collision Repair Industry

Founded in 1913, formerly known as the NZ Motor Body Builders Association until 1998, CRA is an industry association whose members include panelbeaters and auto-refinish painters, and includes other car collision repair tradesmen and allied businesses. CRA aims to provide quality and safety assurance to customers by ensuring all CRA members' work meet high standards. International best practice auto repair information is gathered from around the world and disseminated to about 450 members and accredited collision repair specialists nationwide. Members are committed to attend training courses and upgrade their equipment to keep up with ever changing technology in the motor vehicle industry. CRA also helps ensure that its members' interests are protected.

CRA members make up most of the larger well-established collision repair shops and together they account for around 90% of all collision repair insurance work done in New Zealand.

CRA members are small family-owned businesses employing on average 11 persons. About 70% of annual turnover is under $2m per annum, with the balance having turnovers mainly under $4m.

Approximately 80% of collision repair work is carried out on behalf of general insurance companies; the remaining 20% is private work. As a result of mergers and acquisition in recent years between general insurance companies (which include private and business motor vehicle cover), the general insurance market has become quite concentrated, and dominated by two Australian insurance company groups, IAG and Suncorp (Vero).

It is the practice of many insurance companies to appoint "approved" collision repairers to which policyholders are encouraged to use to carry out repairs to their vehicles. CRA members are usually approved repairers for multiple insurance companies. They are required to sign up to the insurance company's standard Vehicle Repair Agreements on a "take it or leave it" basis. Members complain that these agreements are one-sided and onerous in parts, such as in terms of them carrying a disproportionate level of risk. Members also complain that the recovery rates for particularly some of the larger insurance companies are artificially low, but they have no option but to accept them.

It is believed the collision repair industry, which is characterised by unequal bargaining power between insurance companies and collision repairers, falls squarely within the areas of concern identified in the Discussion Paper. The situation facing collision repairers in New Zealand is not unique. **Attached** to this letter is a recent article appearing in the Australian Paint & Panel published by CRA's equivalent association in Australia. It reports that a committee of the Western Australian State Parliament has recommended that the Australian Competition & Consumer Commission undertake an in-depth enquiry into anti-competitive conduct and misuse of market power into the collision repair industry, and that a Code of Conduct be mandated. A number of the same insurance companies in Australia are also very active in the New Zealand market.

CRA believes that there is a gap in the law to control such conduct, which can have damaging effects to members business and personal circumstances, through no fault of their own. Accordingly, and particularly as a consequence of the way the collision repair industry is developing, CRA believes that this initiative to review unfair conduct and contract laws is an excellent and timely initiative.

CRA's answers to the questions posed in the Discussion Paper are attached to this letter. We hope you find them useful. If you require any clarification, please contact me.

The Motor Trade Association (MTA) is also making a submission which refers to the collision repair market, as our memberships overlap. Our submissions were prepared independently of each other. They are consistent over the description of the problems facing our members and the need for additional laws to help address them.

CRA does not request confidentiality for any information contained in this submission.

Yours faithfully

Neil Pritchard
General Manager

PROTECTING BUSINESSES AND CONSUMERS FROM UNFAIR COMMERCIAL PRACTICES

Answers to questions raised in Discussion Paper

OPTION 1 – High Level Prohibition

Q1: What types of unfair business to business contract terms are you aware of, if any? How common are these?

CRA members are party to a number of collision repair agreements with insurance companies. The terms of these agreements are confidential and therefore we are unable to discuss them in detail or attribute them to a particular insurance company. It is also worth noting that while the wording of terms may not appear on their surface to be unfair, their application (particularly where a discretion is held by the insurance company) can make them operate unfairly in practice.

As examples of what "non-negotiable" agreements can result in, members complain about unfairness in the following areas:

- Artificially low labour rates and/or time allowances for tasks. Insurance companies also control from where parts can be sourced, and set low margins on parts.

- Repairers carrying a disproportionate level of risk. For example most insurance companies offer a guarantee to their customers for the quality of the repair work for so long as the customer owns the vehicle. That contingent risk can last for many years, and is actually carried by the repairer (not the insurer) – who may be required to use second-hand parts to keep costs down – and the insurance company approved how the vehicle is to be repaired.

- As insurance work make up 80% of business, when owners wish to retire and sell the business, the business may have little value unless the insurance companies agree to the assignment of contracts to a purchaser. The insurance company may decide not to.

Q2: What impact, if any, do these unfair contract terms have?

As an illustration, the low recovery rates set by insurance companies are not off-set by guaranteed levels of work, as insurance companies are free to appoint other approved repairers in the area at their discretion. Thus profitability is impaired and the businesses do not thrive and grow as firms do in other areas of the economy. This has flow-on effects in terms of wage levels that can be offered to technicians and ability to attract apprentices into an occupation.

Vehicle repair work is becoming more and more specialised as vehicle construction technology and materials, and componentry increase in complexity. These new technologies mean that repairers must constantly re-train, upskill and reinvest in new machinery, diagnostics and equipment that cover the very wide range of vehicles on the road. Unless repairers receive an adequate remuneration, it is inevitable that corners will be cut, investments are not made and standards are not maintained. In addition, repairers are

forced to set higher rates for private work to help cross-subsidise insurance work (which is unfair – private work may be for customers that could not afford insurance in the first place).

The potential difficulties of owners selling the business (which also include contingent liability under the guarantees offered by insurance companies) also impact on investments being made to keep the business up-to-date and efficient.

Q3: Is government intervention to address unfair business-to-business contract terms justified? Why/why not?

CRA believes intervention is justified. Its members are in a very weak position as they are beholden to insurance companies to essentially remain in business. CRA members do not have financial resources to resist or challenge contracts and basically accept them as offered without argument. There is no law that provides protection against unfair terms of contracts between businesses that is brought about by the presence of unequal bargaining power.

Q4: What types of unfair business-to-business conduct are you aware of, if any? How common is this type of conduct?

CRA members complain about how they are treated by insurance companies, particularly in terms of how discretions are applied as permitted in the contracts. For example, insurance companies need to approve quotes and changes to previous quotes to repair and there may be disagreements. As you would expect, insurance companies are motivated to keep repair costs to be the lowest possible – yet require high standards to be applied. Any significant challenge may result in the agreement being terminated or not renewed, thereby forcing repairers to accept the insurer's decision. Insurance companies are usually prompt payers but some ignore the payment periods set out in the agreements and pay much later. Payments can also be held up if there is a dispute. Often repairers cannot afford to carry the cost of unpaid accounts and are incentivised to accept what the insurance company will agree to.

Q5: What impact, if any, does this conduct have?

Please refer to our answer to Q2 above.

Q6: Is government intervention to address unfair business-to-business conduct beyond existing legislative protections justified? Why/why not?

CRA believes setting a high-level standard of conduct will help redress the imbalance of bargaining power. In the past, CRA has made submissions to the Commerce Commission in connection with mergers between insurance companies (IAG/AMI in 2012 and IAG/Lumley in 2014) warning the Commission that the consequential increases in market power will have detrimental effects in the collision repair market. The Commission did not agree as it considered that lowering costs to repair vehicles brought about by increased market power was beneficial to consumers. It concluded that IAG would not have a sufficiently high market share following its acquisitions that would enable it to depress prices for collision repair services below competitive levels, or reduce the quality of repair work.

Whether that is true or not is debateable (the largest insurer currently pays the lowest average repair cost which shows it uses its power over repairers) but that is an assessment made across the industry, and not on a case-by-case basis. In other words, the Commission's only concern was whether the collision repair market as a whole would essentially collapse as a result of the mergers going through. There needs to be a law that also protects individual firms from unfair conduct applied to it in unequal bargaining power situations.

CRA has been advised that as a result of past clearance decisions it would be difficult to claim that the abuse of market power section of the Commerce Act applied even to the larger insurance companies. Also as they do not (at least at this time) compete directly in the collision repair services market, it would be hard to make a case out even if they came within the scope of that section.

Q7: What types of unfair business-to-consumer conduct are you aware of, if any? How common is this type of conduct?

As noted above, CRA only addresses business-to-business contracts and conduct and does not wish to make any submission in relation to the position of consumers.

Q8: What impact, if any, does this conduct have?

Please see Q7 above.

Q9: Is government intervention to address unfair business-to-business consumer conduct beyond existing legislative protections justified? Why/why not?

Please see Q7 above.

Q10: Do you agree to our proposed high-level objectives and criteria for assessing any potential changes to the regulatory framework governing unfair practices? If not, why not?

CRA's agreement with the proposed high-level objectives and criteria is as set out.

Q11: Should a high-level prohibition against unfair conduct be introduced? If not, why not?

For the reasons already explained, CRA believes that a high-level prohibition against unfair conduct as between business should be introduced.

Q12: What are the advantages and disadvantages of Option 1A, 1B, and 1C (refer to Annex A1 for more information)? Which option, if any, do you support?

CRA does not feel that it is in a position to provide what the legal high-level prohibition legal test should be. After reading the three options and the commentary provided in the Discussion Paper, CRA is of the view that Option 1A – Unconscionable Conduct – test would be more suitable in a business-to-consumer situation. In business-to-business settings, the Option 1C – Unfair Commercial Practices – seems to be more suitable, although Option 1B – Oppressive – might also be suitable. This is because introducing concepts of norms of society that form part of the unconscionable conduct test doesn't seem to sit that well in business-to-business relationships, as it does when consumers are involved.

Q13: If unconscionable conduct were prohibited (Option 1A), should the definition of unconscionability be included in the statute, and if so, how should it be identified?

CRA has no views on this question.

Q14: Is it appropriate to require businesses to act in good faith (as per Option 1C – see Annex 1)? Are there situations in which doing so could have a negative economic outcome?

CRA thinks it is appropriate to require businesses to act in good faith and does not foresee negative economic outcomes.

Q15: Are there any other variations to Option 1 that we should consider?

CRA is not aware of any.

Q16: If a version of Option 1 is selected, should it also extend to matters relating to the contract itself?

Yes. As already noted, unfair conduct by insurance companies can arise from giving effect to or how they apply contractual terms. Unless those are covered under the same legal obligation, it is foreseeable that firms that hold an advantage of bargaining power can point to a term in a contract to justify its action notwithstanding that the term itself is unfair.

Q17: Should any protection against unfair conduct apply to consumers only, consumers and some business (and if so which ones), or all consumers and businesses?

For the reasons given above, CRA believes the protection against unfair conduct should apply to businesses. CRA does not wish to comment on the position of consumers, except to say that it seems logical that they should also be protected.

The Discussion Paper puts forward an option that only small businesses receive protection, or if there is an imbalance of negotiating power between the relevant businesses. CRA believes its members would be typically regarded as "small businesses". From data received, the average number of employees is around 11 and almost all come within the 20 employee threshold being put forward. However, in terms of turnover, about a third would exceed the suggested $2m cap. Turnover may be an unreliable threshold as some small businesses may have high turnover because of the costs of the goods they trade in. Collision repairers pay for expensive parts for cars, but make very little profit margin on them. Many other "small" businesses may face similar situations. If a small business turnover threshold was to be introduced, we think a higher turnover figure be set, such as up to $5m to cover this.

OPTION 2 – Unfair Contract Terms

Q18: If the UCT protections are extended to business, do you agree that the current consumer UCT provisions should be carried over without major changes? If not, why not?

CRA has no experience from which to judge whether the current UCT provisions in the Fair Trading Act would provide the necessary protections if it is applied between businesses. CRA is concerned that enforcement would be entrusted only with the Commerce Commission. We also have doubts as to whether issues such as whether unfair prices being

imposed would be covered at all under the UCT provisions if they were extended and, also whether conduct as to how discretions applied would also be covered. Also, the UCT provisions seem to be useful for controlling "across the board' problem situations and not "one offs" unfair contract terms. CRA considers some significant changes might need to be made but acknowledges that insurance companies tend to use "standard form" contracts and there is no effective negotiation between the parties.

If the UCT provisions were to be extended to apply to business-to-business contracts, it should only be in addition to a high level prohibition as discussed above.

Q19: If the UCT protections are extended to business, should the FTA's "grey list" for consumer UCTs be carried over "as is"? Are there any existing examples of unfair terms that should be removed from the list, or any new examples that should be added?

CRA has not compared the terms of the various collision repair services contracts against the "grey list" unfair contract terms to provide comments to this question. As a general observation, the types of unfair contract terms on the grey list tend to be at more extreme end we don't think many (if any) would be found in collusion repair services contracts. Members complain about other terms that are not covered by that list.

Q20: Should the protections against UCTs apply to consumers only (as at present), consumers and some businesses (and if so which ones)? Or to all consumers and businesses?

CRA's has no views on whether the UCTs provisions should continue to apply to consumers following the addition of a high level prohibition discussed above. CRA does not believe extending the UCTs to businesses will be a useful protection for its members, but it does not know what small businesses in other industry sectors face in terms of unfair standard terms being imposed on them.

If it was decided to only apply the UCT provisions on small businesses, CRA repeats the warnings around using turnover caps as noted in answer to Q17 above.

Q21: If the protections against UCTs are extended to businesses, should a transaction value threshold be introduced, above which the protections do not apply? If so, what should the threshold be?

CRA has no views on this.

Q22: Should there be penalties for breaching any new provisions regarding UCTs, and should there be civil remedies available, even if unfair terms have not previously been declared by a Court to be unfair? How should any penalties and remedies be designed?

If extended to businesses, there should be civil penalties that include compensation payable to any firm suffering a loss.

Q23: Are there other options to address unfair conduct or unfair contracts that we should consider? If so, what are these?

CRA has no other options to offers.

Q24: Do you have any preferred options package? If so, which is your preferred package, and why?

In-line with our comments above, CRA's preference is Package 2 (with the business-to-business prohibition being first unfair practices or second oppressive conduct). Following that is Package 4.

Q25 Do you agree with our assessment of the impact of each package against the criteria? If not, why not? Do you have any further evidence on the costs and benefits of this option?

As the likely perpetrators of unfair conduct and unfair contracts are expected to be large and well-resourced firms, CRA does not believe that they will suffer adverse effects from uncertainty, and they can afford to obtain appropriate advice.