

VACC Submission: Enhancements to Unfair Contract Term Protections: Consultation Regulation Impact Statement

16 March 2020



About VACC

The Victorian Automobile Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,500 members in over 20 retail automotive sectors that employ over 50,000 Victorians.

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers.

VACC is also an active member of the Motor Trades Association of Australia (MTAA) and contributes significantly to the national policy debate through Australia's peak national automotive association.

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VACC Response to Consultation Regulation Impact Statement

The Victorian Automobile Chamber of Commerce (VACC) provides the following information and evidence on the use of UCTs (or potential UCTs) in contracts involving VACC members that are predominantly small privately-owned businesses engaged in automotive body repair services.

Background

Automotive body repair businesses are primarily engaged in repairing, panel beating or spray painting damaged or smashed motor vehicles. Industry operators rely on insurance companies to provide them with most of their work, as consumers make claims to insurers to pay for vehicle repairs. Over the past decade, car insurers have become increasingly powerful within the industry, utilising their strong bargaining power to dictate lower payment fees for body repairers, whilst embedding these lower rates in standard form contracts and potentially contravening the UCT provisions of the Australian Consumer Law (ACL).

To illustrate this power imbalance, VACC provides the following information in relation to the standard form contract, or repair Authority, used by Insurance Australia Limited (IAG) (Repair Authority), in transactions with smash repairers.

IAG Repair Authority

The IAG Repair Authority contains four clauses that may be classified as unfair— Clauses 1, 5, 10 and 11. The full Repair Authority is contained in Appendix A to this submission. Clause 1 provides IAG with a unilateral right to determine the fees that may be charged by repairers under its ‘preferred quoting methodology’. Clause 5 provides IAG with a largely unfettered right to terminate the Repair Authority. Clause 10 provides IAG with a broad discretion in determining whether to allow a repairer the first opportunity to repair defects in any repair work. Clause 11 allows IAG to immediately terminate the Repair Authority if the repairer fails to give access to his/her premises (irrespective of whether or not the failure is beyond the repairer’s control).

These respective clauses and their industry impacts are detailed below.

Clause 1 – Itemised Quote and Variations

Clause 1 of the IAG Repair Authority provides:

You warrant that your itemised quotation and any variations:

(a) unless we agree otherwise, are prepared in accordance with our preferred quoting methodology for the following operations: Remove and Refit, Repair, Paint, Parts, Consumerables, Miscellaneous/Sublet;

(b) lists times for each operation at an agreed hourly rate;

(c) lists any mark-ups for sublet work as permitted under these Terms of Authority;

(d) includes the manufacturer’s part number that correctly matches the make, model and variant of the Property for each OEM part quoted;

(e) only includes amounts in respect of damage to the Property which is within the scope of the incident description, and an appropriate scope of repairs; and

(f) for the avoidance of doubt, does not include any amount in respect of damage to the Property

which is outside the scope of the incident description.

Clause 1 is tantamount to IAG imposing its New Times and Rates (NTAR) repair and costing model upon smash repairers, which applies an industry 'average time' to repair costings and not the real costs that apply to individual businesses. Many VACC repairers have been informed by the insurer that this costing model is non-negotiable, unless the repairer elects to estimate the hourly costs for repair below IAG industry average time.

Clause 1 of the Repair Authority is unfair on many levels:

- Firstly, it causes a significant imbalance in the parties' rights and obligations. Clause 1 effectively entitles IAG to unilaterally vary the terms of the Repair Authority by allowing IAG to determine what Repairers may charge for their work
- Clause 1 is not necessary in order to protect IAG's legitimate interests. The costs of the work could be as agreed between the parties
- Clause 1 would cause detriment to the Repairer if IAG sought to rely on it - that the rates of fees imposed by IAG do not reflect real costs

With IAG having a 30 per cent share of the car insurance market, the impacts of Clause 1 on the automotive body repair industry have been severe. Over the past few years, the number of body repair businesses has halved from an estimated 6,000 in 2017 to around 3,000 currently, with a loss of 14,000 people employed. This rationalisation of repair businesses is a direct consequence of unfair price directives embedded in standard form contracts by insurers, that have made the industry unviable for many operators.

Clause 5 – Terminating or suspending Repair Authority

Clause 5 of the IAG Repair Authority provides:

We may immediately terminate (by providing you with notice in writing) or suspend the Repair Authority. You must immediately cease work on the Property if we terminate the Repair Authority or we request you to suspend work. If we terminate the repair Authority, we may remove the Property from your possession by communicating this to you in writing or as otherwise agreed. We will pay you the fair and reasonable repair costs having regard to the circumstances including the authorised quotation, any authorised variations, the stage and the quality of the repair work completed as at the date of termination.

Applying section 24(1) of the ACL, clause 5, on its own, is an unfair term. Clause 5 causes a significant imbalance in the parties' rights and obligations and provides IAG with a largely unfettered discretion to terminate the Repair Authority. The only constraint, within the Repair Authority, on IAG's discretion to terminate is the requirement to give 'notice in writing.' There is no requirement that such notice be reasonable. There is no corresponding right for the crash repairer to terminate.

VACC argues that such a broad discretion to terminate is not necessary in order to protect IAG's legitimate interests.

Clause 10 - Rectifications

Clause 10 of the Repair Authority provides:

If, during the period of your Warranty or a warranty or guarantee under the law, we find that any repair work performed by you or paint, parts or materials used by you in repairing the Property for us are defective or do not comply with the standards required by these Terms of Authority we will, (where practicable, and where the Claimant consents, and if we believe you can safely do so), give you first option to rectify the defect. You will fix the defect at your expense and pay us our reasonable costs. The rectification must be completed using a method of repair agreed with us and with a minimum of inconvenience to the Claimant. If we have not given you the first option to rectify, or you do not agree to rectify the defect, or we believe you cannot properly carry out the rectification, we may;

- arrange for another repairer to fix the defect at your expense and you must pay us our reasonable costs (if any) if we ask you to; or*
- sell the Property in its defective condition and you must pay us our reasonable costs incurred in effecting the sale plus any shortfall between the sale price and the Claimant's sum insured, agreed value, market value or retail value of the property (as applicable).*

We may require you to pay compensation for any reasonably related loss caused to the Claimant as a result of the defect. The remedies set out above do not limit your liability under the law and are in addition to any other remedies available under law.

Again, applying section 24(1) of the ACL, clause 10, on its own, is an unfair term. Clause 10 causes a significant imbalance in the parties' rights and obligations, giving IAG a broad discretion in determining whether to give the Repairer an opportunity to remedy a defect: that is '*where practicable, and where the Claimant consents, and if we believe you can safely do so*' unless '*we believe you cannot properly carry out the rectification*'. If the Repairer does not, or cannot, remedy the defect then the Repairer may be liable, among other things, for the costs of repair by another repairer or the sale of the Property and any shortfall. The crash repairer has no ability in these circumstances to control or limit his/her liability.

VACC also believes that clause 10 is not necessary in order to protect IAG's legitimate interests and would cause detriment to the Repairer if IAG sought to rely on it. The Repairer would incur the costs of repair by another repairer when the Repairer could have repaired the defect him/herself and incur minimal, or at least lower, additional cost. The Repairer may also incur substantial costs if the Property is sold and IAG seeks compensation for the costs of the sale and any shortfall.

Clause 11 - Access

Clause 11 of the Repair Authority Provides:

You agree to allow and authorise our staff, contractors and agents to enter your premises upon reasonable notice during normal business hours to:

- conduct assessments; and*
- inspect the Property; and*
- conduct audits of work we have authorised.*

You must co-operate with them for these purposes and you must ensure the Property is accessible to them and in a safe environment. If you do not give access as set out above, we may immediately terminate or suspend the Repair Authority and you must cease work immediately. Additionally, we may require you to pay compensation for any reasonably related loss caused to us and/or the

Claimant as a result of your failure to give access.

VACC argues that Clause 11, on its own, is an unfair term. Clause 11 causes a significant imbalance in the parties' rights and obligations. Clause 11 entitles IAG to terminate the Repair Authority immediately if the Repairer fails to allow IAG access to the Repairer's premises. Clause 11 makes no allowance for the possibility that a Repairer, through no fault of his/her own, may be unable to provide IAG with access at the time stipulated in IAG's notice. Further clause 11 allows IAG to terminate the repair Authority immediately without affording the Repairer an opportunity to remedy a failure to grant access.

Again, VACC believes that clause 11 is not necessary in order to protect the legitimate interests of IAG. It is not contrary to IAG's legitimate interest to reach an agreed time to permit IAG access to the Repairer's premises or otherwise to allow the Repairer an opportunity to remedy a failure to grant access.

Clause 11 would also cause detriment to the Repairer if IAG sought to rely on it. Assuming that IAG would, in compliance with clause 5 of the Repair Authority, pay the Repairer fair and reasonable costs of work done prior to termination, the Repairer is likely to incur the detriment identified above. Additionally, the Repairer may be required to pay compensation.

VACC Recommendation

Whilst VACC welcomes recent initiatives to extend UCT protections to insurance contracts, VACC argues that the behavior of car insurers has been appalling over the past few years in respect to their usage of UCTs in their standard form contracts towards automotive body repair businesses. Regrettably, such behavior has shown little sign of abatement.

VACC therefore recommends that car insurers be monitored and investigated more closely for future compliance and potential contraventions the UCT provisions of the Australian Consumer Law (ACL). VACC also supports the imposition of a stricter financial penalty regime as a deterrent for future breaches of the law.

APPENDIX A

IAG Repair Authority - Terms of Authority

Version Date: 9 March 2020

This document sets out the terms applicable to repair work that Insurance Australia Limited and its related bodies corporate (we, us, our) authorise under a Repair Authority that incorporates these Terms of Authority. When you commence such repair work, you agree to be bound by these Terms of Authority.

The repair work is for the property (Property) referred to in the Repair Authority.

If you have a current smash repairer agreement with us at the time the Repair Authority is provided, then the terms of that agreement will apply in addition to these Terms of Authority. To the extent of any inconsistency between the smash repairer agreement and these Terms of Authority, the agreement will prevail.

We are a signatory to the Motor Vehicle Insurance and Repair Industry (MVIRI) Code of Conduct (Code). By commencing repairs on the Property, you agree to be bound by the Code as amended from time to time. To the extent that any provision of these Terms of Authority conflicts with the Code the provisions of the Code will prevail.

1. Itemised Quote and variations

You warrant that your itemised quotation and any variations:

- (a) unless we agree otherwise, are prepared in accordance with our preferred quoting methodology for the following operations: Remove and Refit, Repair, Paint, Parts, Consumables, Miscellaneous / Sublet;
- (b) lists times for each operation at an agreed hourly rate;
- (c) lists any mark-ups for sublet work as permitted under these Terms of Authority;
- (d) includes the manufacturer's part number that correctly matches the make, model and variant of the Property for each OEM part quoted;
- (e) only includes amounts in respect of damage to the Property which is within the scope of the incident description, and an appropriate scope of repairs; and
- (f) for the avoidance of doubt, does not include any amount in respect of damage to the Property which is outside the scope of the incident description.

2. Commencing Repairs

You agree not to commence any work or repairs on the Property unless we have first authorised you to do so in writing.

You agree that if you do any work or repairs on the Property before we have authorised you in writing to do so, you will not charge us (and we are not obliged to pay) for any amount for such work or repairs. In such circumstances, we or the Claimant may request you to release the Property and make it reasonably accessible. You must comply with such requests and co-operate with the removal of the Property.

You agree that unless we have specifically authorised you in writing, you must not provide or sublet

any work to another supplier on the basis that the supplier will invoice us directly.

You agree to ask us to inspect the Property if you believe there are suspicious circumstances in respect of the damage to the Property.

You agree to tell us if you think that the Property has any damage that is not related to the incident for which our insured or the other party has lodged a claim with us (Claimant).

You undertake to us and the Claimant that you or any person engaged by you (including employees and subcontractors) has the experience, qualifications and equipment to properly repair the Property.

3. Customer Service

The Claimant is entitled to expect repairs to be commenced and completed within a reasonable time. You must advise the Claimant and us if there are any delays to you starting or finishing any repair work.

You must ensure the safety of the Claimant throughout the repair process, including but not limited to transport you arrange for the Claimant.

4. Once we have authorised Repair Work

You agree that you will advise us immediately of any:

- (a) deviation from the authorised method of repair;
- (b) additional damage; or
- (c) additional subcontracted and/or sublet work.

You must obtain our authorisation before commencing or organising any repairs relating to such changes (Variations). If we authorise variations, they will then be part of the assessed quotation.

We will not be responsible for the cost of any variations unless we have assessed and authorised them before they are commenced.

You agree to ensure that any repair work you do (whether under these Terms of Authority or otherwise) must not result in the Property being unsafe.

5. Terminating or suspending Repair Authority

Either party may immediately terminate (by providing the other with notice in writing) the Repair Authority.

We may immediately suspend (by providing you with notice in writing) the Repair Authority for a period of up to five (5) business days.

You must immediately cease work on the Property if either party terminates the Repair Authority or we request you to suspend work.

If either party terminates the Repair Authority, we may remove the Property from your possession by communicating this to you in writing or as otherwise agreed. We will pay you the fair and reasonable repair costs having regard to the circumstances including the authorised quotation, any authorised variations, the stage and the quality of the repair work completed as at the date of termination.

6. Moving the Property

You agree to keep the Property safe and secure at all times when it is in your custody or control. The Property must not be driven or used for any reason other than for the purpose of repairing the Property under these Terms of Authority. You must not tow or transport the Property without the prior permission of us or the Claimant except for the purpose of work already authorised.

You agree not to assert any right to possession of the Property as against us or the Claimant. You must release the Property and make it reasonably accessible and co-operate with its removal on our request or the Claimant's request.

If you have paid a third-party tow operator an amount for the towing or storage of the Property that we have not authorised and you want to be reimbursed for that amount, you must provide us with your request together with the relevant invoice (and such other information we may request) for our consideration. We will consider your request and we may pay you for such amounts if we believe it is reasonable to do so.

7. Invoicing and Payment

Within fourteen (14) days of completion of the repairs you must complete and forward to us your final tax invoice which sets out the actual date of completion of the repairs. By submitting your invoice, you confirm that the repairs have been completed in accordance with these Terms of Authority, including the Warranty.

You agree that we are not obliged to pay you until the actual date of completion is set out in your invoice.

Unless otherwise agreed you must not invoice us (and we are not obliged to pay you) until:

(a) all repair work to be undertaken by you on the Property has been completed in accordance with the quotation as authorised by us; and

(b) we have reinspected the vehicle where we have indicated to you in writing that we wish to reinspect the vehicle during repairs or on completion of repairs (we may do this by, for example, noting this in the Repair Authority, marking or writing on a quotation or sending you an e-mail).

You may only invoice us for (and we will only be obliged to pay) amounts set out in an itemised quote or variation which we have authorised. You must not invoice us for any work that has not been done or for any parts or material that have not been used.

Your tax invoice must include OEM part numbers that are correct for the make, model and variant of the Property for all parts supplied.

You are to collect the excess and contribution (if any) from the Claimant on our behalf. The amount collected may be offset by us against the amount payable by us for the repairs.

You must not collect any excess if the excess amount is greater than the fair and reasonable authorised repair cost. You must request the Claimant to contact us when this occurs.

You agree that you will not charge, and we will not be liable for any item or amount unless you have clearly set it out in your quotation and we have authorised and agreed to it in writing. If you are not sure if we will pay an item, you should contact us to discuss it first before including it in your quotation.

On receipt of your final tax invoice and any associated documents (for example, all parts invoices and information associated with the sourcing of parts requested by us), we will pay you the authorised quotation price for labour plus the amount authorised for parts plus any authorised variations including GST on the total, less the excess and contribution (if any) due from the Claimant. Unless otherwise notified by us, the basis for the calculation of parts and subcontracted and/or sublet work will be:

(a) the lowest of:

(i) the manufacturer's list price for that part excluding GST; or

(ii) in the absence of the manufacturer's list price, the maximum price published via our Parts Guidelines (the latest copy of which can be found at <http://www.repairernetwork.com.au/iag/parts-guidelines>) for that part excluding GST; and

(b) the subcontracted and/or sublet work (including all parts supplied in connection with that work) at cost plus 10%, up to a maximum of \$100.00 excluding GST, unless otherwise advised by us.

You agree to release the Property upon completion of repairs and receipt of the excess and contribution (if any).

Work completed under our authority is performed for us at our cost unless we advise otherwise in relation to a particular repair.

8. Supplier and parts information

We are not obliged to pay you for any repair work we authorise until you provide us with the following as may be requested by us from time to time:

(a) copies of any original parts purchase invoices;

(b) copies of any original sublet and/or subcontracted service provider invoices; and

(c) copies of any other associated reports and documents.

9. Warranties

You warrant (Warranty) that:

(a) the repairs will be carried out in a safe, sound and workmanlike manner and must:

(i) be in accordance with our Quality Inspection Repair Criteria (the latest version of which can be found at: <http://www.repairernetwork.com.au/iag/repair-criteria>); and

(ii) be in accordance with documented manufacturers' technical specifications and repair guidelines (including those supplied by other industry agencies or authorities recognised by us); and

(iii) be in accordance with all specifications and standards that are mandatory by law; and

(iv) return the Property to its pre-accident condition (or as close to this standard as is reasonably possible), having regard to the age and condition of the Property; and

(b) all parts authorised will be fitted to the Property; and

(c) all parts supplied will comply with the above and:

(i) comply with the manufacturer's specifications; and

(ii) comply with our Parts Guidelines (the latest copy of which can be found at

<http://www.repairernetwork.com.au/iag/parts-guidelines>); and

(iii) conform to all relevant national standards set out in the Motor Vehicle Standards Act 1989 (Cth), any published Australian Design Rules and standards published by Standards Australia, and be in accordance with all specifications and standards that are mandatory by law; and

(iv) not compromise the safety or repair integrity of the Property; and

(v) not lower the resale value of the Property; and

(vi) not adversely affect the post-repair appearance of the Property; and

(vii) unless we agree, not void or affect any warranty or guarantee provided by the manufacturer of the Property.

You agree the Warranty includes a warranty by you on all materials, parts and paint you supply or use in the repair work to the extent that the manufacturer, distributor, supplier or importer of that material, part or paint is liable under an express warranty or under the law.

Whilst we offer the Claimant a lifetime guarantee on the workmanship of all repair work we authorise, you provide the Warranty on your workmanship as required by the law.

You warrant and represent to us that our insured has not assigned to you any of our insured's rights or benefits under our insured's insurance policy including any right or benefit in relation to having the Property repaired, and you agree not to obtain or accept such an assignment.

You warrant and represent to us that you will declare any actual or potential conflict of interest in relation to the repair of the Property. You agree to cooperate with us and follow our reasonable directions in relation to the management of any claim where there is an actual or potential conflict of interest.

10. Rectifications

If, during the period of your Warranty or a warranty or guarantee under the law, any repair work performed by you or paint, parts or materials used by you in repairing the Property for us are defective and do not comply with the standards required by these Terms of Authority we will, where issues of workmanship arise, and where practicable, including taking into account the Claimant's preference, offer you the first option to effect the required rectification. You will fix the defect at your expense and pay us our reasonable costs. The rectification must be completed using a method of repair agreed with us and with minimum inconvenience to the Claimant. If we have not given you the first option to rectify, or you do not agree to rectify the defect, we may:

(a) arrange for another repairer to fix the defect at your expense and you must pay us our reasonable costs (if any) if we ask you to; or

(b) if it is not practical to arrange for another repairer to fix the defect in accordance with (a), sell the Property in its defective condition and you must pay us our reasonable costs incurred in effecting the sale plus any shortfall between the sale price and the Claimant's sum insured, agreed value, market value or retail value of the Property (as applicable).

We may require you to pay compensation for any reasonably related loss caused to the Claimant as a result of the defect.

The remedies set out above do not limit your liability under the law and are in addition to any other

remedies available under the law.

11. Access

You agree to allow and authorise our staff, contractors and agents to enter your premises upon reasonable notice during normal business hours to:

- (a) conduct assessments; and
- (b) inspect the Property; and
- (c) conduct audits of work we have authorised.

You must reasonably co-operate with them for these purposes and you must ensure the Property is accessible to them and in a safe environment.

If you do not give access as set out above, we may give written notice requiring you to arrange access within one (1) business day.

If you fail to give access in accordance with our written notice, we may immediately suspend (by providing you with notice in writing) the Repair Authority and you must cease work immediately.

If you fail to give access within one (1) business day of the suspension of the Repair Authority, we may immediately terminate (by providing you with notice in writing) the Repair Authority.

Additionally, we may require you to pay compensation for any reasonably related loss caused to us and / or the Claimant as a result of your failure to give access.

12. Professional Conduct

You must ensure our staff, contractors and agents who enter your premises or communicate with you are:

- (a) treated with respect, courtesy and professionally; and
- (b) in a safe environment when on your premises.

13. Compliance with Laws

You agree to comply with all laws applicable to the operation of your business, including laws for occupational / work health and safety, licensing and certification.

You agree that you must obtain and keep current all licences, certificates and other authorities that may be required to conduct the repairs (Licences) and must provide satisfactory evidence to us that you have done so as soon as possible after each request from us. You will notify us in writing as soon as possible if there is any change to the status or nature of one or more Licences, including the revocation or cancellation of any Licences and the imposition of any new or varied condition, qualification or limitation on any Licences.

The Repair Authority is conditional upon you holding all required Licences. If you do not hold all required Licences, the Repair Authority will not be valid, and you are not authorised to carry out repair work.

You will immediately notify us if any provider you engage to complete this repair (including subcontractors) does not have the Licences required by law to repair the Property. You must immediately cease using such providers.

You agree to reasonably co-operate with us in relation to our compliance with any laws affecting the Property including, without limitation, any laws relating to notifying details for a written-off vehicle register or applying labels to the Property.

You must not use any of the trade marks, or logos or any names (including any abbreviation of a name) used by any of us, or by any of our related bodies corporate, in any way including in advertising, marketing or promotions in any media including brochures or websites.

14. Privacy

You must not use or disclose any personal information other than to comply with your obligations under these Terms of Authority. You must take all necessary steps to protect personal information in your possession against unauthorised use and must return all personal information to us, if we request, on termination of the Repair Authority (provided that you may retain copies to the extent you are required to by law).

You must notify us promptly if you become aware of an incident which compromises the security of any personal information in your possession or control.