Financial Rights
LEGAL CENTRE

Submission by the Financial Rights Legal Centre

NSW Fair Trading

Motor Dealers and Repairers Act Statutory Review Discussion Paper

14 August 2020

Financial Rights Legal Centre |PO BOX 538, Surry Hills 2010 | Tel (02) 9212 4216 |Fax (02) 9212 4711 |
info@financialrights.org.au | www.financialrights.org.au | @Fin_Rights_CLC | ABN: 40 506 635 273

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took over 20,000 calls for advice or assistance during the 2020/2021 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to
www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

Or sign up to our E-flyer at www.financialrights.org.au

National Debt Helpline 1800 007 007
Credit & Debt Legal Advice Line 1800 844 949
Insurance Law Service 1300 663 464
Mob Strong Debt Help 1800 808 488

Monday – Friday 9.30am-4.30pm

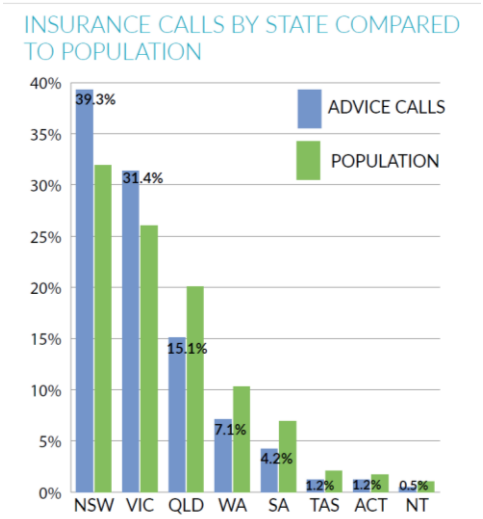
Introduction

Thank you for the opportunity to comment on the statutory review of the *Motor Dealers and Repairers Act 2013*. The Financial Rights Legal Centre (**Financial Rights**) will address the following problems relating to motor dealers and repairers in NSW:

- Ongoing problems with quality and transparency of repairs;
- Car-napping by tow truck drivers and smash repairers; and
- Licensing of credit hire businesses.

Ongoing problems with quality and transparency of repairs

Financial Rights regularly receives complaints by consumers about the scope, quality and timeliness of repairs in NSW. These calls generally come through our Insurance Law Service (**ILS**), which is a national telephone legal advice line, but last financial year nearly 40% of our calls come from NSW.



Financial Rights receives regular complaints about the quality of repairs arranged by insurers, as well as repairs done by independent repairers. Financial Rights has received complaints about:

- the repairs being poor and requiring a complaint to the insurer to insist the repairs are fixed;
- the consumer having to hire an independent assessor to prove the repairs are poor;
- the repairer being very slow in obtaining parts even when the parts were readily available by order on the internet;

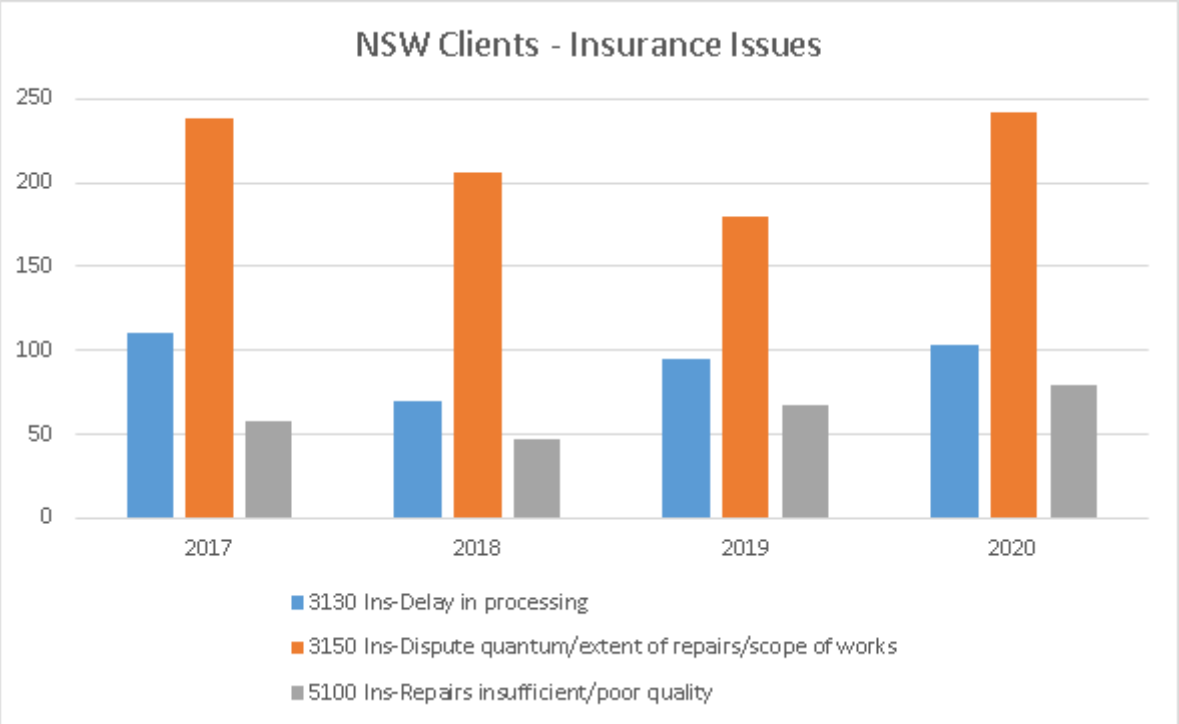
- the repairs taking an unreasonable amount of time;
- repairers leaving the car unroadworthy; and
- motor vehicles being determined a total loss or written off and consumers not being informed.

Financial Rights also receives complaints from uninsured consumers being asked to pay damage from an insurance company for repair costs. Consumers complain about the repair quotes:

- being unclear;
- repairing damage not caused by the accident; and
- being excessive.

Overall, complaints to the ILS about quality and transparency of car repairs is an ongoing issue. The process for getting poor repairs fixed is difficult and may involve the cost to the consumer of getting independent assessors. Consumers often indicate they have little trust or confidence in the repair industry.

To give an idea about the number of calls we get that relate to these issues we have done a search of our call database for repairer related-complaints[1].



[1] This data also includes calls about problems with home insurance and associated problems with repairs and scopes of works, however, motor vehicle accidents and motor vehicle insurance are consistently the most common type of problem raised with the Insurance Law Service.

Provision of information to consumers by motor vehicle repairers

The discussion Paper asks

> *Q27: Are the current obligations for motor vehicle repairers fit for purpose? For example, record keeping and provision of information to consumers.*

Financial Rights submits that they are not. The lack of transparency around car repairs discussed above could be greatly improved with stronger legislative requirements for repairers to provide information to car owners.

We support the idea raised in the Discussion Paper that repairers could be required to document the scope of the repair work to be undertaken on a job card. We would also support the introduction of standard "approved forms" to be published on the NSW Fair Trading website, as long as those forms are consumer tested to ensure they are fit for their intended purpose. Repairers should be required to provide to consumers in writing the scope of work that will be undertaken before the repairs commence, and if the repairs differ from those originally disclosed, an amended scope of work report must be provided to the consumer after the car is fixed. This should occur both for consumers whose repairs are being organised by an insurer as well as those organised by the consumer directly. We often hear complaints by consumers whose repairs are being organised by their own insurer and they are feeling cut out of the process completely. The insurer instructs the repairer on how to proceed and the repairer sends the scope of works and the invoice to the insurer directly. The consumer gets their car back and they do not understand what repairs have been completed.

Recommendations

1. **The suggestions made in the Discussion Paper to:**
   a) **Require repairers to document the scope of the repair work to be undertaken on a job card; and**
   b) **Introduce standard "approved forms" for repairers to use which would be published on the NSW Fair Trading website**

   should be implemented, with the proviso that the approved forms should be subject to consumer testing in development.

Opportunity to contact insurer

Consumers also need to know whether the repairer is outside their insurer's network (or outside of the at-fault driver's insurer's network) before repairs commence. Financial Rights strongly recommends that before starting any repair work repairers be required to confirm with the consumer whether they have already spoken with their insurer (or the at-fault driver's insurer) and if they have not, ask whether they would they like to make contact with the relevant insurer before the repairs begin. We have seen too many examples of consumers left holding the bill for

repairs conducted by a repairer outside of the relevant insurer's network and, subsequently, the insurer not agreeing to cover the cost of the repairs. Consumers should have the opportunity to contact the relevant insurer before the repairs begin. This would promote greater appreciation of the risk of using a repairer that has not been approved.

Case Study – Geoff's Story

Geoff was in a car accident 12 months ago. A truck backed into his car and caused some damage. Geoff took his car to a smash repairer around the corner. Geoff has comprehensive car insurance and the smash repairer told him that they do a lot of work with that insurer. The smash repairer said it would fix everything up with the insurer and that Geoff would not need to pay anything. The smash repairer told Geoff it would cost about $3300 to fix the damage and his car would be ready in two weeks.

Meanwhile Geoff called his insurer to make the claim, and his insurer said they wanted a second quote for the repairs. When Geoff went to pick up the car, the repairer told him that he had already pulled car apart and started work. The smash repairer said it was going to go through the other driver's (the truck's) insurance. The smash repairer was not going to let Geoff take the car.

In the end it took 4 months for Geoff's car to be repaired and a year after the accident the smash repairer still hasn't been paid. Geoff's insurer is offering to only cover $3,700 and will only pay this to Geoff's bank account, not to the smash repairer. Geoff's insurer is relying on an invoice from different repairer for cost of repairs. The smash repairer that fixed Geoff's car is claiming $11,000 and has given the bill to Geoff. Geoff says he didn't sign anything for the car until day he picked it up.

Source: C201361

Recommendation

2. **Repairers should be required to confirm with the consumer before starting any repair work whether or not they have already spoken with their insurer (or the at-fault driver's insurer) and if they have not, be provided the opportunity to make contact with the relevant insurer before the repairs begin.**

Choice of repairer

The Discussion Paper mentions that insurance policy wordings may state that repairs must be done by the insurer's nominated repairer, and this can result in less choice for the consumer as well as negatively impact smaller repair businesses. Financial Rights agrees that this is an issue, and we note that even when policies give a consumer a "choice of repairer", the lack of standard terms in general insurance means that consumers are rarely given an unfettered choice of a repairer and the policy entitlement is often limited or restricted, or may carry certain disincentives within the wording itself. Financial Rights discussed this in more detail with the *Select Committee on the Motor Vehicle Repair Industry* during its inquiry in 2014. We were specifically asked by Deputy Chair Bryan Doyle: "*Can you give an example of when the policy does provide for some choice of repairer, do you get any complaints in relation to being steered in a particular direction?*" Our written response to Mr Doyle is **attached** to this submission (Note our organisation at that time was called the Consumer Credit Legal Centre, although we were operating the same Insurance Law Service we still operate today).

We recommend that insurers offering "choice of repairer" entitlements in car insurance policies in NSW be required to use a standardised term so that consumers who have paid for this entitlement get an actual choice in which repairer to use after an accident. In our experience, policy wording for "choice of repairer" in car insurance can include any number of restrictions and limitations including, for example:

- The consumer can use their choice of repairer only if the insurer agrees AND if they have assessed the car at the insurer's assessment centre AND the quote is reasonable and cost effective.
- The consumer can use their choice of repairer only if the total repair cost does not exceed the quoted repair by the insurer's authorised repairer.
- The policy's choice of repairer clause allows for adjustments to be made by the assessor including to the method of repair.
- The insurer will only pay the fair and reasonable costs of repairs as determined by their own assessor.

Recommendations

3. **The Financial Rights Legal Centre recommends that the term "choice of repairer" be standardised in NSW and simplified so that consumers who purchase policies with this entitlement get a real choice of repairer.**

Written Off Vehicles

In our experience issues around transparency, provision of information and car repairs are never more problematic than in the context of written off vehicles. Financial Rights has a legal information factsheet on our website entitled "*Your vehicle has been 'written off'* [2] which is consistently the most popular factsheet on our website. This factsheet alone nationally receives over 40,000 pageviews a year, with an average view time of over 6 minutes. We consistently get calls from NSW residents whose cars have been written off and they do not understand why, or they have not been notified of it in a timely fashion (meaning they may unknowingly driving the vehicle illegally), or they strongly disagree with the assessment.

Financial Rights understands that the rules around vehicle write-offs in NSW are in the *Roads Transport Act*, which was just reviewed in 2019. Unfortunately, we were not identified as an interested party to that review and were not notified of the public consultation. Financial Rights believes changes should be made to the relevant sections of that Act to improve transparency, contestability and standatisation of information provided to consumers when their cars have been assessed as written off.

Case study –Jordan's story

Jordan was comprehensively insured when she hit a kangaroo in December 2019. Jordan submitted her claim and paid the excess amount. At the time Jordan was staying on the south coast of NSW looking after a friend's house in the fire-stricken area. Jordan received an email from her insurer in late January requesting her bank details to enable them to deposit the repair amount into her account. She then received a phone call a day later when she was driving so she asked if they could call her back in an hour which didn't happen. Ten days later Jordan received an SMS asking her to call the insurer which she did. Only then was she told that her car had been written off, that the registration had already been cancelled and that she had no option to have the car repaired.

Jordan was shocked by this outcome. The car only had a few dents and a broken front light from the kangaroo. She had already gotten a quote for repairs of $2800 and the car was insured for over $3000. Jordan says the car was in excellent condition and still road worthy. And how could the assessor make this decision without ever looking at the car and let her keep driving it around for 10 days unregistered!? Jordan just wants her car repaired but she has tried to contact NSW Roads twice and they say there is nothing she can do, the car cannot be repaired.

Source: C200939

[2] https://insurancelaw.org.au/factsheets/your-vehicle-has-been-written-off-factsheet/

Car-napping – Credit Repair and Credit Hire

"Car-napping" refers to the practice where drivers involved in a car accident are encouraged, either by a tow truck operator, a smash repairer, to sign a form that authorises a third party to act on behalf of the consumer for storage, repairs and/or car hire. The consumer is generally not made aware of the nature of the document, and many make the mistaken inference that the form is merely related to the towing or repair of their vehicle.

The form signed usually has the legal consequence of allowing a third party to act on the consumer's behalf, such as a power of attorney, and this can result in significant fees being incurred by the consumer for representation. Some arrangements require the consumer to pay, and others entitle the representative to recover the costs from the at fault party in the accident.

Where the consumer later changes their mind, for example, they decide to claim on their own insurance, the smash repairer may charge "storage fees" or other costs, which may not be recoverable by the consumer from their own insurer or from the at fault party.

The client is usually the not-at-fault driver in the accident, or believes they are not at fault. Often they have just been in an accident, could be suffering from shock or injury or otherwise impacted by the event, and may be understandably vulnerable because they have never have experienced the situation before. Worried about the consequences of losing their car, unfamiliar with the process, they can be overly trusting of tow truck operators and repairers at the scene offering to help. Consumers who are newly arrived migrants or elderly are particularly vulnerable to entering such contracts without realising the implications. Contracts are often long, contain complex clauses or language, and may be electronically on an ipad, in circumstances where the consumer is not provided time to read or understand the document.

The business model is structured so that the "car-napping" smash repairer may inflate prices for repairs, towing and replacement car hire (Credit Hire is dealt with in more detail below) on the basis that the at-fault party will accept the inflated fees rather than face legal action. If the insurer or the at-fault driver will not pay, the repairer may demand payment from their client instead or commence legal action on the client's behalf. If the client refuses to co-operate, some agreements allow for the repairer recovering the costs from the client instead as a consequence of their non-cooperation.

The risks of the arrangement are rarely mentioned by the smash repairers. The client's car may take weeks or months to repair, effectively taken 'hostage' until the insurer of the at-fault party agrees to be liable for the various costs incurred. At the same time the client may have a courtesy car and is not aware of the escalating costs.

The corollary is the impact of these practices on the allegedly at-fault party who ends up liable for the costs. Financial Rights also receives calls from uninsured at-fault parties who are being debt collected for unreasonable costs raised by car-nappers and credit hire companies. The impact of the Credit Repair business models, is that it incentivises the businesses to inflate the cost of repair, ostensibly to recover the funds from the insurer of the at fault party. The insurer

may decide to pay, rather than dispute the costs through the Court process. However, uninsured consumers can often be adversely impacted by the activities including:

a) being subject to debt collection practices that can be stressful, time consuming and difficult to resolve;

b) facing legal proceeding where they are ill equipped to pay or defend themselves;

c) being forced to file for bankruptcy or sell assets to pay the debts incurred.

Where an insurer is recovering a debt incurred in an accident, they are subject to the General Insurance Code of Practice which provides some protections for uninsured third parties who are experiencing financial hardship. They are obliged to meet the ACCC/ASIC Debt Collection Guidelines and will generally enter reasonable repayment arrangement and to refer consumers for free financial counselling. Many insurers will have internal policies for payment arrangements and debt waivers for vulnerable consumers and are required to, this obligation is monitored by the General Insurance Code Compliance Monitoring Committee. Credit Hire and Credit Repair businesses do not. While these businesses are arguably caught by the Debt Collection Guidelines there is no requirement for them to refer an uninsured driver to a financial counsellor, and disputing the enforcement is harder. If a Credit Repair or Credit Hire business is acting unfairly an uninsured driver's only complaint option is to the ACCC or Fair Trading.

Obtaining evidence from a Credit Repair business such as itemised bills and comparable quotes can be difficult. For many uninsured third parties it is not until they get a statement of claim that they become aware of the size of the repair bill and other associated costs, such as storage and car hire.

Case study –Sam's story

Our client, Sam, is a 24 year old refugee from Afghanistan. Sam could not read or write in English. He was a casual labourer.

Sam was involved in a motor vehicle accident. Sam was driving his cousin's car, which had comprehensive car insurance and he is a listed driver under the policy. Sam did not admit liability for the accident. The other driver engaged the services of a Credit Hire and Credit Repair service, which issued a Statement of Claim ("the first proceedings") on behalf of the owner of the vehicle against Sam and his cousin for the cost of repairs for the damaged fancy car, claiming over $25,000.

Sam's cousin lodged a claim with his insurer, who refused to cover the claim because of "failure to provide information". As Sam cannot read, write or speak English, he had no idea what was going on.

A default judgment was entered against him and his cousin and the entity enforced the debt via garnishee of their bank accounts, resulting in them paying a total of $30,000 between them.

A year later another entity claiming to be the owner of the vehicle in the motor vehicle accident, issued a statement of claim against our client for hire car costs ("the second proceedings"). The total claimed in these proceedings was approximately $13,000.

Financial Rights obtained pro bono counsel to file a defence and appear for Sam, and were successful in defending the second proceedings. We also assisted Sam with his insurance claim being rejected.

Ultimately Sam got his money back and received confirmation of no further pursuit from any party about the accident. He said he could finally feel 'safe' about putting money in his bank account rather than hiding it in the house to avoid a potential further garnishee.

Sam is unlikely to be alone, Financial Rights routinely hears from clients who are being pursued by an insurer or debt collector for car repairs and in addition to a separate bill for the costs of the other party hiring a car. These costs can be many thousands of dollars and often disproportionate to the damage.

Source: C140684

Need for protections in the Motor Dealers and Repairers Act that mirror those in the Tow Truck Industry Act.

Smash repairers, car yards, motor vehicle repairers are licensed under the *Motor Dealers and Repairers Act 2013 (NSW)* and *Motor Dealers and Repairers Regulation 2014 (NSW)*.

The *Tow Truck Industry Act 1998 (NSW)* (**Tow Truck Act**) and *Tow Truck Industry Regulation 2008 (NSW)* set out what reasonable fees tow truck operators can charge for towing and storage. However, these provisions are not mirrored in the *Motor Dealers and Repairers Act 2013* and this seems to be allowing some repairers and tow truck operators to circumvent the operation of the *Tow Truck Act*. Similar provisions concerning repairers should be contained in the *Tow Truck Act* and the *Motor Dealers and Repairers Act* (and/or their supporting regulations) to ensure consistency of towing and storage costs in this regard.[3]

The current *Motor Dealers and Repairers Act* does not deal with the situation where tow truck operators are able to circumvent regulated storage fees by storing vehicles at an allied smash repair business. A tow truck driver delivers a vehicle to a repairer and the vehicle is detained until these additional fees are paid to the repairer. This leads to delays in the repair of the vehicle and significant inconvenience to the consumer.

[3] See: https://www.insurancecouncil.com.au/assets/submission/2014/2014_June_30_ICA_submission_to_Independent_Pricing_and_Regulatory_Tribunal_review_of_maximum_towing_fees.pdf

The Tow truck legislation was recently reviewed and new Regulations have commenced 1 July 2020. Unfortunately key changes to the proposed replacement Regulation[4] do not include a requirement that fees should apply for all persons (for instance, an operator or smash repairer) that propose to charge or charges a fee for storage of the vehicle at a location specified on an authorisation form. This change was specifically recommended by the Independent Pricing and Regulatory Tribunal in its Final Report in December 2014:

Final Recommendation[5]

28 The Act and Regulation should be amended so that the maximum fees for towing and storage apply to vehicles towed from the scene of an accident. The fees should apply:

- *for all locations specified on an authorisation form, and any other storage locations specified by operators as part of their licence application or renewal, where the vehicle is stored (for instance, in an operator's storage facility, or a smash repairer designated as the final destination by the consumer on the towing authorisation) before the vehicle is returned to the owner or owner's agent, and*
- *for all persons (for instance, an operator or smash repairer) that propose to charge or charges a fee for storage of the vehicle at a location specified on an authorisation form*
- *once a quotation for repair has been accepted no further storage or other fees can be charged.*

This recommendation was also supported by the NSW Government in its response to the IPART Final Report.[6]

As an alternative solution to this car-napping problem, Financial Rights recommends that provisions should be added to the *Motor Dealers and Repairers Act* which regulate storage, towing and administration fees and require any light vehicle storage provider holding a vehicle must, upon payment of regulated towing fees and storage fees, release that vehicle to its owner (or insurer).

We consider that our recommendations should apply to all regulated fees relating to the towing and storage of vehicles involved in an accident, not just storage. This would prevent operators applying other fees (such as administration fees) while a vehicle is being stored. We note that while a vehicle is being stored, the owner or insurer should be able to seek quotes in the competitive market for smash repairs. Once a quote for repairs has been accepted, storage fees should not be charged.

[4] Tow Truck Industry Regulation 2019 https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0007/543607/Tow-Truck-Regulation-consultation-draft.pdf

[5] https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/final_report_-_review_of_tow_truck_fees_and_licensing_in_nsw_-_december_2014.pdf - pg 98

[6] https://www.transport.nsw.gov.au/sites/default/files/media/documents/2017/201512-nsw-government-response-to-ipart-tow-truck-review.pdf

Case Study – Vihaan's story

Vihaan was in a car accident four months ago. Vihaan was hit from behind and a towing company turned up and took his car to the nearest smash repairer. Neither the tow truck company nor the smash repairer were associated with any insurance company.

The smash repairer had Vihaan's car for four months and when he got it back it was clear it had been a dodgy repair job and there were personal items missing from the car. Vihaan has not paid for any services, but he does want his car fixed properly. The insurer for the at-fault driver said they have their own authorised repairer and they won't take Vihann's car now that it has already gone to a different smash repairer.

Vihaan tried to claim on his own comprehensive insurance but he was told that since this is now a rectification issue, his only option is to take his car back to the first smash repairer. Vihaan has now had an independent assessor look at his car and the assessor found extensive problems with the repair.

Vihaan has now been told by the smash repairer that when his car was originally towed he was asked to sign an authority with a Credit Repair company which manages car accident payments. This Credit Repair company would now try and claim the cost of the towing and repairs from the at-fault driver's insurer. Vihaan had signed without knowing what the authority was about. Vihaan has now written to the accident management company to withdraw his authority.

Vihaan just wants his car fixed properly and is not sure how to achieve that.

Source: C207757

Case Study – Craig's story

Craig was recently involved in a car accident and he was not at fault. Craig decided not to claim on his own insurance but to go through the other driver's insurance. At time of the accident the other driver called a towing company which came and took Craig's car to a local smash repairer. The other driver's insurer agreed that Craig's car was a write off and that it would pay the value of the car to Craig. When Craig contacted the smash repairer they asked him who will pay for towing and storage? Craig's car had already been there for 20 days.

At the time of the accident Craig signed a document given to him by towing company. Craig was in shock from the accident at the time. Craig thinks he authorised the towing of the vehicle but he definitely was not provided an estimate of storage and towing costs.

Craig knows he is entitled to recover the market value of his car and towing costs, but what about storage? He doesn't think the insurer is going to pay for that.

Source: C204411

Recommendations

4. **Provisions should be added to the *Motor Dealers and Repairers Act* which regulate storage, towing and administration fees and require any light vehicle storage provider holding a vehicle must, upon payment of regulated towing fees and storage fees, release that vehicle to its owner (or insurer).**
5. **While a vehicle is being stored, the owner or insurer should be able to seek quotes in the competitive market for smash repairs. Once a quote for repairs has been accepted, storage fees should not be charged.**

Credit hire companies

Credit hire car companies offer apparently not at fault drivers replacement hire cars on terms that do not require the claimant to pay the hire charges from their own pocket – instead the intention is that they would recover from the at-fault driver. It has been estimated that these services have increased the costs of insurance considerably.[7]

One common example of this practice is where the not at fault driver is provided a "courtesy car" while their car is towed off to be repaired. The courtesy car is provided at no up-front cost and is essentially being provided to the not at fault party on credit. These companies typically agree to pursue the at-fault driver or their insurance company to recover the towing, storage and hire car costs. Later for a variety of reasons, the at-fault party may not pay and the innocent driver is on the hook for thousands of dollars. These companies are sometimes referred to as credit hire businesses.

Depending on the terms of the agreement, the not at fault driver may be authorising the credit hire company to:

- communicate on their behalf with the other driver and/or their insurer;
- instruct lawyers on their behalf;
- sign documents on their behalf; and
- commence legal proceedings in their name.

[7] https://actuaries.asn.au/Library/Events/GIS/2016/1bRajKanhai.pdf

The terms of the agreement may require the not at fault driver to assist the credit hire company, including by providing witness statements and other relevant documents, and attending court to give evidence as a witness. If the at-fault driver does not have insurance the credit hire company will likely commence court proceedings against them; this will usually be to recover the hire car costs only and not any other costs, such as the cost to repair damage to the car.

There are several companies in NSW participating in these practices including Right2Drive[8], Compass[9], Not My Fault[10] and I'm in the Right[11]. Fees can be very high including $219 per day for a Mercedes.[12]

One result of the car-napping and credit hire sector is more litigation in the local court, clogging up court time and generating legal fees.

There is no specific regulation of credit hire companies. The Australian Consumer Law does apply to these types of credit hire agreements, including consumer protections such as unfair contract terms, and misleading and deceptive conduct, but there are no regulations of the fees they can charge or other practices to prevent these companies from charging high fees or inflated costs for rental cars. While the recent case of *Lee v Strelnicks* [2020] NSWCA 115 involved credit hire companies, the question of whether the costs attributable to the business model of credit hire, insofar as they exceeded the "spot market hire rates", was not before the Court. As such, uncertainty remains as to whether these additional costs are recoverable from an at-fault driver.

Inadequacy of current regulation for car-napping and credit hire: Australian Consumer Law

The Australian Consumer Law (**ACL**) also applies to the repairers, tow truck companies, and credit hire services. The ACL rules regarding sales practices, unfair business practices and unfair contract terms are relevant in this context.

The prohibitions on unconscionable conduct in s 20 and 21 of the ACL for example, may provide relief to victims of car-napping, however it is difficult to establish that the threshold for unconscionable conduct has been met. The bulk of cases dealing with statutory unconscionability have endorsed a narrow standard of unconscionability that requires some level of 'moral obloquy'.[13]

In the case of *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC90 a critical determining factor was that the sales technique found to be unconscionable relied on a deceptive ruse to gain entry into the home of consumers. In car-napping, consumers are similarly confused about the real nature of the transaction they are being asked to enter into by signing a contract. However, in the absence of a positive misrepresentation by the companies concerned, as opposed to conduct

[8] https://www.right2drive.com.au/

[9] https://itwasntmyfault.com.au/

[10] https://www.notmyfault.com.au/

[11] https://www.imintheright.com.au/

[12] https://www.right2drive.com.au/daily-rental-rate

[13] *Attorney General (NSW) v World Best Holdings Ltd* [2005] 63 NSWLR 557;

that simply fails to explain the 'true' consequences and risks implicit in the document being signed, it remains unclear whether the conduct would be found to contravene the statutory prohibition.

Victims of car-napping may seek recourse where there has been misleading or deceptive conduct. However, the circumstances in which ACL will protect consumers who have been misled on account of an omission by another party are very uncertain. Under the ACL a decisive consideration in deciding whether a failure to disclose information is misleading is whether a consumer would have a reasonable expectation of disclosure.[14] This uncertainty has the effect of creating a significant regulatory gap as many victims of the car-napping model may sign authority documents under the false assumption that the documents relate to repairs or towing without being expressly misled.

Moreover, the costs and risks associated with taking legal action are likely to deter consumers from enforcing their rights under the ACL; and those rights are of little or no assistance to members of the public being pursued by credit hire companies on the basis they are at fault.

Need for licensing of credit hire companies

There is clearly a gap in the regulatory system in relation to credit hire companies. One option to address this gap is the insertion into the *Motor Dealers and Repairers Act* of a new class of persons to be licensed, being "credit motor hirers".[15] Any person wishing to provide vehicles on credit hire terms would require a licence. A new Division would be inserted in Part 4 detailing specific obligations imposed on credit motor hirers, including requiring clear and upfront disclosure of the terms and risks of the arrangement including:

1) What the company is authorised to do on a consumer's behalf (including whether the credit hire contract authorizes the commencement of legal proceedings in the consumer's name).
2) The consumer's obligations to the hirer, including whether the consumer will be required to assist in court proceedings (including giving evidence).
3) Whether the consumer will need to pay for any of the hire car costs, including if the credit hire company cannot recover the hire car costs from the other driver for whatever reason.
4) Whether the credit hire company charges more than the daily market rates for a particular car, and whether they will require the consumer to pay the difference in the event the credit hire company cannot recover this higher rate from the other party.
5) What happens if the credit hire company wants to go to court, including whether the consumer is indemnified against any costs order in any unsuccessful legal proceedings brought by the credit hire company.
6) What happens if the consumer (or their insurer) needs to go to court too (for example, to recover repair costs).

[14] See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 557

[15] Cf. Discussion Paper Question 5 – Who should be regulated or hold a licence under the Act?

Further to (4), our view is that the proposed new Division in Part 4 should require credit hire companies to indemnify their consumers for the cost of unsuccessful legal proceedings other than in exceptional circumstances. Those circumstances should be defined by the legislation, and reliance on them should required the credit hire company to obtain approval from the Secretary.

In relation to providing some protection to individuals who are experiencing financial hardship and being pursued by credit hire companies, the proposed new Division in Part 4 should impose similar obligations on credit hire companies as are imposed on insurers under Part 10 of the General Insurance Code of Practice 2020. In particular, any individual from whom a credit hire company is seeking to recover money should be entitled to make an application for financial hardship support and have that application assessed fairly and reasonably. That assessment should be reviewable by the Secretary. Recovery action must be put on hold while the application is assessed and reviewed.

Licensing credit hire companies under the *Motor Dealers and Repairers Act* (with a new definition and bespoke obligations as proposed) would also have the advantage of making such companies subject to Part 5. This would subject credit hire companies to a specific legislative restraint on unjust conduct, and provide consumers the option of an administrative (as opposed to Court or Tribunal-based) dispute resolution mechanism.

We would also take this opportunity to note that there is also a regulatory gap with respect to car hire companies more broadly. Our Insurance Law Service frequently fields calls in relation to these companies, in particular with respect to the "insurance" (in fact, liability limitation) offered by these companies to their customers, and the conduct of these companies in pursuing customers and third parties for damage to their vehicles. We consider, at a minimum, that the Car Rental Code of Practice should be binding on all rental car companies operating in NSW, all such companies should be bound by the decisions of the Australian Car Rental Conciliation Service, and the jurisdiction of that Service should be expanded to allow it to adjudicate on quantum (e.g. of repair or hire car costs) and award compensation, and include jurisdiction even where NSW court proceedings have commenced (and lodgement of a dispute therewith should stay court proceedings).

Case Study – Gavin's story

Gavin owns a scooter and had an accident. The at-fault person agreed to fix her car and Gavin's damaged scooter with her insurance.

Gavin hired a scooter while his damaged scooter was being fixed. The repairer put Gavin on to a Credit Hire company to provide him with a scooter similar to his vehicle. He was told that the Credit Hire company check everything and that they ask for the money from the at-fault driver´s insurer. Gavin signed an agreement.

Everything seemed to be good with the Credit Hire company because they collected details and told Gavin that he had to pay absolutely nothing because it was not his fault.

However now the Credit Hire Company is pushing Gavin through a lawyer to sign an agreement to sue the at-fault driver to get the money to pay for the rental scooter for 4 days.

Gavin is not sure if he needs to sign the document to sue the at fault person. The Credit Hire wants to take legal action to sue the person guilty of the accident on his behalf to get the money. Gavin does not want to be involved in a legal process.

Case Study – Hamish's story

Hamish was involved in a motor vehicle accident while driving his AUDI. Hamish was not at fault and has comprehensive insurance. The other driver admitted fault and was insured. The other driver made a claim through his insurance and it was accepted.

Hamish's car was sent to a car repairer. The car repairer organised a replacement vehicle for Hamish with a Credit Hire Company. Hamish called his insurer about the replacement vehicle and his insurer made a representation that they would cover the cost of the replacement vehicle. Hamish signed a contract for the replacement vehicle but says no one explained to him the terms of the contract. Hamish was provided with a Mercedes. The Mercedes had issues and Hamish was subsequently given a Lexus. The Lexus also had issues and Hamish was given a Mitsubishi while the Mercedes was being fixed and Hamish was ultimately provided with the Mercedes once it was fixed.

It was only until much later that Hamish discovered later that replacement car cost was $1200 per day. Hamish's car took 90 days to repair because a part needed to be imported from Germany. The total bill for the hire car was over $100,000.

Hamish's is refusing to pay the bill and the Credit Hire Company commenced proceedings against the other driver's insurer on behalf of Hamish. The Credit Hire Company initially acted for Hamish to make the insurer pay for the replacement car cost but has now told Hamish that they are ceasing to act for Hamish because he is not cooperative and is not assisting them with the process. Hamish denies that he has been uncooperative.

Hamish has now been summoned to court and asked to collect evidence for a court hearing a month later and then two further days of court have been booked in for a review and a hearing.

Source: C196748

Case study –Rob's story

Rob was involved in a car accident in early 2020. It was clear that he was not at fault and the other party's insurer has admitted liability. Rob is comprehensively insured but there is no provision for a hire car in his insurance policy. When Rob took his car (which is a luxury vehicle) to a smash repairer, they referred him to a credit hire company.

Rob signed an agreement with the credit hire company and he says from his understanding, he will be liable if they aren't able to recover from at fault party. Rob has had his rental car for 3 months already. His car repairs haven't commenced, and Rob says his car hasn't even been properly assessed yet. Rob is concerned that he's had the car for a long time and the credit hire bill is already $20,000. The credit hire company have assured him that the at-fault driver's insurer has admitted liability and that the credit hire company will recover their costs, but Rob is still nervous about this growing bill.

Source: C205858

Recommendations

6. **A new class of persons should be introduced into the *Motor Dealers and Repairers Act* to be licensed, being "credit motor hirers", to be subject to, inter alia, specific obligations detailed in the Act relating to disclosure, indemnification and financial hardship.**
7. **The Car Rental Code of Practice should be binding on all rental car companies, including Credit Hire, operating in NSW, all such companies should be bound by the decisions of the Australian Car Rental Conciliation Service, and the jurisdiction of that Service should be expanded to allow it to adjudicate on quantum (e.g. of repair or hire car costs) and award compensation, and include jurisdiction even where NSW court proceedings have commenced (and lodgement of a dispute therewith should stay court proceedings).**

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Julia Davis, Policy & Communications Officer at the Financial Rights Legal Centre on (02) 8204 1384 or julia.davis@financialrightsorg.au

Kind Regards,

Karen Cox
Chief Executive Officer
Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: Karen.Cox@financialrights.org.au