NSW OSBC DRU 18- 001 Code expert determination

INTRODUCTION

1. This is a determination under Clause 12 of *the Motor Vehicle Insurance and Repair Industry Code* ('the *Code*) and the *Approved Determination Scheme Rules* (`the *Rules*'). As the facts giving rise to the dispute and the subject of this determination occurred after 1 May 2017 I have applied the iteration of the *Code* and *Rules* current at that date which is current law in New South Wales pursuant to section 53 of the *Fair Trading Act* (NSW) 1987 and regulation 21 of the *Fair Trading Regulation* 2012.

2. In this decision words in italics having initial capitals, unless the context otherwise requires, are used in the sense in which they are defined under Clause 3 of the *Code*. In compliance with Clause 6.1 of the *Rules* I have not identified the *Parties*, the *Insurer* or the *Customer.*

3. Because I understand that this decision will appear in some form on the *Code Administration Committee* (`*CAC*') website I have included, whether summarised or by direct quotation, almost all of the *Parties'* evidence and submissions. I have done so for the guidance of repairers and insurers, their lay and legal advisers, so that they can be aware of the facts and arguments in this determination to assist them in any decision they have to make about proceeding to a determination under the *Code* for any future dispute. As a consequence this determination is much longer than I consider was envisaged under the *Scheme*.

PROCEDURAL HISTORY

4. On or about 19 October 2017[1] the *Applicant* lodged an IDR[2] as follows:

> "***Relevant Code Clause:***
> *4.2 (b) (ii)*
>
> ***Why the Claimant Believes the Insurer has Breached the Code:***
> *The Insurer is required to consider estimates in a fair and transparent manner. Consider not Compile! Compiling their own estimate to repair a motor vehicle when they do not have a repairer licence, use an artificial labour rate, use terminology that is not understood by the vast majority of repairers and assessors is not fair and the material*

1 As stated in the *Respondent's* email to the *Applicant* of 15 November 2017.
2 Defined in the *Code* as an *Internal Dispute Resolution process* established by an *Insurer* under clause 11.2 of the *Code*

> *allowances in the Audatex program are not transparent. In comparison my estimate clearly uses a realistic rate and the material and consumables are fully transparent as to how they were calculated.*
>
> ***Requested Outcome:***
> *The Insurer to negotiate in good faith using the estimate that I provided. The Respondent policy allows for the customer to nominate a repairer of their choosing for the repairs.*"

5. On 15 November 2017 the *Respondent* responded denying the *Applicant's* arguments and stating in part:

> "Our records confirm (the *Applicant*) was provided 2 separate repair authorities in July, one on the 7th then one on the 31st (after request from {one of the *Applicant's*} staff members) noting the repair estimate and authority costing.
>
> You repaired the insured's vehicle pursuant to the latest authority."

6. On or about 17 November 2017 the *Applicant* lodged by email with the *Respondent* a Dispute Lodgement form which was acknowledged by the *Respondent* on the same day. The dispute concerned the *Applicant's* estimate prepared on or about 2 June 2017 for its *Customer's* vehicle.

7. On 22 November 2017 the *Applicant* first approached the OSBC about resolution of the dispute with the *Respondent*.

8. On 31 January 2018 a *Mediation* under Clause 11.3 of the *Code* was conducted. At the *Mediation* the *Respondent* provided the director with a marked up estimate which he had provided to the *Assessor* on 6 July 2017. The *Mediator* certified under Clause 13.3(i) of the *Code* that on 31 January 2018 a *Mediation* occurred of a dispute about the *Applicant's* claim that the *Respondent* had breached Clause 4.2(b)(ii) of the *Code*. The *Mediator* certified that the *Mediation* did not result in an outcome acceptable to both *Parties* and that the unresolved issues between the *Parties* were:
   a. The value of the claim.
   b. Whether the generally agreed actions of the Respondent constituted unfair, unreasonable conduct in breach of the *Code* and whether those actions were transparent.
   c. The future methodology for dealing with estimates and repairs by the applicant.

9. On 28 February 2018 the Applicant lodged an application for an expert determination with the NSW South Wales Office of the Small Business Commissioner (‘OSBC’). I will refer in more detail to the *Applicant's* outline of issues for determination and requested outcome later in these reasons.

10. On 12 March 2018 I was appointed as determiner by the OSBC, which is an *Approved Determination Provider* named in Schedule 2 of the *Code*, in its capacity as a *Determination Nominator* under Clause 1.5 of the *Code Approved Determination Scheme Rules* (`the *Rules*'). The appointment letter disclosed the following milestone dates:

a.	19 April 2018	last date for *Applicant* to supply its information to OSBC
b.	20 April 2018	date for OSBC to supply *Applicant's* information to determiner and *Respondent*
c.	30 May 2018	last date for *Respondent* to supply its information to OSBC
d.	31 May 2018	date for OSBC to supply respondent's information to determiner and *Applicant*

11. On 20 April 2018 OSBC revised the above schedule as follows:

a.	26 April 2018	last date for *Applicant* to supply its information to OSBC
b.	27 April 2018	date for OSBC to supply *Applicant's* information to determiner and *Respondent*
c.	6 June 2018	last date for *Respondent* to supply its information to OSBC
d.	7 June 2018	date for OSBC to supply respondent's information to determiner and *Applicant*

12. On 26 April 2018 the *Applicant* provided its material to OSBC which in turn provided it to me the following day. Notwithstanding the provisions of Clause 5.3(a) of the *Rules*, the *Applicant* did not serve the *Respondent* with its information on 26 April 2018 or at all. In consequence it was provided to the *Respondent* by OSBC which extended the *Respondent's* due date for provision of its information until 28 June 2018.

13. On 26 June 2018, following a request by the *Respondent*, OSBC granted a further extension to the *Respondent* for filing and serving its information until 5 July 2018. The *Respondent's* information was provided to the *Applicant* and me within time.

14. On 12 July 2018 the *Applicant* asked OSBC as the *Determination Provider* for the opportunity to put on evidence in reply and further short submissions from counsel. After receiving further submissions from the *Applicant* OSBC was satisfied the *Applicant's* application was appropriate and allowed until 13 August 2018 for it to be filed and served. The *Applicant* did not put any evidence in reply rather only filed and served submissions in reply, and those within time.

15. On 19 September 2018, pursuant to Clause 5.3(c) of the *Rules* I invited the *Parties* (the `*Request*') to make simultaneous submissions on:
    1. Whether the Determiner may have regard to Clauses 6 and 7 of the *Code* in deciding this matter?
    2. On the assumption that the Determiner may have regard to Clauses 6 and 7 of the *Code*, how should either or both of those clauses be taken into account in deciding this matter?

    I also invited the *Parties* to simultaneously serve on each other any comments they wished to make on the other party's submissions. The *Parties* made their respective submissions and comments during the period 20 – 24 September 2018.

DOCUMENTS PROVIDED BY BOTH PARTIES

16. Suitably de-identified in order to comply with Clause 6.1 of the *Rules* the documents provided by the parties are set out below:

17. **Applicant's Initial Documents**
    a. Statement of *Applicant's* managing director, incorporating
        i. Copy of estimate #19020 from the *Applicant*.
        ii. Manufacturer Specifications for the vehicle.
        iii. Motor Vehicle Insurance and Repair Industry *Code of Conduct*.
        iv. Copy of 3 previous estimates that have been approved by the *Respondent* in the past using the *Applicant's* quoting methodology.
        v. Court decision *Iconic Group Australia Pty Ltd v Miraki-Ardestani*, a decision of the New South Wales Local Court on 8 March 2018, relating to reasonable hourly rates for repairers.
        vi. Copy of Sikkens Standard Repair process which is a paint manufacturing standard and Sikkens warrantable process.
        vii. Copy of the emails dated 7 July 2017 at 10:18pm between the *Parties*.
        viii. Photographs taken during the stages of the repair process by the *Applicant*.

ix. *Applicant's* Tax Invoice in the amount of $14,796.28.
x. Email chain from 31 August 2017 between the *Parties*.
xi. Copy of the Audanet Assessment carried out by the *Respondent*.
xii. Copy of the email correspondence sent to the *Respondent* after the incident.
xiii. Statement of the *Applicant's* manager.
xiv. Statement of the *Applicant's* secretary.
xv. General Insurance code of Practice 2014.
xvi. Training manuals for Audanet.
xvii. Photograph of the other vehicle.
xviii. The *Respondent's* PDS.
xix. *Motor Dealers & Repairs Act* Commentary.
xx. Copy of the *Respondent's* Assessed quote withheld until Mediation.
xxi. Copy of an Assessment and supplementary assessment conducted by an independent assessor at the *Applicant's* request.
xxii. Request for personal information on the *Customer*.
xxiii. Acknowledgements and Labour Overview of Audanet.
xxiv. Licence Search of the *Respondent's* assessor who conducted the initial assessment of the *Applicant's* quote for the *Respondent*.
xxv. Licence Search on the *Applicant*.

b. Report by independent assessor.

c. Submissions by the *Applicant's* barrister.

18. **Respondent's Initial Documents**

a. Statement of 4 July 2018 of the *Respondent's* assessor who conducted the initial assessment of the *Applicant's* quote for the *Respondent*.

b. Statement of 4 July 2018 of the *Respondent's* State Manager of Motor Assessing in New South Wales and the Australian Capital Territory (the `*NSW/ACT Assessing Manager*').

c. Undated statement of the *Respondent's* NSW Motor Assessing Team Manager.

d. Statement of 4 July 2018 of Australian Head of Estimatics of Audatex Australia.

e. Submissions.

19. **Applicant's Documents in Reply**

a. Submissions in reply of 13 August 2018.

20. **Documents provided pursuant to the 19 September 2018 *Request***
    a. *Applicant's* submissions.
    b. *Respondent's* submissions.
    c. *Applicant's* comments on *Respondent's* submissions.
    d. *Respondent's* comments on *Applicant's* submissions.

ISSUES SUBMITTED FOR DETERMINATION

21. In the Application for Expert Determination the *Applicant* expanded the issues for determination from those set out in paragraphs 4 and 8 (above) as follows:
    a. The *Respondent's* assessor has not assessed the estimate provided by the *Applicant* but has instead produced their own estimate and then assessed their own estimate for claim number XXXXXXXX.
    b. The *Respondent* has failed to operate in an honest and transparent manner whilst dealing with the *Applicant* and has failed to consider the estimate provided fairly.
    c. The *Respondent* has failed to properly identify any issues in dispute and has not provided any explanation as to why certain line items are not to be used.
    d. The *Respondent* is operating in a questionable manner by acting as a repairer and operating without a Repairer's Licence.
    e. The *Respondent* is dictating unfair and artificial labour rates generated by Audatex which are not transparent.
    f. The *Respondent* is using terminology that is not understood or used by the vast majority of repairers.
    g. The *Respondent* is using assessors who apply unfair material allowances in the Audatex program which are not transparent.
    h. In comparison the estimate provided by the *Applicant* clearly uses a realistic rate and the material and consumables are fully transparent as to how they were calculated.
    i. Again, the relevant *Code* provision was 4.2(b)(ii).

EVIDENCE

The Applicant's Director's statement

22. The evidence of the *Applicant's* director covered introductory matters and the source of his belief (paragraphs 1 - 5), that the *Applicant* had carried out the repairs the subject of the dispute (paragraph 6), the director's personal background and experience, including having worked in the panel beating industry for 22 years and holding the relevant licences (paragraphs 7 and 8).

23. The process of preparation of the estimate or quotation which was subsequently disputed is dealt with in paragraphs 9 - 16. The *Applicant* has for the past 5 - 6 years used software known as Auto-Quote as its primary quoting software in order to clearly specify what work is required to be performed to bring the vehicle requiring repairs back to its pre-accident condition. The *Applicant's* director relies on his experience in calculating the cost of the repair works required based on the time to be taken.

24. I set out below paragraphs 17 – 19 of the director's statement.

> "17 Manufacturer specifications are used to determine the accurate measurements of panels and internal components of the vehicle and assists us in determining what damage has been caused due to the accident and what method to use to return the vehicle to its pre-accident condition. From my experience I am able to calculate the costs of the repair works required based on the time taken.
>
> 18 Manufacturer specification assist in determining the method of repairs for damaged vehicles. Further, manufacturers provided times and rates for warranty purposes.
>
> 19 An accident damaged vehicle will require more time to repair than an undamaged vehicle as an accident damaged vehicle will have either impeded areas as parts are damaged and squashed areas and will require additional time to remove and refit and may affect the time taken to remove and refit adjacent panels. I included the manufacturer specifications for this vehicle in the list of documents attached to my statement."

25. The *Applicant* states that it uses times and rates which are accepted by the motor repair industry and it follows the *Code* (paragraph 20).

26. As to the hourly rates charged by the *Applicant* the director says that other smash repairers in the Sydney and southern areas of a similar type to the *Applicant* charge at an hourly rate of $90.00 to $150.00 exclusive of GST. He has calculated the *Applicant's* hourly rate in consultation with the *Applicant's* accountant and as a result of enquiries made about competitor rates in the market (paragraph 21). The *Applicant* normally charges an hourly rate of $110.00 exclusive of GST (paragraph 22).

27. The director says that the *Respondent* has previously paid the repair invoices from the *Applicant* at the rate of $90.00 exclusive of GST and annexes to his statement what he says are 3 such paid invoices (paragraph 22). The director says that this is evidence of a long-standing agreement between the *Applicant*

and the *Respondent* about how the *Applicant* repairs vehicles and the basis of charging for those repairs (paragraph 22).

28. The director says that the hourly rate of $110.00 exclusive of GST is not unreasonable and, in fact, has been accepted by NSW courts in proceedings which seek to determine the reasonableness of an hourly rate charged for motor vehicle repairs (paragraph 23). On the other hand, in the director's opinion the *Respondent's* labour rates of about $60.00 an hour, are substantially below current market rates, based on industry bodies such as the Motor Traders' Association, a decision of the NSW Local Court on 8 March 2018 (*Iconic Group Australia Pty Ltd v Miraki-Ardestani*) and comparative labour rates from other repairers (paragraph 24). The director says that the *Applicant* charges a realistic rate which corresponds with labour rates commonly charged in the automotive repair industry as it is entitled to do so under Clause 6.2 (b) of the *Code* (paragraph 25).

29. In paragraphs 26 - 29 of his statement the director gives his opinion that he use the method of repair that would return the vehicle back to its pre-accident condition based on the manufacturer's specifications including the correct method of painting panels fully and not using shortcut methods, which he says compromise the presentation of the vehicle and does not return it to its pre-accident condition and breaches the warranty recommended procedures outlined in the Sikkens Standard Repair Process. As part of the repair process of the *Applicant* requires more time to take into account the "Miscellaneous Items & Materials", items such as specialist systems clearing, transport to and from specialists, air-conditioning gassing and re-gassing, drying time of paint, deceivers, primers, mix-and-match time and set up times of different products and associated times are listed under the "Miscellaneous" heading on the *Applicant's* quotation.

30. In paragraphs 30 - 42 of his statement the director says that on about 28 June 2018 he sent a copy of the *Applicant's* estimate to the *Respondent*. However, the *Respondent* did not communicate with the *Applicant* until 6 July 2017. In the opinion of the director, that is a breach by the *Respondent* of Clause 4.2(c) of the *Code.* What was said in the conversation 6 July 2018 between the director and the *Respondent's* assessor is contested. The director says that as a result of the conversation the assessor understood that he wanted a copy of his assessed quote back marked up with what was and was not allowed and that the director did not understand Audanet. For his part, the director says he understood that

the assessor would finish his assessment at home but that the *Applicant* should start the repairs.

31. As a consequence of the director's understanding, the *Applicant* started repairs on the *Customer's* vehicle the following day, 7 July 2017. During the morning of that day the *Applicant* received an authority document from the *Respondent*, under cover of an email describing the document as a Claim Authorisation Letter proposing a repair cost of $7,894.90. Nothing was provided by the *Respondent* substantiating the amount in the Claim Authorisation Letter, to provide a breakdown of the amount allowed, and it did not include any kind of an estimate. The director considered it likely that some sort of mistake had occurred in the office of the *Respondent*. However, as the assessor had told him he was going on holidays imminently he knew he would not be able to contact the assessor.

32. The director then arranged for an independent assessor to conduct an assessment in order to confirm the appropriate repair methodology for the vehicle. He conducted his assessment on 8 July 2017. During the course of working on the vehicle the *Applicant's* staff realised that additional processes were required necessitating variations to the original quote. The director arranged for the independent assessor to conduct a further review of the repair process which was carried out on Thursday, 13 July 2017. The repairs to the front of the *Customer's* vehicle were completed the following day, 14 July 2017 and a tax invoice prepared for $14,796.28.

33. On about 31 August 2017 the director received an email from the *Respondent* which attached a repair authority and a quote written by the assessor using the Audanet system. Upon reading the Audanet quote the director observed notes made by the assessor including "DO NOT AUTH, ONGOING NEGOTIATION FOR REPAIR COSTS … FURTHER REVIEW MAY BE REQUIRED PRIOR TO AUTH." So far as the director was concerned, those notes were consistent with his understanding of the conversation he had with the *Respondent's* assessor to the effect that the assessor had not yet finalised his assessment of the vehicle and a repair cost was yet to be negotiated (paragraphs 44 - 45).

34. In the director's opinion all the assessment reports he had previously seen had several features in common, namely, they included:
    a. a copy of the original estimate,
    b. a list of different adjustments to the estimate by way of tick marks or cross-out lines,

c. an "add-strip" which summarise the differences between the original estimate and the adjusted estimate.

35. The director observed that the *Respondent's* Audanet report did not include any of these features. In the director's view the *Respondent's* Audanet report was a wholly new document which proposed a new repair method, a new labour rate and new repair times (paragraph 46).

36. The reason given by the director for not accepting the Audanet report was that the line items are not transparent, the terminology and times are unclear and the times are unreasonable (paragraph 47).

37. On or about 26 October 2017 the director obtained the *Customer's* authority and requested the full file from the *Respondent*. The director says that the *Respondent* refused this request without giving a reason. Following that the *Applicant* lodged an *IDR* (paragraphs 48 and 49).

38. The director states that on or about 3 November 2017 he had a conversation with the manager of the *Respondent's* assessor responsible for the repairs to the *Customer's* vehicle. He says that the manager told him that the *Respondent* did not need to give the *Applicant* the assessor's copy of the *Applicant's* assessment which the assessor had marked up on 6 July 2017 because the *Respondent* relied on its process, Audanet (paragraph 50). Despite numerous requests, the *Respondent* did not provide a copy of the marked up estimate to the *Applicant* until during the course of the *Mediation* held on 31 January 2018 (paragraph 57).

39. In paragraph 55 of his statement the director argues that the *Respondent* is not complying with Clauses 4.2(a) and (b), 6.1, 6.2 and 6.3, setting out the text of those clauses. In paragraph 56 he sets out the basis of his belief about the *Respondent's* breach of Clause 6.3 because the *Respondent* has not provided the *Applicant* with any breakdown of the rejected items, has not negotiated on the costs of repairs and has not explained how the Audanet quote was calculated. He says that the *Respondent* presented the Audanet quote as an "assessment report" which arbitrarily altered the *Applicant's* repair estimate, without attempting to negotiate any of the key items including labour rate, repair times or repair methodology.

40. For reasons which will become apparent at the time I do so, I will not deal with either paragraphs 51 - 54[3] or 67 - 78[4] of the director's statement until later.

41. In paragraphs 60 - 66 the *Applicant* argues that the Audanet report provided to the director by the *Respondent's* assessor was not an assessment report rather a repair estimate created by a software system designed to create repair estimates. The director argues that an assessment report is, by definition, something which assesses a previously made document. In doing so, it must reference the previously made document. The director argues that the Audanet report does not reference the *Applicant's* original estimate in any way whatsoever. The *Applicant* argues that the *Code* does not authorise the *Respondent* to prepare its own quotes and that it is the role of repairers to make estimates and the role of assessors to assess the estimates.

42. The *Applicant* argues that the reason for this is that, unlike a licenced motor vehicle repairer, an insurer usually does not spend enough time with the vehicle in order to make reliable repair estimates. To achieve a reliable repair estimate, it needs to be done by a trained panel beater who dismantles and scopes the vehicle using appropriate facilities, tools and equipment. It is for this reason that the role of estimating is completed by repairers. The *Applicant* further says that the reason the *Code* intends repairers to complete estimating tasks is because insurance companies lack objectivity due to their financial interest in minimising repair costs.

43. Further, because the Audanet software uses a proprietary database of repair times and procedures in order to prepare estimates the *Respondent's* assessors are not able to explain the basis of Audanet's calculations because they do not know how the software is built or the source of the software's proprietary data. The *Applicant* says the most common response from the *Respondent's* assessors to a question about why Audanet has recommended a particular repair time is: "*No one knows. That's just how the software is coded in the United States.*" The *Applicant* argues that such a response is a failure in transparency and at odds with the intention of the *Code*.

44. I set out below, suitably anonymised, the balance of the director's statement.

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3 Which deal with a visit to the *Applicant's* premises on 3 November 2017 by the *Respondent's* State Manager of Motor Assessing in NSW/ACT and the *Respondent's* NSW Motor Assessing Team Manager.

4 Which set out the *Applicant's* contentions about the *Respondent's* alleged breaches of certain of the licensing provisions of the *Motor Dealers and Repairers Act* 2013 and its cognate regulations.

"**Manufacturer Times and Rates**

79 I understand that it is the *Respondent's* contention, that repair times adopted by its software provider are in actual fact repair times which have been obtained from vehicle manufacturers, in this case Lexus. In my experience, this is a mistaken belief.

80 When car makers sell a motor vehicle, they typically provide a warranty period. The purpose of the warranty period is to offer the motorist a peace of mind that should a mechanical defect happen to the vehicle within the warranty period, then the vehicle would be repaired at the manufacturer's expense.

81 In order to operate this scheme, manufacturers utilise a network of mechanics, typically operated by motor dealers, where a faulty vehicle is able to be repaired. In order to price this repair work, and pay the mechanics, vehicle manufacturers publish a list of prices and times that they offer to pay mechanics for rectifying mechanical, fuel, electrical and other systems. The hourly rates for warranty claims through dealerships exceed $100 per hour up to $200 per hour.

82 Manufacturer's do not publish times and rate for paint and panel work, because they are typically not responsible for rectifying damage to vehicles incurred in road accidents.

83 The times provided by the manufacturer are not associated to costs of repairs ie panel repairs but are created for mechanical warranty claims and do not give additional times for damaged parts and processes. Removing a damaged item which will take significantly longer to remove in an accident claim compared to a warranty claim because access is impeded and the area is crumpled and the part is in a restricted area and is not as easily accessible if it is damaged.

84 This provision of manufacturer warranty times is misleading as these times are not applicable to smash repair times. The *Respondent* is acting in a deceptive manner and using these quotes in dispute processes to convince repairers/tribunals and courts that this is an accepted amount of time allowable to repair different parts of vehicles. Furthermore, the *Respondent* is compiling a quote without a repairer's licence and not actively being in the business of employing or having facilities to repair damaged vehicles.

85 These fictitious costs created by the insurer or their assessor are not reasonable allocated are not profitable. The insurer not having to carry out the work for the price they are quoting and does not reflect the true repair costs associated with repairing a vehicle and running a smash repair business.

AUDANET/AUDATEX

86 When reviewing the quote provided by the *Respondent* the first issue that I see is that the shaded area is not a reflection of the damage to the vehicle. The *Respondent*'s assessor has accepted parts that are not shaded under "Damage Areas".

87 The *Respondent* has maintained that the procedures are obtained through the manufacturer and that their times are manufacturer times. This is false from my own investigation on this particular vehicle. In addition, I have not been provided with any

supporting documentation from the *Respondent* to substantiate the times are from the manufacturer.

88 The *Respondent's* Audanet quote is written in a way that terminology is unclear of what work is to carried out. The first line item "Floor Anchorage" is not a standard industry process and I cannot see where it fits as an item. This use of non-standard terminology is continued throughout the quote. Some material costs only provide a price and does not indicate or show any calculation or justification for the amount allowed.

89 I have made inquiries and reviewed the Audanet systems of calculation and reviewed the training manual. I included a copy of the training manual for Audanet which outlines how the software can be manipulated in the list of documents attached to my statement.

90 Based on the training manual provided by Audanet the operator at the backend can change a number of options with no visible variation to the repairer. These changes can be made without consultation and makes it impossible to identify if anyone has made any changes. For example, it is possible for the insurance assessor to remove blends, override and set labour and paint rates without disclosure or investigation.

91 Further, Audanet software uses terminology that simply is not standard industry practice, I am not aware of a range of phrases that have been used on the Audanet quote, such phrases include;

i. PANEL SURFACE PAINT

ii. NEW PART PAINT K1G

iii. PAINTING<50%

iv. SURFACE PAINT PLAST.

v. PREPARATION MAIN WORK METAL

vi. FACTOR

vii. PREPARATION COMP. WORK PLASTIC

viii. SURFACE-/BLEND PAINT

ix. MATERIAL-CONSTANT METAL

x. MATERIAL-CONSTANT PLASTIC

92 There are a number of notations that are listed on the bottom of the Audanet Quotations which are not clear;

a. NN – No manufacturer code exists

i. My investigation into the Audanet system shows an incomplete data set for vehicles and is likely that the times for this vehicle are not available.

b. WU – Partial Incl in other positions

ii. I am not aware of what this notation means.

c. * - user supplied data

iii. There are 21 items on the *Respondent's* Audanet quote which have * symbols which suggests that the *Respondent's* assessor has inputted on his own. There is no documentation or explanation provided for any of the items with a *.

d. There are 4 codes with the letters 'KN' where the code has been replaced.

iv. These codes has been created by Audatex[5] where there was no data available. No explanation has been provided of how the times were calculated.

e. Vehicle to repaired to Manufacturer Specifications – YES

v. There is no evidence of relevant manufacturer specifications that are provided and does not suggest where or how they are calculated or even when they received the relevant data and what process was adopted in calculating the relevant times. The specification of when the latest data was received is not available.

f. Manufacturer specifications have been discussed with repairer and applied in preparation of the estimate – N/A

vi. The assessor has attended [the repairer's premises] to review the original quote but fails to make mention the quote which he has made notes on which he provided 8 months later only at the mediation of this dispute.

g. "Additional Comments repairer will not accept Audanet quoting methodology for calculation of repair costs.

vii. Even though this is evidenced on the quotation no further efforts have been made to clarify any of the questions or issues that I have asked the *Respondent* in relation to the Audanet system.

93 The *Respondent* has used an inappropriate method of which to quote the vehicle. They have failed to disclose it to the industry, provide sufficient training and the system lacks transparency as to calculation of times and does not fully identify the procedures required to repair vehicles.

94 The *Respondent* has not used real time real money on this quotation which is not a preferred industry standard. They have used funny times funny money to reduce the amount on their assessment.

[5] It seems from the Parties' evidence that the terms `Audatex' and `Audanet' are used to refer to the same system and that those terms are treated as being interchangeable.

95 Audanet is normally used for panel shops for network repairers for insurance companies, it is for volume repairers who are signed up with the insurer.

96 Audanet has its own methodology, it is not transparent, it has been utilised by an insurance company without industry consultation, to manage their own repair work.

97 Repair processes are grouped together without clarity as to what times each process can take.

98 I have obtained material from Audanet website:

> *The Audatex system provides vehicle manufacturers (OEM) times for removal, refitt and replacement as published in their workshop manuals.*

Looking at the Audanet website and marketing material, a reasonable person would think that car makers supply Audanet with R/R, repair and paint times. However on further reading, Audanet declares:

> "*Vehicle manufacturers directly supply our International Data Development Centres (DDC's) with their methods/times. In some cases (e.g. Jaguar/Land Rover/Rover), Thatcham panel times are in fact used. In others the OEM has utilised other independent data centre (e.g Jikken, AZT, Samsung Fire & Marine, KART) to research the time and method on their behalf."*

At this point, it appears that some repair times are obtained from car makers, and others are obtained from various overseas sources like Samsung Fire & Marine Insurance company. Then, on further investigation, Audanet states:

> *Audatex may provide additional times in cases where manufacturers do not publish removal, refit and replacement times for specific operations, and where in our opinion it is necessary work. These times will be calculated through methodical comparisons with data from equal or similar models, and/or by reference to existing times. Where times are supplied by Audatex, they will be designated with a KN number on the calculated report.*

It now appears that, in actuality, Audanet is actually in the business of calculating repair times all on its own, without any consultation with repairers like the *Applicant*. Worse still, the information published in Australia is at odds with information published by Audanet's head office in United States. Specifically, I refer to a training manual provided by Audatex USA. The manual states:

> All labor times included in Audatex products are the property and proprietary information of Audatex. They are developed through independent time studies conducted by Audatex, coupled with service procedures provided by the vehicle manufacturers. They do not reflect vehicle manufacturers' warranty times.

99 Over the last 6 months I have spoken to a number of the *Respondent's* assessors about how Audanet is calculated and they could not explain the formulations and calculations on Audatex specifically how they determine the shop rates and how their formulations are calculated and their response was that the system calculates it.

100 Audatex claims to use vehicle manufacturers times as published in their workshop manuals. It is not specific, where the calculations are made from. The Audatex system is outdated, incomplete and is specifically designed not to "replace a methods manual", ie methodology. The workshop manual referred to is what is used in Dealerships for warranty jobs.

101 The majority of vehicle manufacturers do not have body repair manuals with listed times operations that are specifically for smash repairers.

102 The data doesn't suggest when it has been updated and if it relates to each make and model.

Outcomes sought

45. The outcomes the *Applicant* sought in its evidence lodged in this determination are as follows[6]:
    a. A higher level of transparency by the *Respondent* when assessing quotations from the *Applicant*.
    b. The *Respondent* to address delays in the repair and assessment process.
    c. The *Respondent* to conduct its operations in an honest and fair manner and to provide feedback or clarity on items removed from quotations.
    d. Cessation of the *Respondent's* Quotations being compiled or written by the *Respondent's* employees or agents.
    e. Cessation of the *Respondent's* Quotations being compiled using Audanet.
    f. The *Respondent* to use appropriate assessment processes.
    g. The *Respondent* to confirm what repair methodology they follow.
    h. The *Respondent* to rely on and use industry times and rates.

46. In addition, in the Application for Expert Determination form lodged with OSBC by the *Applicant*, the following outcomes were sought[7]:
    a. The insurer to negotiate in good faith using the estimate that has been provided.
    b. The insurer to communicate in an open and transparent manner.
    c. The insurer's policy allow for the customer to nominate a repairer of their choosing for the repairs.

The Applicant's Expert's Statement

47. The *Applicant* also provided an expert report from an independent motor vehicle assessor who also inspected the *Customer's* vehicle. The expert supported the *Applicant's* estimate and conducted a detailed analysis of the operations provided for in both the *Applicant's* estimate the *Respondent's* marked up assessment of it. I will return to that expert report later in these reasons.

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6 From the final page of the statement of the *Applicant's* director.

7 Application for Expert Determination form, page 6.

Statement by Respondent's Assessor

48. The *Respondent's* assessor's evidence sought to establish his relevant expert knowledge under the *Expert Witness Code of Conduct* by reference to his experience in the motor vehicle repair trade, his training in auto body repair and his experience in the assessment of accident damaged motor vehicles.

49. When he attended the *Applicant's* premises 6 July 2017 to inspect the *Customer's* vehicle there were some matters which concerned him, including that the front end damage was suffered in 2015 and the owner had continued to drive it since, the vehicle's front end had been totally stripped down with many components missing and the *Applicant* had used a green marker pen on the front of the vehicle to indicate damage in those areas. The assessor considered that the markings exaggerated the amount of the damage.

50. I set out below extracts (suitably anonymised) from the assessor's statement which I consider are relevant.

> "11. The *Applicant's* director handed me a hard copy of the estimate he had prepared. I recall saying words to the effect "*I don't really need this, as you know I will be assessing with Audanet, but I will take it into consideration".*
>
> ……
>
> 20. I asked the director what estimating methodology he was utilising when compiling his quote and he said *"RTRM (real time real money)".* I then recall then saying words to the effect *"which research schedule and code did you use?"*
>
> 21. The *Applicant's* director could not tell me his RTRM schedule and simply said words to the effect *"This is what my shop charges to fix cars".* He did not say that he used Auto Quote or any other platform. (Auto Quote does not generate verifiable times in any event, but just a template with such details at the repairer's discretion.)
>
> 22. I was very concerned with the fact his response indicated that his repair rate/format/time appeared to have no factual basis, and was self-generated.
>
> 23. I recall then saying to the director words to the effect *'I will be using the AudaNet platform. It is based on many years of research in conjunction with many sources, in particular actual times from vehicle manufacturers".*
>
> 24. I recall the director then said words to the effect "*I don't use that AudaNet and I don't understand if*'.

25. I then replied saying words to the effect *"The Respondent uses AudaNet. I am using AudaNet as the basis for my assessment, it's the Respondent's policy. I will be considering your quote for comparative purposes to validate whether or not your estimated costs are fair and reasonable".*

26. The *Applicant's* director then said *"No, you can adjust my quote in your hand and sign it and give it back to me".*

27. I then responded and said words to the effect *"no, that is not our estimating practice, and I am not authorised to do that, however I will take your quote back to the office for consideration when I do the fair and reasonable costing. If necessary the Applicant and the Respondent might need to negotiate. I go on annual leave tomorrow,* so *one of my colleagues will have to pick up where we left off'.* I had by now formed the view that the repairer had quoted for non-existent damage and had produced an inflated quote. I had discussed these issues with him, and we were in a state of disagreement when I left.

……

31. I recall also saying words to the effect *"you shouldn't have dismantled the vehicle without authorisation. You should not do any further work on the vehicle until the Respondent authorises you to repair it."*

32. Finally, I recall also saying words to the effect "*As I am going overseas on leave, another Assessor will be appointed. You will be able to deal with him while I am gone."*

……..

34. I took the *Applicant's* quote into consideration, along with my observations, notes and conversation with the director about the damage and his quote. I made some tentative calculations on his quote which at that stage had not been checked for accuracy e.g. parts prices and his times. At that stage I had only adjusted the operations, and I had not been told any objective basis for his times estimates.

35. I then entered details into the AudaNet platform which involved my assessment of what was required to repair the damage I observed on the front of the vehicle.

……..

39. I did not authorise any repair. I had serious misgivings about it. I was of the opinion that further review and further negotiation with the repairer would be required. My reasons included my opinion that the repairer had produced a very inflated quote with unnecessary operations and that the *Applicant* had exaggerated the damage. ……

40. That evening I made the following entry onto the *Respondent's* record:

> ****DO NOT AUTHORISE.ONGOING NEGOTATIONS FOR REPAIR COSTS*** *****NOTE: INCIDENT/CLAIM OCCURRED 21 MONTHS AGO, FURTHER REVIEWING MAY BE REQUIRED. PRIOR TO AUTH*** PAV $39000 SALVAGE $4043 .. .DAMAGE VEHICLE HAS INCURED DAMAGE TO It FRONT DAMAGE APPEARS CONSISTENT WITH INCIDENT DESCRIPTION//CONSISTENT PRE ACCIDENT DAMAGE/ SEE AUDANET*
> *REPORT REPAIR COSTS AND METHODS DISCUSSED WITH REPAIRER /t NIAI MANUFACTURER SPECIFICATIONS HAVE BEEN DISCUSSED WITH THE REPAIRER AND APPLIED IN PREPARATION OF* THE ESTIMATE. ... *NOTES REGARDING CLIENT CONVERSATIONS/ ADDITIONAL COMMENTS/ REPAIRER WILL NOT ACCEPT AUDANET QUOTING METHODOLOGY FOR CALCULATION OF REPAIR COSTS*
>
> ……..

45. On my return to the office on Thursday afternoon, I was worried about the repairer's claim for non-existent damage and incorrect repair methods, as well as matters that arose out of the inspection. I telephoned my manager, to discuss this. I thought the vehicle should be removed to another repairer, and he asked me to put my worries into writing.

46. Later that night, on Friday the 7 July 2017, at 1.25am, I sent my manager an email which raised the main issues worrying me, so he could look into it while I was on annual leave. I had entered into no further conversation with the *Applicant's* director, but I did have a draft Audanet assessment prepared on which I clearly stated **"Do not authorise, still in negotiation".** Copies of my email[8] to my manager and my draft Audanet Assessment are annexed to this statement.

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8 The email read: "This is that complicated job that I was talking about today at [*Applicant*].
Few points about this claim that need to be noted
• Incident occurred about 21 months ago. It appears odd that OI wants to proceed with repairs now
• There is some minor old damage to the driver's door area
• I have generated a generous Audanet quote
• I have adjusted the *Applicant's* quote operations only, there is room to adjust the times also but I have not done this as I just wanted compare these simple operation costs vs Audanet costs
• (The director) has advised that he does not accept Audanet & that the NSW/ACT Assessment Manager lets the *Respondent's* assessors like [*NAME*] & others authorise RTRM quotes on his premises "all the time"
• I have accepted his RTRM quote as per the code of conduct, & I personally advised him it is for consideration purposes at this stage
• (The director) has been made fully aware that I am on annual leave as of tomorrow, however another assessor will finalise the rest of the assessment
• I have not sent the *Applicant* any copies of the Audanet Report or the *Applicant's* adjusted quote. I wanted the next assessor to review this and do this on my behalf.
• The *Applicant* has quoted for non-existent damage & incorrect repair methods.
• I recommend moving the vehicle for a second opinion as It is our right to do so via the code. Unfortunately I am on leave & unable to do this.
• If for any reason you need to ask me a question regarding this claim, email me at: [*ADDRESS GIVEN*] or call my personal phone [*NUMBER GIVEN*] as it is on roaming overseas."

47. Unknown to me, on 7 July 2017, a claims officer has authorised the Audanet draft calculation prior to any conversation taking place with the assessor who should have been appointed to look after my assessment and despite **"do not authorise"** being clearly labelled in the repairer name field of this report, a measure that I put there to avoid authorisation. An Authority to repair for $7,894.90 was sent the *Applicant* by email at 10:17am on 7 July 2017.

……

50. My study of the *Respondent's* claims record shows the *Applicant* failed to communicate again with the *Respondent* before undertaking the repair.

……

52. In relation to Annexure E, the Audanet Assessment, I say that this Assessment clearly stipulated the repair operations I allowed, the times allowed and the prices allowed for labour and parts.

53. Audanet is a real time platform which is in widespread use in the insurance Industry and also is used by numerous smash repair shops in Australia.

……

54. The repair of modern vehicles is now highly technical due to the use of special high strength steels, aluminium, composite constructions and even glues to replace welding. The only way a modern vehicle can be repaired (other than the simplest repairs) is by reference to the manufacturer's repair operations manual, which is required in order to repair the vehicle back to manufacturer's specifications.

55. These manuals are published for all vehicles, including this model Lexus. Codes listed in the left hand columns of the Audanet Assessment are referenced back to the particular operation in the operations repair manual. For instance, 8010 is Remove and replace front bumper, for which the allowance is 6 Work Units (yVU), at the hourly rate of about $60.00 = $36.84. The Assessment clearly states: *"Time Base 10 WU/h".* Estimates have been drawn in 6 minute units for as long as I have been in the industry. The time is provided by Audanet based on the vehicle manufacturer's data.
……

57. Repair quotes are based on the application of manufacturer's specifications and a competent repair must be done in accordance with the correct procedures, which are to be found in the Repair Operations manual for the vehicle.

……

58. In turn, to be able to properly assess quotations for modern vehicles, all Loss Assessors are required to have specialised knowledge in repair to manufacturer's specifications. The *Road Transport (Vehicle Registration) Regulation* 2017 sets out

required qualifications for motor vehicle loss assessors, which includes a demonstrated ability to apply the relevant technical specifications for a vehicle being assessed, or a requirement to undergoing approved training in:

(a) the sourcing and interpretation of the standards and methods of repair documented by the Australian Skills Quality Authority; or

(b) a course that includes instruction on all of the following:

(i) the sourcing and interpretation of the standards and methods of repair documented by the manufacturers of vehicles or recognised in the industry for vehicles,

(ii) the use of those standards and methods in the calculation of repair costs,

(iii) the conduct of assessments of repairs in compliance with those standards and methods,

Annexed to this statement and marked "J" is a copy of Regulation 105.

59. I would expect any repairer to be aware of the repair operations manuals and therefore Codes for repair operations for vehicles they quote on.

60. The Audanet Assessment sets out the hourly rate clearly. It sets out the real time allowances clearly. It sets out the paint times and paint material allowances clearly. It sets out amounts allowed for material allowances clearly. It sets out the operations allowed which apply directly to the Operations manual for the vehicle in question.

61 I used the Audanel platform purely for the purpose of assessing the appropriate amount to allow for repairs. It does not impose upon the repairer an obligation to use any particular methodology. It is not a quote. Rather, it sets out the amount to be allowed assuming the repairer repairs the vehicle back to manufacturer's specification in accordance with the repair operations manual of the manufacturer."

Statement by Respondent's State Manager of Motor Assessing in New South Wales and the Australian Capital Territory

51. The *Respondent's* State Manager of Motor Assessing in New South Wales and the Australian Capital Territory's (the `*NSW/ACT Assessing Manager*') evidence sought to establish his relevant expert knowledge under the *Expert Witness Code of Conduct* by reference to his experience in the motor vehicle repair trade, his training in auto body repair and his experience in the assessment of accident damaged motor vehicles.

52. I set out below extracts (suitably anonymised) from the *NSW/ACT Assessing Manager*'s statement about the *Respondent's* assessment operating procedure.

"a. Car Loss Assessors are expected to perform damaged vehicle inspections and assess the damage. Assessment of damage includes:

i. The *Respondent's* Claims department contacting the repairer to inform of intention to assess the vehicle and appointing a Car Assessor to the claim;
ii. Car Assessor contacting the repairer to inform of date of attendance;
iii. Car Assessor referencing the damage on the vehicle to the claim accident description and confirm consistency;
iv. Car Assessor reviewing the damage to consider repair methodology;
v. Car Assessor reviewing the repair estimate supplied by the repairer to determine consistency in repair method outlined by the repairer and considering the repairer's estimate. Discrepancies are discussed with the repairer;
vi. Car Assessor considering the repairer's repair estimate in accordance with the Motor Vehicle Insurance and Repair Industry Code of Conduct **(Code);**
vii. Car Assessor informing the repairer that the damage will be assessed via imputing the information into Audanet, the *Respondent's* assessing methodology. The complexity of the damage will determine if Audanet is actioned at the repairer at the time of the inspection or after;
viii. Once the assessment is completed through Audanet, the Assessment Report is sent to the repairer via email and the Assessor calls the repairer to discuss outcome; and
ix. A Repair Authority, based on the result of the assessment process outlined above, is dispatched to the repairer from the *Respondent's* Claims department.

b. The *Respondent*, as I understand is the case with a number of insurance companies, has determined that Audanet is the preferred platform for motor vehicle damage assessment. Audanet provides OEM safe repair methods. Audanet is a world-wide product and is available for the industry."

53. Paragraphs 4 – 21 of the *NSW/ACT Assessing Manager*'s statement deal with his response to the *Applicant's* evidence and submissions arising out of the *NSW/ACT Assessing Manager*'s visit to the *Applicant's* premises on 3 November 2017. As I have already indicated in paragraph 40 (above) that I will deal with those matters later in these reasons, I make no further mention of paragraphs 4 – 21 at this stage.

Statement by Respondent's NSW Motor Assessing Team Manager

54. The *Respondent's* State NSW Motor Assessing Team Manager's (the `*NSW Assessing Team Manager*') evidence sought to establish his relevant expert knowledge under the *Expert Witness Code of Conduct* by reference to his experience in the motor vehicle repair trade, his training in auto body repair and his experience in the assessment of accident damaged motor vehicles.

55. However, as the remainder of the NSW Assessing Team Manager's statement dealt only with the NSW/ACT Assessing Manager's visit to the Applicant's premises on 3 November 2017, as I have already indicated in paragraph 40

(above), I will deal with those matters later in these reasons, I make no further mention of the NSW Assessing Team Manager's statement at this stage.

Statement by Australian Head of Estimatics of Audatex Australia

56. This statement was made by the Australian Head of Estimatics of Audatex Australia, who sought to establish his relevant expert knowledge under the Expert Witness Code of Conduct by reference to his experience in the motor vehicle repair trade, his training in auto body repair and his experience with Audatex. It will be convenient to set out the remainder of his statement in full:

> "2. Audatex is the leading market repair estimating tool used in the motor vehicle repair industry world-wide.
>
> 3. Audanet is used in 78 countries, and by repairers, independent assessors and insurers throughout the world including the United Kingdom, across Europe and Australasia. (A different product is marketed in the USA because of an adherence in that market to historical times in the industry. It is more like the IAG (NRMA) system).
>
> ……
>
> 6. Audanet is an Assessing and estimating tool developed by Audatex in Germany in 1966. It is the oldest assessing/estimating system in the world. It was conceived by Wilfred Reuter and Sons, Minden, Germany to provide a fair and reasonable mediation tool between insurers and repairers.
>
> 7. Audatex is an independent company with no vested interests with either insurers or repairers.
>
> 8. Audanet currently has over 100,000 customers, being insurers, independent assessors and repairers worldwide.
>
> 9. Audanet is an assessing tool currently used by Suncorp, and its brands (e.g. GIO, AAMI, Apia, Bingle etc.), Auto & General, Allianz, QBE and Youi in Australia.
>
> 10. The product is designed and marketed as an accurate and comprehensive assessment tool for insurers and repairers to determine accurately the time and work required to perform various operations. It allows repairers to accurately estimate the times operations will take and it allows insurers to accurately assess the times operations will take.
>
> 11. Audatex provides group labour operations based on the Original Equipment Manufacturers (OEM's) (i.e. the vehicle manufacturer) research centre method and times to replace components. It also provides OEM part numbers and pricing, partial replacement sectional options.
>
> 12. It does not provide repair methodology. It does not textually list every operation required in the repair process method-the granular times are included but bundled into the overall group times.

13. In providing group times for the operations, Audatex does not split up each operation into its individual components in a "granular" way, but rather provides the accurate time for performing the entire task based on real time information from the vehicle manufacturer. For instance to remove and replace a particular component - for example a bonnet may involve many different operations. These operations vary greatly between different makes and models. When "split up" individually each particular element is allocated a time and there is a real risk that an erroneous time is estimated. Where two or more repairers quote on the same job, they may well come up with very different estimates, as until the job has been performed they will not know how long it will in reality take. They are truly "estimating" beforehand. The Audatex system looks at the total time for the whole job based on the OEM researched time for the specific vehicle; not by adding up estimates of how long it ***might*** take based on similar vehicles to do each of the 6 or more tasks involved, but by providing the actual measure of time it takes to do the whole operation-in this example--bonnet removal and replacement.

14. We have approximately 500 staff members worldwide dedicated to maintaining the existing model database with new and updated repair information from OEM repair manuals.

15. The product is specifically designed to accurately capture the time required to perform operations to OEM specifications. Most original equipment manufacturers maintain their own research centres to perform time and motion studies of the replacement process for damaged body components. This is a part of the research and development of the OEM's repair methodology specifications. The OEM research centres are actual repair shops performing real repairs on cars of the relevant model. There are also a number of independent facilities doing this research.

16. The OEMs perform due diligence to ensure:

    i) the vehicle can be properly repaired back to factory specification;

    ii) how long it take to perform the component operations;

    iii) the repair method required to repair the vehicle back to OEM specification;

    iv) to establish that the job can be performed in a real repair shop;

    v) to perform the job safely;

    vi) to perform the job efficiently;

    vii) to determine what level of equipment needs to be specified to repairers undertaking repairs to their products (for example specifications for welders used for particular alloys in car constructions).

17. Where the OEM has not researched a specific method, they utilise independent research centres to time the operations on their behalf (e.g. Thatchem, Jikken, AZT, KART). These times are then adopted and sanctioned by the OEM as the OEM time. For example, Toyota and Lexus have their own research centre, but they also reference Jikken (an

automotive paint and body repair research centre in Japan) to do confirmatory testing of their data and to fill in any gaps in their data revealed after models are released.

18. It is always the responsibility of the repairer to ensure his repair methodology is in accordance with manufacturer's methodological specifications. Audanet's group time is derived directly from the manufacturers information about the time required to perform the procedures. Audanet does not provide the manufacturer's methodological specifications.

19. The Audanet tool does not attempt to specify times for **repairs** of components to be carried out, but rather the times for all of the operations associated with a repair to be carried out. For instance, if a quarter panel has to be replaced on a particular vehicle, it provides the realistic time to perform the operations necessary to do that work from information provided by the manufacturer of the vehicle, including the removal and replacement of the quarter panel. This includes for instance drilling out the spot welds, and welding in the new panel, as well as other operations required such as removal and re-fitting of associated components such at the tail lamps, bumper, rear windscreen. If the quarter panel can be repaired (as opposed to replacing the part) and requires repairs in situ (the art of panel beating), AudaNet does not estimate how many hours that repair might take because this will vary according to the extent of damage in each case based on personal opinion.

20. In Australia, over 800 smash repairers and nearly 60% of the electronic insurance claims run through the Audanet estimating software.

21. Audatex conducts regular public training courses in the use of the system to customers, those who wish to learn about it or who may be considering purchasing it.

22. The Audatex system does not concern itself with the hourly labour rate. That variable is entirely up to the individual user, as are time estimates for repairs.

23. I have been provided with an AudaNet assessment generated by the *Respondent's* Assessor, relating to a Lexis RX350 5 door 2009 model vehicle.

24. The assessor has chosen the correct database for the 2009 RX350 Lexus model vehicle: namely RX series 2006-2009. The RX series is one of the common platforms. There are three models-the RX270/RX350/RX450. The fundamental body/chassis remains the same across the series, and the one AudaNet database covers the three."

……..

57. The Audatex expert then moves to comment on statements by the *Applicant* in its outline of submissions and in the director's statement. For convenience I set them out below in tabular form along with The Audatex expert' comments on them.

OUTLINE OF SUBMISSIONS	THE AUDATEX EXPERT' STATEMENT
20 A visit to the website https://www.audatex.com.au/audatex-times/, confirms that the Audatex system is an	25. I have been asked to comment of the following statement: "A visit to the website

estimating tool developed for motor vehicle manufacturers – not for motor vehicle repairers, or insurers, as it includes: *The Audatex system provides vehicle manufacturers (OEM) times for removal, refit and replacement as published in their workshop manuals.* *The Audatex estimating system was not designed to replace the methods manual*	https//www.audatex.com.au/audatex-times/ confirm that the Audatex system is an estimating tool developed for motor vehicle manufacturers- not for motor vehicle repairers, or insurers, as it includes: *The Audatex system provides vehicle manufacturers (OEM) times for removal, refit and replacement as published in their workshop manuals.* *The Audatex system was not designed to replace the methods manual"* 26. This statement misunderstands both the product and the website and exploits a seeming ambiguity (only ambiguous to someone who does not know what OEM means in the motor trades). When one reads the full entry rather than a small selection, there is no basis for the statement: *The Audatex system provides vehicle manufacturers (OEM) times for removal, refit and replacement as published in their workshop manuals. However, the operations are listed in a logical sequence for ease of understanding, and quote the manufacturer's original operation number for further reference.* *Vehicle manufacturers directly supply our International Data Development Centres (DDC's) with their methods/times. In some cases (e.g. Jaguar /Land Rover/Rover), Thatcham panel times are in fact used. In others the OEM has utilised other independent data centre (e.g Jikken, AZT, Samsung Fire & Marine, KART) to research the time and method on their behalf.*
28. b. The estimating system used by the respondent was developed for a different part of the motor vehicle industry – manufacturers, …	28. This is incorrect. It was developed for insurers and repairers, who are our customers (approximately 100,000 world-wide).
28. c. The Audatex system is outdated, incomplete and is specifically designed not to "replace a methods manual", ie methodology.	30. This is incorrect. Our model sheets are built directly from those same methods manuals. If a manufacturer changes a method, we will update our model sheets accordingly. We do not replace the methods manual: we make that very clear. The methods manuals are available from the manufacturers and with modern vehicles, these manuals are required for repairing them. The manufacturers create and provide those manuals. We do not own the intellectual property in the manufacturer's methods manuals.
33 There is no certainty in the Audatex estimating system to allow for: *a.* replacement of certain parts only being catered for after intervening parts are removed to allow access to the damaged part; *b.* any confidence that restricting repairs to a system not designed to replace methodology, the vehicle would be returned	32. My response is: a. Selecting to replace a part in Audanet does include associated remove and refits to gain access. These major components will be stated in the quote. If the particular item in the remove and refit is not described it is because the time has been included in the overall group time of the item being replaced. b. Audanet is not replacing the Manufacturers

to its pre-accident condition, with applicable manufacturers' warranty(s) applying;	methods manual. It is working in parallel to the method manual to provide the times for the operations set out in the methods manual. The repairer can see the method in the methods manual. If the repairer does the job as per the methods manual, the job should take the time listed in Audanet for performing that process. The Audanet times are derived from the manufacturer's real time study of how long the process actually takes in a real life repair shop.
DIRECTOR'S STATEMENT	**THE AUDATEX EXPERT' STATEMENT**
60 The Audanet report provided to me by the *Assessor* is clearly not an assessment report. It is obviously a repair estimate, created by a software system which is designed to create repair estimates. Writing the words "Assessment Number" on it, does not change the fact that the document is not an assessment report. An assessment report, is by definition something which assesses a previously made document. By definition, it must reference a previously made document. The Audanet report does not reference my original estimate in any way what so ever. As such, it is a wholly new estimate, created by a software program which is designed for the construction of repair estimates. I included screenshot from Audanet's website which explains what the software does to the list of documents attached to my statement.	34. As to paragraph 60, all Audanet estimates are assessments and are headed "Assessment".
63 Aside from not having the facilities, or the objectivity to compile repair estimates, the other problem is that the software used by the *Respondent* to make their estimate is completely opaque and non-transparent. This is evident because Audanet software uses a proprietary database of repair times and procedures in order to prepare estimates. When the *Respondent's* assessors are queried on Audanet's recommendations, they are not able to provide any clarification because they do not know how the software is built, or where the software's propriety data comes from. As an example, if asked "Why does Audanet recommend a repair time of 30 minutes to Renew Upper Radiator panel, the expected answer is that no one knows, and that's just how the software is coded in United States. I believe that when the *Respondent's* assessors have not been able to explain to me the recommendations made by software which they acquired from a vendor in United	36. Paragraph 63: The Audanet software is far from "opaque." For instance, if one goes to the item "Renew Upper radiator panel," next to the description is the Lexus Repair code B125. B125 is the Lexus code for that operation. Persons who quote to repair Lexus vehicles (or any vehicles) would be expected to recognise such codes. Use of repair codes is widespread throughout the industry, and the codes are all set out in the OEM methods manuals. A person quoting on a Lexus vehicle would be familiar with the repair methodology manual in order to produce a competent quote. Modern vehicles are complex and use different types of steel, and sometimes other alloys, which have to be treated in specialised ways. The OEM method manuals address these issues and provide the process and the methodology to return the vehicle to manufacturers specifications. 37. Audatex has 500 staff worldwide compiling motor vehicle body/chassis repair data year round. A Lexus RS350 chassis is the same vehicle in Madrid and in Tokyo or Sydney, and

States, that is a failure in transparency and completely at odds with the intention of the Code.	the same operation takes a tradesman the same time. The same Repair code applies to every RX350 in every country and the Toyota/Lexus operations manual is universal.
Paragraphs 79 – 85 of the director's statement are set out at par 44 (above) of these reasons.	38. As to paragraph 79,-85, the director is mistaken. Manufacturer's times are verified actual times for panel repair work. We do not provide times for "repair" operations, as outlined above. Our times are not about mechanical work or warranty work. Manufacturers do not provide times for paint work. We research and provide our own times for paintwork. We use an independent research centre (AZT) for paint times and we use current Australian RFU (ready for use) waterborne list prices from PPG, Glasurit and Sikkens for paint materials. We use 3M lists for consumables. 39. As to paragraph 83, The OEM removal times we use factor in time taken for removal of damaged parts. 40. As to paragraphs 84-85, the times are based on how long the job takes, not on the cost. The hourly rate is a factor that is outside our field. It is a matter for the customer of our product to set.
88 The *Respondent's* Audanet quote is written in a way that terminology is unclear of what work is to be carried out. The first line item "Floor Anchorage" is not a standard industry process and I cannot see where it fits as an item. This use of non-standard terminology is continued throughout the quote. Some material costs only provide a price and does not indicate or show any calculation or justification for the amount allowed.	41. As to paragraph 88, the terms used are terms taken from the manufacturer's repair methods manual. 88: Floor anchorage is term relating to securing the vehicle to a jigging bed or anchor post before pulling of a panel or structure can commence. Training is needed to understand the finer usage points.
89 I have made inquiries and reviewed the Audanet systems of calculation and reviewed the training manual. I included a copy of the training manual for Audanet which outlines how the software can be manipulated in the list of documents attached to my statement.	89:*U.S. or AU training manual?* Yes AudaNet can be manipulated by anyone, repairers and assessors alike. This is the same with all quoting systems in the market place worldwide. This caters for any "outside the box" scenarios.
90 Based on the training manual provided by Audanet the operator at the backend can change a number of options with no visible variation to the repairer. These changes can be made without consultation and makes it impossible to identify if anyone has made any changes. For example, it is possible for the insurance assessor to remove blends, override and set labour and paint rates without disclosure or investigation.	90: Again this is a training and comprehension issue. If the user was actually using AudaNet these changes can be seen. Blends are added and removed at the discretion of the repairer or assessor. The OEMs and paint research centres will never automatically add blends operations for a user.
91 Further, Audanet software uses terminology that simply is not standard	91. Again, this is a topic of training. The majority of these terms are explained in our manuals and

industry practice, I am not aware of a range of phrases that have been used on the Audanet quote, such phrases include; i. PANEL SURFACE PAINT ii. NEW PART PAINT K1G iii. PAINTING<50% iv. SURFACE PAINT PLAST. v. PREPARATION MAIN WORK METAL vi. FACTOR vii. PREPARATION COMP. WORK PLASTIC viii. SURFACE-/BLEND PAINT ix. MATERIAL-CONSTANT METAL x. MATERIAL-CONSTANT PLASTIC	during the training courses.
96 Audanet has its own methodology, it is not transparent, it has been utilised by an insurance company without industry consultation, to manage their own repair work. 97 Repair processes are grouped together without clarity as to what times each process can take.	42. As to paragraphs 96 and 97, these are answered above.
98 I have obtained material from Audanet website: *The Audatex system provides vehicle manufacturers (OEM) times for removal, refit and replacement as published in their workshop manuals.* Looking at the Audanet website and marketing material, a reasonable person would think that car makers supply Audanet with R/R, repair and paint times. However on further reading, Audanet declares: *"Vehicle manufacturers directly supply our International Data Development Centres (DDC's) with their methods/times. In some cases (e.g. Jaguar/Land Rover/Rover), Thatcham panel times are in fact used. In others the OEM has utilised other independent data centre (e.g Jikken, AZT, Samsung Fire & Marine, KART) to research the time and method on their behalf."* At this point, it appears that some repair times are obtained from car makers, and others are obtained from various overseas sources like Samsung Fire & Marine Insurance company. Then, on further investigation, Audanet states: *Audatex may provide additional times in cases where manufacturers do not publish removal, refit and replacement times for specific operations, and where in our opinion it is necessary work. These times will be calculated through methodical comparisons with data from equal or similar models,*	43. As to paragraph 98, Audanet USA is a different product. Audatex sometimes has to add times when they are not available from the OEMs. These are derived from comparable operations on comparable vehicles and the determinations are made by experienced experts such as panel beaters spray painters and mechanics (where, for example, removal of mechanical items is involved).

and/or by reference to existing times. Where times are supplied by Audatex, they will be designated with a KN number on the calculated report. It now appears that, in actuality, Audanet is actually in the business of calculating repair times all on its own, without any consultation with repairers like the *Applicant*. Worse still, the information published in Australia is at odds with information published by Audanet's head office in United States. Specifically, I refer to a training manual provided by Audatex USA. The manual states[9]:	
100 Audatex claims to use vehicle manufacturers times as published in their workshop manuals. It is not specific, where the calculations are made from. The Audatex system is outdated, incomplete and is specifically designed not to "replace a methods manual", ie methodology. The workshop manual referred to is what is used in Dealerships for warranty jobs.	44. As to paragraph 100. Please see above. Manufacturers publish their times and their methods manuals.
101 The majority of vehicle manufacturers do not have body repair manuals with listed times operations that are specifically for smash repairers.	45. As to paragraph 101, the time for a "repair" in the sense if panel beating a ding out is obviously incapable of estimation by software or times manuals, other operations are capable of accurate estimation by reason of the real life studies the OEMs and the independent research centres carry out around the world.

APPLICANT'S SUBMISSIONS

58. The *Applicant's* Outline of Submissions relevantly covered the following topics:
    a. compiling own estimates;
    b. inappropriateness of use of Audatex;
    c. conduct breaching Cl. 4.2(b)(ii) of the *Code*.

Where the *Respondent* has commented on the *Applicant's* submissions I have set those out in tabular format below. The numbers are references to the paragraph numbers in the respective submissions.

Compiling Own Estimates

59. The *Applicant* argues[10] that the *Code* is a code developed between motor vehicle insurers and the repair industry by which signatories agree to abide. It relates to

[9] This is set out at par 44 (above) of these reasons

[10] Outline of submissions, par. 16, p. 2.

the *Applicant* and *Respondent* in this instance, both of which are signatories. Part 3 of the Code includes a definition section that defines an "Assessor" *means an employee, assessing contractor or agent of an Insurer, who is engaged to assess Motor Vehicle accident damage and/or negotiate Repair Estimates between Insurers and Repairers*[11]. Thus, when the *Respondent's* assessor acts as such, his duties are to:

a. assess damage to a vehicle;
b. negotiate a repair estimate; or
c. undertake both (a) and (b)[12].

60. For convenience I set out below in tabular form the *Applicant's* submissions and the *Respondent's* responses.

Applicant	***Respondent***
19. It is clear from the definition of an assessor is that the *Respondent's* assessor cannot draw up his own estimate, nor can the respondent as neither is licenced to do so. However, the *Respondent's* assessor has done just that, drawn up his own estimate – as per his email dated 31 August 2017 at 15:39: "*I have provided **my** Audatex assessment …*"[13]	53. Paragraphs 19 is irrelevant and another red herring which diverts attention from section 4(2)(b)(ii). There is no legal basis proffered, and no complaint concerning the drawing of estimates for determination. In any event paragraph 9 is self contradictory, as the passage relied on in the Assessor's email, refers to his document as an **assessment**.

61.

Applicant	***Respondent***
21. The *Respondent's* NSW/ACT Assessing Manager, in his email dated 2 November 2017 at 13:42 to the *Applicant's* director states that the *Respondent* operates " … *in conjunction with Audatex, to establish repair methodology and estimate when dealing with damaged vehicles*."[14]	55. The submissions at paragraphs 21 and 22 are incorrect. Audanet was developed for the purpose of estimating repair costs. The submission at paragraph 21 compounds the earlier error ….

62.

Applicant	***Respondent***
23. The *Respondent's* Head of Motor Assessing, in his email dated 15 November	55. The submissions at paragraphs 21 and 22 are incorrect. Audanet was developed for the

11 Outline of submissions, par. 17, p. 2.
12 Outline of submissions, par. 18, p. 2.
13 Outline of submissions, par. 19, p. 3.
14 Outline of submissions, par. 21, p. 3.

2017 at 12:41 to the *Applicant's* director also confirms: "*The Respondent has a right, pursuant to our contract with our insureds, to inspect and assess its insured vehicles (sic.) and make repair estimate recommendations, the Respondent itself do (sic.) not repair vehicles.*" [15]	purpose of estimating repair costs. The submission at paragraph 21 compounds the earlier error ….
24. Presumably "*the contract with our insureds*" referred to by the *Respondent's* Head of Motor Assessing includes the terms and conditions detailed in the *Respondent's* Product Disclosure Statement (`*PDS*') that accompanies the insurance policy. If there is any other document, it is not readily apparent. On page 23 of the PDS the respondent confirms: it is a signatory to the *Code.* under the heading of 'Choice of Repairer': "*If we do not authorise repairs we will pay you the fair and reasonable cost as determined by us, considering a number of factors including comparison quotes from an alternate repairer we choose and …*"[16] The *Applicant* submits that whilst consistent with the *Respondent's* Head of Motor Assessing's statement that it can "*make repair estimate recommendations*" there is simply no suggestion in the insurance PDS that the *Respondent* has any entitlement to draft its own estimate, as the assessor and the NSW/ACT Assessing Manager confirm was done, with particular reference to the assessor stating: "*my Audatex assessment*".[17]	56. The submissions made at paragraphs 23 and 24 are irrelevant to section 4(2)(b)(ii) and the dispute. They are in another context, ….

63. Further, the *Applicant* argues that Clause 4.1 of the *Code* refers to a repairer preparing an estimate under the heading "*the repairer will*". Under the heading "*the insurer will*" there is no suggestion the insurer[18] has any entitlement to prepare an estimate but will "*consider estimates in a fair and reasonable manner*". The estimate referred to in Clause 4.2(b)(ii) must be the estimate referred to in Clause 4.1 which was prepared by the repairer.[19]

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15 Outline of submissions, par. 23, p. 3.

16 Outline of submissions, par. 24, p. 3.

17 Outline of submissions, par. 24, p. 4.

18 In the Outline of submissions the word "repairer" is used here, however, given the context it must be "insurer".

19 Outline of submissions, par. 25, p. 4.

Inappropriateness of use of Audatex

64.

Applicant	***Respondent***
26. The *Applicant* says[20] that in compiling the Audatex estimate the *Respondent* is doing so *ultra vires*: a. the contract of insurance with its insured; and b. the *Code*.	57. The submissions made at paragraph 26 introduce an administrative law concept of ultra vires. It is misconceived and irrelevant. It literally means "*beyond power*", and is frequently used in writs of certiorari and prohibition where officials, whose power is limited by statute, seek to exceed the power. No evidence of any statutory limitation on the power of an assessor to produce an estimate has been, or can be, brought forward because none exists. The argument in paragraphs 25 and 26 is without basis as if a person has a duty to do one thing, how does that exclude him from doing something else? The logical disconnect in the submission is not addressed.

65.

Applicant	***Respondent***
28(b). The estimating system used by the *Respondent* was developed for a different part of the motor vehicle industry – manufacturers, and is inappropriate to adapt it to motor vehicle repair.[21]	60. The submissions at paragraph 28(b) and (c) are factually incorrect.

66. The *Applicant* claims that there is no certainty in the Audatex estimating system to allow for:
    a. replacement of certain parts only being catered for after intervening parts are removed to allow access to the damaged part;
    b. any confidence that restricting repairs to a system not designed to replace methodology, the vehicle would be returned to its pre-accident condition, with applicable manufacturers' warranty(s) applying;
    c. any confidence that regulation 4.2 (a) is not breached. [22]

Conduct breaching Cl. 4.2(b)(ii) of the Code

67. Further to the issue of estimate preparation the *Applicant* says[23] the approach taken by the *Respondent*, as evidenced in this instance, has failed to consider its

[20] Outline of submissions, par. 26, p. 4.
[21] Outline of submissions, par. 28(b), p. 4.
[22] Outline of submissions, par. 32, p. 5.
[23] Outline of submissions, par. 27, p. 4.

estimate in a "*fair and transparent manner*." The complaint is not that the estimate has not been accepted in its entirety, but the consideration has not been:

a. fair; and
b. transparent.

68. The approach from the *Respondent*, as detailed in the emails attached to the application suggests that the *Respondent*, having made its own estimate, will not consider paying a cent more. No independent estimate was obtained, as referred to in its policy with the insured, and no negotiation/discussion with the repairer, as suggested, is not the ideal of the *Code* under the heading of '*Principles of the Code*', in part 2.[24]

69.

Applicant	***Respondent***
31. Included in the consideration of "*fair*" is the artificial labour rate said to be allowed, as referred to in the *Respondent's* estimate – namely about $60.00 per hour. Such a rate is substantially below the "market rate" confirmed not only by industry standards but by an infinite number of judicial determinations, in all common law jurisdictions in New South Wales[25]. 32. Also included in the consideration of "*fair*" is that there is no transparency in the explanation proffered by the *Respondent* providing an estimate based on an Audatex assessment that is forwarded: a. without explanation; b. without reference to any detailed or understandable methodology*;* and c. using terms that are not understood industry wide.[26]	66. The submissions at paragraphs 31-34 do not provide any framework for the analysis of the terms "*fair*" and "*transparent*". Rather, they deal with assertions of what behaviour might or might not be fair or transparent, without definition or analytical framework it is submitted that this is not a valid way to construe a section in a Code of Conduct .The submission at paragraph 32 imposes a test not found in section 4(2)(b)(ii) namely that rather than to consider the estimate in a fair and transparent manner, the insurer must also explain to the repairer how it was arrived at, the methodology utilised, and using terms "*understood industry wide*" whatever that might mean. Simply put, the Code does not require this it is not an available construction of section 4(2)(b)(ii). See detailed analysis above.
33. The lack of fairness arises through a number of factors : a. The *Respondent* draws up its own estimate when not licenced (sic) to do so and contrary to the Code; b. The estimating system used by the *Respondent* was developed for a different part of the motor vehicle industry – manufacturers, and is inappropriate to adapt it to motor vehicle repair; c. The Audatex system is outdated, incomplete and is specifically designed not to	67. The error is compounded in the submissions at paragraphs 33 and 34, where the thrust of the submission is that Audatex estimating system has shortfalls and does not create confidence that the vehicle would be returned to its preaccident specification (exactly what Audanet does achieve) and inspire confidence that section 4(2)(a) is not breached. This raises subjective elements, based entirely on the level of understanding of the perceiver. It is a complaint predicated on the assumption that requires the insurer to ensure the repairer

[24] Outline of submissions, par. 30, p. 5.
[25] Outline of submissions, par. 31, p. 5.
[26] Outline of submissions, par. 32, p. 5.

"replace a methods manual", ie methodology. d. the *Respondent's* assessor, on the *Applicant's* version, giving verbal authority to complete the repairs and thereafter ravaging the repair costs when providing his own estimate, when not entitled to do so and utilising an inappropriate system. As to the allegation the repairer's estimate was approved, undoubtedly, the reaction to such a submission will be there may/must have been a mistake on the part of the repairer. If that suggestion is correct, then why did it take the respondent: i. well over 6 weeks (if accepted the authority dated 31 July were sent) to provide authorisation; ii. well over 10 weeks to try to justify the amount authorised. 34. A transparent explanation allows the repairer the possibility of discussing any issue arising with his estimate. Providing a response to a repairer's quote that cannot be understood – and not trying to explain it, is simply not fair, and not being transparent, both issues are contrary to the *Code*, as referred to in Clause 4.2(b)(ii) of the *Code*. [27]	understands the assessment. Section 4(2)(b)(ii) imposes no such obligation.

70.

Applicant	***Respondent***
35. The Applicant concludes its submissions by arguing that when the Respondent insurer confirms on page 23 of its policy that it abides by the Code, it does so to imbue confidence in its insureds and commercially benefit as a result. In practice it has failed to abide by the Code, and should be taken to task for its breaches that, in this instance includes breaches of: a. The Code's principles in dealing with repairers in an appropriate manner, the failure of which is evidenced by: b. the alleged actions of Respondent's NSW/ACT Assessing Manager; c. the actions of the Respondent's Head of Motor Assessing; d. the Respondent's assessor's lateness in providing authorisation and a detailed	67 (cont'd). Paragraph 35 highlights the error. One repairer may understand Audanet because he has acquainted himself with it, his next door neighbour may have not. The transparency of a system cannot be judged by idiosyncratic criteria, and the Code does not require that the insurer ensure that its assessment process fits the needs of each and every repairer. A thousand repairers might each have different requirements. The test posited by the complainant is a subjective test: test potentially based on each repairer's unique position, but the Code imposes only an obligation to conduct the assessment in a fair and transparent manner. This does not even place an obligation on the insurer to provide a copy of the Audanet assessment: it is a purely internal matter governing the way the assessor must conduct

[27] Outline of submissions, par. 34, p. 5.

itemisation of the authorised repairs; e. Drafting its own estimate, when not licenced (sic) or contractually entitled to do so – and contrary to the Code, at the same time relying on an estimate that is inappropriate and outdated; f. A failure to deal with the repairer in a "fair and transparent manner".	his assessment.

71. Also included in the consideration of "*fair*" by the *Applicant* is that there is no transparency in the explanation proffered by the *Respondent* providing an estimate based on an Audatex assessment that is forwarded:
    c. without explanation;
    d. without reference to any detailed or understandable methodology*;* and
    e. using terms that are not understood industry wide.[28]

72. As to the outcome the *Applicant* seeks in this determination the *Applicant* submits that:
    a. Rectification of the above breaches of the *Code*, in this instance, will be difficult, in view of the passage of time. The *Applicant* seeks confirmation that either the alleged breaches have or have not occurred, with reasons.
    b. If a monetary resolution, ie finalisation of the matter applies, which is probably necessary in view of the *Respondent's* entrenched position, the *Applicant* says its cost of repairs, as estimated, should be allowed in whole.

RESPONDENT'S SUBMISSIONS

73. The *Respondent's* submissions relevantly covered the following topics:
    a. That the submissions were limited to the "*subject of the reference*" which I infer is the alleged breach of Clause 4.2(b)(ii) of the *Code*.
    b. A recital of the facts from the *Respondent's* perspective.
    c. An analysis and rebuttal of the *Applicant's* director's evidence that he believed that the *Respondent's* assessor had authorised him to start repairs on the *Customer's* vehicle.
    d. An analysis of the doctrine of election and the case of *Commonwealth vs Verwayen*[29] in the context of the *Applicant's* claim for monetary compensation.

[28] Outline of submissions, par. 32, p. 5.
[29] The Commonwealth v Verwaven (1990) 170 CLR 394

e. An analysis of Clause 4.2(b)(ii) of the *Code* from the *Respondent's* perspective.
f. The visit of the *Respondent's* NSW/ACT Assessing Manager and NSW Motor Assessing Team Manager to the *Applicant's* premises on 3 November 2017.
g. An attack on the credit of the *Applicant's* director.
h. An attack on the evidence of the *Applicant's* expert witness.
i. A response to the *Applicant's* submissions.

The submissions were limited to the "subject of the reference".

74. It was because the *Respondent* had thus limited its submissions and evidence that I sent my request for information under Clause 5.3(c) of the *Rules* (`*Request*') on 19 September 2018. I need say nothing further about this topic until I deal with the parties' responses and comments arising from the Request.

Recital of the facts from the Respondent's perspective.

75. Apart from the contentious issue of the *Applicant's* director's belief that he had been verbally authorised by the *Respondent's* assessor to proceed with repairs on 6 July 2017, I consider that the parties are in substantial agreement on the events giving rise to this reference.

Whether the director was authorised to commence repairs?

76. The *Respondent* submits that the *Applicant's* director's assertion that at the inspection, the *Respondent's* assessor verbally authorised him to go ahead and repair the vehicle and that if he took "*lots of photos*" the repair costs would somehow be sorted out on the assessor's return, is simply not believable in view of the objective evidence. That evidence includes the assessor's subsequent behaviour as seen in the file note on the electronic claims file, the phone call to his manager and subsequent email in the early hours of the following morning, and the notes contained on the assessor's Audatex assessment. [30]

An analysis of the doctrine of election and the case of <u>Commonwealth vs Verwayen</u> in the context of the Applicant's claim for monetary compensation.

77. I set out below in full the *Respondent's* submissions[31], suitably anonymised, on this point:

> "12. The *Applicant's* director maintains that based on the assessor's verbal authority he effectively disregarded the repair Authority of the 7 July 2017 as a mistake.

[30] *Respondent's* submissions, par. 11, pp. 4-5.
[31] *Respondent's* submissions, pars. 12-15, pp. 5-6.

However a claims officer decided to authorise repairs based on the Audanet assessment and that authorisation was capable of giving rise to binding legal relations. It stipulated the sum the *Respondent* was prepared to authorise for repairs. If the repairer was willing to repair the vehicle for that sum, he was at liberty to repair it. If he was not, he was under no obligation to repair it. If he wished to negotiate a different price, he ought to have done so before repairing the vehicle. In simple contract terms he accepted the offer by performing the work. It is submitted there was no basis for him to think that he was being authorised on any other terms. He made an **election** to accept the authorisation as the price basis for his repairs.

13. If the *Applicant's* director's present complaint has a genuine basis, it is difficult to see why he elected to repair the vehicle. The answer lies in what transpired at the physical inspection. The assessor raised and discussed with the *Applicant's* director the exaggerations of damage, the incorrect repair methodology and the unnecessary repair operations. The director was told that Audanet would be used to assess the repairs, and the director responded that he did not accept Audanet assessments. On receipt of the Authority, he decided to go ahead with the repairs it must be assumed, on that basis as at least he had thereby secured the repair job.

14. The *Applicant's* present claim for monetary recompense is an approbation and reprobation, which will not be allowed at law.

15. In **Clth v Verwayen**, 1990 HCA 39 Brennan J at paragraph 6 of his judgement described it in the following terms:

> "*Election consists in a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights: Evans v. Bartlam (1937) 2 All ER 646, at pp 652,653; Tropical Traders Ltd. v. Goonan [1964] HCA 20; (1964) 111 CLR 41 at p 55; Kammins Co. v. Zenith Investments (1971) AC 850 at p 883. A doctrine closely related to election, and sometimes treated as a species of election, is the doctrine of approbation and reprobation. This doctrine precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he exercised as, for example, where a person "having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit":* Evans v. Bartlam, per Lord Russell of Killowen at p 652.

An analysis of Clause 4.2(b)(ii) of the Code from the Respondent's perspective.

78. Again, I set out below in full the Respondent's submissions , suitably anonymised, on this point:[32]

> "17. The relevant obligation under section 4(2)(b)(ii) is that Insurers:
> - in their dealings with repairers
> - in relation to their repair work:
> - will consider estimates in a fair and transparent manner,
> - and will not refuse to consider an estimate on unreasonable

[32] *Respondent's* submissions, pars. 17-44 pp. 6-12.

- or capricious grounds.

18. On the evidence of the assessor, he did consider the *Applicant*'s estimate. He considered it on at least two occasions: while he was inspecting the vehicle with the assessor, and when he got back to the office to compile his Audanet assessment. Thus it cannot be asserted that he refused to consider it under the last two dot points above.

19. Therefore the only remaining issue is whether he considered the estimate in a "*fair and transparent manner*".

20. The question arises about the meaning of "*fair and transparent manner*".

21. However the first point to be made is that the obligation is one about the manner in which the assessor will consider the estimate. It is the manner of his consideration that must be fair and transparent.

22. The Code (i.e. section 4(2)(b)(ii)) does not say anything about the fairness of allowing any particular quantum of repairs to an insured vehicle, or the fairness or reasonableness of hourly rates to be imposed by an insurer or insisted upon by a repairer. Those matters are left to market forces. The Code does not seek to interfere in those market forces. The evidence of the *Applicant's* expert witness raises issues irrelevant to these proceedings and for that reason has not been addressed. The Code does not venture into issues about whether the quantum of an assessment is fair or reasonable, as that is quite properly left as an issue between the insurer and its insureds, and will in each instance depend upon individual terms of individual policies. This is an industry wide code.

23. It is not to the point that the director does not understand how Audanet works. The industry wide obligation mandated by the Code is not to be determined upon the idiosyncratic position of an individual repairer, whose state of knowledge-or capacity for comprehension, for that matter may vary widely from one individual repairer to another.

24. The evidence of The Audatex expert establishes that Audanet has a firm rational basis, grounded in extensive research and based on information harvested from verified and impeccable sources. Over 100,000 customers worldwide consisting of insurers and smash repairers use the product, which has an international staff of approximately 500 people constantly maintaining and updating the data base. Given the small size of Australia, the fact that there are over 800 users in Australia including numerous motor vehicle insurers as well as the smash repairers, is a telling piece of evidence.

25. The first answer is that on the facts, the assessor **DID** consider the director's shop estimate in a fair and transparent manner. He went over the vehicle with the director, noting things on the estimate and arguing about the differences of opinion with the director on the spot. He told the director he would take it into consideration when compiling his Audanet Assessment, and on his evidence he did do this. He was perfectly frank and open with the director that he would consider the shop estimate and that he would generate an Audanet estimate.

26. The director's position is clear from the outset he stated he would not accept an Audanet estimate, that he required a copy of his own shop estimate to be physically adjusted and placed in his hand. The Code imposes no such requirement, and does not fetter the right of an insurer to conduct its assessment according to its own requirements, so long as section 4 of the Code is observed.

27. The term "*transparent*" is descriptive in nature and which has a number of meanings. The online Cambridge Dictionary at https://dictionary.cambridge.org/dictionary/english/transparent lists three meanings:

    i) see through;

    ii) obvious; and

    iii) Without secrets.

28. The online Collins dictionary at https://www.collinsdictionary.com/dictionary/english/transparent (lists the following meanings):

    i) permitting the uninterrupted passage of light, clear;

    ii) easy to see through, understand or recognize, obvious;

    iii) permitting the free passage of electromagnetic radiation; and

    iv) candid, open, frank.

29. A standard canon of construction is that words are to be accorded their natural meaning in their context. The adoption of the word "*transparent*" creates difficulties for the construction of the section because of the several distinct nuances of the word.

30. The use of the word is unfortunate as it is vague and invites the application of subjective rather than objective criteria in its evaluation.

31. "*Transparent*" is such a general term with such a range of meanings that it would be impossible to define with certainty where the dividing line lies between behaviour which is transparent in one sense but not in another. For an example, someone may be perfectly '*candid, open and frank*' (one definition above) but not '*easy to understand*' or '*obvious*'.

32. Einstein's Theory of Relativity may be a perfectly "*transparent*" exposition of the time space continuum to you, but not to me. Depending on which definition is used, perhaps the Theory is never transparent or perhaps it is always transparent. Is it "*without secrets*"? Yes. Everything is revealed in exquisite detail including calculations and formulae. Is it Obvious? No. One might quip "*obviously not*". Is it easy to understand? That depends on your education and intellect, and proclivities. Most would say "*No*", but I might speculate that a scientist may say "*yes*" and a lawyer may say "*No*", but who really knows what any individual may answer? If it is easy to understand to you but not me, is it for that reason "*not transparent*"? Or is it transparent?

33. A test that invites speculation and the application of subjective criteria is forensically unappealing.

34. The solution must be that if the word transparent is to be given any role in section 4 of the Code, it must be given a meaning capable of embracing a wide range of

behaviour (as contemplated in the various definitions), or else either ignored (a difficult solution since it is there) or treated as ejusdem generis with "fair".

35. On the assessor's evidence, he was both fair and transparent in his manner of consideration of the director's shop estimate. He told him he would consider it, and he did. He told him he would be using Audanet, and he did. He was candid, open and frank about the methodology he would adopt, and he was as good as his word. He held back no secrets: he considered the "s*hop*" estimate when using Audanet and he generated an assessment as a result of a conscientious effort to reach a result reflecting his honestly held opinion.

36. That the director (unlike approximately 800 other repairers in Australia) was not a subscriber to Audanet and did not understand it, was a fact incapable of affecting the issue of whether the assessor's manner of consideration of the assessment of this vehicle was transparent.

37. The necessary corollary of the director's argument is that for every assessment undertaken in Australia, an insurer would have a potential duty to determine the level of expertise of each smash repairer (maybe each employee in each shop in a position to consider an assessment) and then tailor its assessment process to meet the particular needs and capabilities of each of those individuals. The proposition only has to be expressed to demonstrate its inanity. The director would prefer to have his own assessment marked up and placed in his hand. Another smash repairer may prefer an assessment in a different format. Another may already use Audanet. Another may use the NRMA (IAG) system. Is every insurer required to meet every such contingency on every occasion in order to comply with the Code? Obviously not.

38. The word "*fair*" has a reasonably plain meaning. The Collins online dictionary defines it (relevantly) as "*1. Free from discrimination, dishonesty, etc. just, impartial. 2. In conformity with rules or standards, legitimate*".

39. Was the assessor's manner of consideration fair? Yes. He observed his usual procedure which is applied to all his assessments. He carefully inspected the vehicle. He raised his concerns and issues with the director. He considered the director's quote, as he promised. He generated the Audanet quote just as he said he would do. The Audanet assessment upon which the director was authorised to repair the vehicle was generated taking into account the matters the assessor had observed and raised. It also accounted for the data provided by specialised assessing software used worldwide and by many of Australia's motor vehicle insurers including the Suncorp group (whose entities include but are not limited to AAMI, GIO, APIA), QBE, ALLIANZ and others identified by The Audatex expert including YOUI. He formed an honest opinion about the nature and extent of the damage. He used his standard office procedures (see statement of the NSW/ACT Manager of Motor Assessing as to the procedures in place) which ensure, by the consistent application of the Audanet platform with its independently generated times and operations, that all repairers are treated equally and assessed by the same standards and procedures.

40. It would **NOT** have been fair for the Assessor to make an exception for the benefit of the director and to apply a different methodology and assessing procedure, and had he done so his assessing procedure would no longer be transparent, as he would be applying special criteria or procedures in response to pressure from a single repairer. The assessor's duty pursuant to the Code is an industry wide duty, one owed to all repairers.

41. It is plain that the director from the outset decided he would not accept an Audanet assessment process and insisted on a manual hand written physical assessment of his own printed quote. It is plain he still insists on this, as evidenced by his extensive evidence about his own lack of understanding of Audanet. These proceedings are a flagrant attempt to force the *Respondent*, and by extension the Australian insurance industry to abandon its impartial and objective assessing criteria under Audanet and to adopt idiosyncratic assessments based on the personal preferences of individual repairers.

42. It is almost too simplistic to state that where the assessor generates an assessment using Audanet software, he is performing an assessment and not preparing a quote in the sense of being a "*repair*". Even if he did prepare a document styled "*quote*" (Audanet is an Assessment- see statement of Christopher Giles), it is for the purpose of assessing the cost of repairs. He is obviously not "repairing" the vehicle. Moreover this is totally irrelevant to the complaint. The submissions in relation to this are misconceived. Whist this is totally irrelevant to the complaint raised under section 4(2)(b)(ii), it is indicative of the confused and unfocussed approach of the complainant. The evidence and submissions in the complainant's case reveal many red herrings and irrelevancies, distracting from rather than assisting focus on an argument as to why the manner of consideration of the estimate was unfair or not transparent."

The 3 November 2017 visit by the Respondent's employees to the Applicant's premises

79. Paragraphs 43 – 44, 48 and 52 of the *Respondent's* submissions deal with this issue. As I have already indicated in paragraph 40 (above), I don't consider it necessary to address these matters at this stage in my reasons and will do so later.

An attack on the evidence of the Applicant's director

80. The *Respondent* says[33] that on the matter of credit, the *Applicant's* director has engaged in a number of practices which raise questions:
    a. He dismantled the Lexus in clear breach of his own obligations under the *Code*, which hindered the assessment and he must have known it would do so.
    b. He placed unnecessary markings on the vehicle tending to confuse obfuscate the extent of damage and to hinder the assessment and must have known this.
    c. He also must have known that a professional assessor could not be aided by such markings.
    d. The *Respondent's* assessor found these exaggerated the extent of the damage.
    e. He failed to advise the Assessor that he had already quoted over $21,000 for repairs to old damage to the rear of the vehicle, when he must have known that fact would be relevant to the Assessor.

33 *Respondent's* submissions, par. 45, p. 13.

f. He denies receiving documents which were in fact sent to him by email i.e. the Audanet assessment on 10 July 2017.
g. He repaired the vehicle in possession of an authority for $7,800 but would have us believe he did not think he needed to query it, or that he was bound by it. If in fact had he not received the Audanet assessment, why didn't he ask for it before commencing repairs?
h. His evidence in relation to the Assessor's verbal approval and taking "*lots of photos*" and that the Assessor would sort it out after his holiday is demonstrably false. The Assessor gives a totally different account of the conversation, which is corroborated by his subsequent actions and notes.
i. The director's account is inconsistent with the Assessor's subsequent actions and contemporaneous file notes.
j. The Assessor's version of the conversation should be accepted.

An attack on the evidence of the Applicant's expert witness.

81. The *Respondent* says[34] the evidence of the *Applicant's* expert witness is neither impartial nor temperate, based on some completely insupportable assertions in relation to which entities are legally allowed to compile repair estimates in NSW, including that in assessing a vehicle using "*an Audanet quotation*" the assessor requires a repairer's licence. He lacks a basic understanding of Audanet, a matter which must call his competence into question given the *Respondent's* evidence about Audanet's widespread use and market penetration worldwide. He has no qualifications to proffer legal opinions, and it counts seriously against his credit that he makes such assertions. His evidence is obviously tainted by error and bias. It should not be accepted. The *Respondent* submits that at para 11(f) of his evidence he relates complaints made to him by the repairer, the effect of which is that the Audanet assessment does not reflect the repairer's quote in format (all items in the repairer's quote are not referred to in the Audanet estimate). He thinks that would allow the repairer to better understand the adjustments.

Response to the Applicant's Submissions.

82. I have already dealt with these submissions either in the tabular format or otherwise above.

Applicant's Submissions in Reply

83. On 12 July 2018 the *Applicant* asked OSBC as the *Determination Provider* for the opportunity to put on evidence in reply and further short submissions from counsel. After receiving further submissions from the *Applicant* OSBC was satisfied the *Applicant's* application was appropriate and allowed until 13 August 2018 for it to be filed and served. The *Applicant* did not put any evidence in reply rather only filed and served submissions in reply, and those within time.

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34 *Respondent's* submissions, pars. 47-49, p. 13.

84. The *Applicant* summarised the *Respondent's* statements and submissions as making the following allegations that:
    a. The *Applicant* breached its obligations under the *Code* by dismantling the Vehicle without authorisation, in breach of Clause 4(1)(b)(ii);
    b. The quote prepared by the *Applicant* was exaggerated and included items that were not damaged;
    c. The *Respondent* did consider the *Applicant's* quote in a fair and transparent manner; and
    d. The *Respondent* also seeks to confine the words fair and transparent to a single definition referable only to the assessor's conduct or way he carries out an assessment.

85. On the other hand, *Applicant* says each word should be given its own work to do in the regulation of the *Code* and apply not only in the manner in which an assessment, not estimate, is compiled, but the end product submitted to the repairer, so that both parties understand what each contends if there is a dispute as to repairs. The *Applicant* contends that this is a primary function of the *Code* and in particular Clause 4(2)(b)(ii), which should be given an expansive application rather than the contended by the *Respondent*. [35]

86. As a general response the *Applicant* says:
    a. That originally the *Respondent* was to conduct a Desktop Investigation only. Such an assessment is performed based on photographic evidence. In the circumstances, it was not unreasonable for the *Applicant* to dismantle the Vehicle to assess transfer damage and provide photographic evidence of internally damaged parts to the *Respondent* to ensure that the damage to the Vehicle was properly repaired[36]; and
    b. The *Respondent* failed to communicate in a fair and transparent manner with the *Applicant* with respect to the estimate provided by the *Applicant*, the manner in which the *Applicant* prepared that estimate, and which items would not be allowed by the *Respondent* and why.[37]

87. The *Respondent's* conduct with respect to the use of the Audanet System was not fair and transparent for the following reasons:
    a. The *Applicant* submits that the *Respondent* should not be entitled to create its own estimate, in line with the *Code* as it is not a licenced repairer and does not operate a repair facility. The code stipulates that the *Respondent* can assess a quote[38].
    b. The *Respondent* provided a single dollar figure in response to the estimate provided by the *Applicant* and in authorisation for the applicant to commence repairs on 7 July 2017. When this was forthcoming repairs had

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35 Applicant's submissions in reply, p. 2.

36 Applicant's submissions in reply, par. 1, p 2..

37 Applicant's submissions in reply, par. 2, p. 3.

38 Applicant's submissions in reply, par. 3(a), p. 3.

already commenced in line with the earlier verbal approval given to the repairer. The *Respondent* subsequently confirms the approval was sent in error and authorisation was not to be given as per notes provided by the *Respondent*[39].

c. Audanet does not properly calculate the times to complete each line item. It is not evidenced that the times are used by Smash Repairers to fix smashed cars but by manufacturers to replace parts, panels or malfunctioning items[40].

d. The *Applicant* submits that the figure derived by the *Respondent* should be a fair figure capable of being understood and discussed by both parties. In other words, the "fair" suggested in Cl. 4 (2)(b)(ii) must relate to a fair assessment undertaken in a fair manner, not just the latter, as submitted by the *Respondent*[41].

e. Audanet does not allow for transparency when identifying works completed or times for certain work as it does not provide itemised estimations. If Audanet provided a breakdown of the times for individual tasks it would allow for greater transparency and alleviate the issues of fairness[42].

f. The Audatex expert confirms that Audanet can be manipulated by the user and, despite efforts to limit the effect of par.2 of his statement confirms Audanet is an estimating tool.[43].

g. The *Respondent's* assessor created a quotation using Audanet without reference to the *Applicant's* estimate. The Audanet quotation does not disclose which items are accepted and which items are disputed therefore it is impossible for the *Applicant* to respond[44]

88. In reply the *Applicant* made the following criticisms of the *Respondent's* witnesses' evidence.

The Respondent's Assessor

89. The *Applicant* submits that:

a. The statement by the *Respondent's* assessor makes it clear that there is a factual dispute between him and the *Applicant's* director with respect to the discussions each alleges occurred on 6 July 2017. Without cross-examination, the assessor's version remains untested, specifically inconsistencies referred to in paragraphs 14, 19, 26, 28, and 51 (*I accepted your quote for record purposes only as per the code.*) of his statement[45].

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39 Applicant's submissions in reply, par. 3(b), p. 3.

40 Applicant's submissions in reply, par. 3(c), p. 3.

41 Applicant's submissions in reply, par. 3(d), p. 3.

42 Applicant's submissions in reply, par. 3(e), p. 3.

43 Applicant's submissions in reply, par. 3(f), p. 3.

44 Applicant's submissions in reply, par. 3(g), pp. 3-4.

45 Applicant's submissions in reply, p. 4, No. 1.

b. Paragraph 31 of the assessor's statement is in direct contradiction to the evidence of the director with respect to the meeting of 6 July 2017. The *Applicant* says, irrespective of subsequent documents, to ascribe words to a smash repairer of 25 years standing, running a successful business and to assert continually the *Applicant's* quote would be considered for comparison reasons to comply with the *Code*, is simply untenable. The director's version, consistent with the 3 other estimates assessed by the *Respondent's* assessors beforehand, is plausible[46].

c. The *Respondent's* assessor states in par. 6 of his statement that originally the Vehicle was booked for a desktop assessment only. In such circumstances, assessment is performed on the basis of photographs of the Vehicle and the quotation only. In order to assess damage to a Vehicle properly and provide an accurate estimate to the *Respondent* for consideration, it is necessary to dismantle elements of the Vehicle to reveal if transfer damage had occurred, as confirmed by the repairer it had[47].

d. There are also paragraphs from the assessor's statement that should be read considering the *Respondent's* obligation to be fair and transparent as per the Code of Conduct. Specifically:

   i. At paragraph 11, the assessor says he advised the director that he did not require a copy of the Applicant's quote for the repairs - which goes to the num (sic) of the *Applicant's* complaint, in direct contravention of his obligation to consider quotes provided by a repairer (4(2)(b)(ii)) [48];

   ii. At paragraph 12, the assessor is disingenuous in saying the vehicle should not have been disassembled, confirming it is not impossible to assess damage to a vehicle once dismantled, simply that it will take longer[49];

   iii. At paragraphs 17 and 18, the assessor outlines that he formed an opinion with respect to the *Applicant* deliberately exaggerating the repairs required. However, he does not communicate this opinion to the director, contrary to the submission. Further, although he exposed photographs of the motor vehicle, had previous photographs been provided by the repairer he offers no evidence of the alleged exaggeration. Presumably, the assessor had the same assistance afforded the *Respondent's NSW/ACT Manager of Motor Assessing* when preparing his affidavit and therefore this failure to identify any exaggeration by reference to the material he, and the *Respondent's* legal team, supposedly had available is relevant when assessing the value of this evidence[50];

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46 Applicant's submissions in reply, p. 4, No. 2.

47 Applicant's submissions in reply, p. 4, No. 3.

48 Applicant's submissions in reply, p. 4, No. 4(a).

49 Applicant's submissions in reply, p. 4, No. 4(a).

50 *Applicant's* submissions in reply, p. 5, No. 4(c).

iv. At paragraphs 23, 24, 25 and 53, the assessor acknowledges that the director was not familiar with the Audanet system. Subsequently providing an estimate, based on a system not understood by the recipient, when the assessor knows that to be the case, is hardly fair and transparent. Where the *Respondent* creates its own estimate or quote for the repairs, this should be in a format that can be understood by the repairer, otherwise the "negotiation" expected by Mr [*NAME]* could hardly be on a level playing field. The Audanet quote makes no reference to the *Applicant's* estimate.[51]

v. At paragraph 27, the assessor states that he informed the director that it would be possible for him to negotiate with respect to the required repairs. In circumstances in which the Audanet estimate makes no reference to the *Applicant's* estimate, it is unclear how such negotiations could reasonably to take place[52].

The Audatex expert

90. The *Applicant* submits that:

a. At paragraphs 2, 6 and 9 of The Audatex expert' statement, he provides inconsistent responses originally confirming the Audanet system is an estimation tool. It is clear that Audanet is an estimating tool only as it only accepts inputs from the user directly, which the assessor estimates asrequired, rather than assessing the repairer's quote[53].

b. Paragraph 9 of The Audatex expert' statement is unnecessarily vague. The Audatex expert does not give evidence as to the extent of the use of Audanet by any of the insurance companies mentioned, whether the use is current, nor the number of assessments performed each year[54].

c. At paragraph 10 of his statement, The Audatex expert outlines that the tool is used by insurers and repairers. The Audatex expert fails to specify whether this means smash repairers or other types of vehicle repairers.

d. The Audatex expert gives evidence as to the use of the Audanet system at paragraphs 3, 8, 9, 10, and 20 of his statement. He outlines that the system is used by 800 repairers in Australia and has 100,000 customers worldwide. The Applicant notes that according to the Australian Bureau of Statistics, there are 23,468 motor vehicle (mechanical and parts) repairers in Australia. In the event that 800 repairers in Australia do use the system, this represents only 3.4% of total repairers, country-wide with a population of 25 million. With a world-wide usage of 100,000 in a global population of 7.2 billion it is a limited use software package. Of course, the Australian market is the relevant usage to consider and it follows that The Audatex

51 Applicant's submissions in reply, p. 5, No. 4(d).
52 Applicant's submissions in reply, p. 5, No. 4(e).
53 Applicant's submissions in reply, p. 5, No. 1.
54 Applicant's submissions in reply, p. 5, No. 2.

expert' conclusion at paragraph 20 that the system is widely used is an exaggerated assessment of the importance of the software[55].

e. At paragraph 19, The Audatex expert does not address whether Audanet's estimations relate to items that are damaged or undamaged. The *Applicant* submits that this is undoubtedly important as damaged items can take longer to remove from a Vehicle. Further, the estimations assume that removal and repair of items will take identical periods of time on every occasion[56].

f. Paragraph 26 of The Audatex expert' statement suggests that the Audanet system does not provide estimates with respect to damaged items, noting that the system outlines times for "removal, refit and replacement". Further, The Audatex expert' notes that the system does not aim to replace the methods manual and doesn't provide a method for repair[57].

g. In paragraph 41 of The Audatex expert' statement, The Audatex expert' concedes that the system is able to be manipulated by a user. The repairer could not do so as he does not know how it works[58].

91. The *Applicant* makes criticisms of the evidence of the *Respondent's NSW/ACT Manager of Motor Assessing* and the *NSW Motor Assessing Team Manager* to which I do not need to refer.

Respondent's Submissions

92. The *Applicant* firstly submits that the *Respondent's* submissions focus on issues that are irrelevant to the claim, such as:

a. The issues as to previous claim to unrelated or unclaimed parts of the vehicle[59].

b. The defacing of panels but provided no evidence of which panels he is referring to and did not provide photographs or any evidence to support the allegation of exaggeration by the *Applicant*, but confirmed an appropriate assessment could still be made, though suggested it was more difficult[60].

93. The remainder of the *Applicant's* submissions on the *Respondent's* submissions are best understood from the table below.

55 *Applicant's* submissions in reply, p. 6, No. 4.
56 *Applicant's* submissions in reply, p. 6, No. 5.
57 *Applicant's* submissions in reply, p. 6, No. 6
58 *Applicant's* submissions in reply, p. 6, No. 7.
59 *Applicant's* submissions in reply, p. 7, Item (a).
60 *Applicant's* submissions in reply, p. 7, Item (b).

Respondent's **3 August 2018 submissions**	***Applicant's*** **13 August 2018 Reply submissions**
10. On 7 July 2017 a claims officer decided to authorise repairs for and sent an authority to repair and the Audanet assessment[61] to the *Applicant*	c) Paragraph 10 of the submissions is inaccurate. The Assessor confirms that the authority to repair sent on 7 July 2017 was sent in error[62]. d) The *Applicant* suggests the normal process is that the *Applicant's* estimate should be assessed and negotiations would take place in a clear and transparent manner at the time of the *Respondent* conducting an assessment. This is consistent with the 3 exampled estimates, assessed by the *Respondent's* assessors[63].
18. On the evidence of the assessor, he did consider the *Applicant's* estimate. He considered it on at least two occasions: while he was inspecting the vehicle with the director, and when he got back to the office to compile his Audanet assessment. Thus it cannot be asserted that he refused to consider it under the last two dot points above.	e) Paragraph 18 is incongruent to paragraphs 11 and 35 in the assessor's statement[64]. It seems clear that the assessor didn't ask for time estimates or had any consultation with the *Applicant* about time for each item[65]. f) The assessor has clearly only completed part of the assessment whilst at the *Applicant's* premises as the pen marks are in two different colours which is consistent with evidence provided by the *Applicant* suggesting the assessor was in a rush[66]. g) It is also not established that the assessor has no knowledge of Audanet other than to enter details. It is not established he knows what processes are accepted within the quotation[67].
14. The *Applicant's* present claim for monetary is an approbation and reprobation, which will not be allowed at law. 15. In **Clth v Verwayen**, 1990 HCA 39 Brennan J at paragraph 6 of his judgment …	h) The *Respondent* seeks to rely on *Cth v Verayen* 1990 HCA 39 in support of the *Applicant* accepting the authority. We reject this submission as the *Respondent* admits the authority was sent in error and the assessor informed the director any assessment would be subject to negotiations[68].
21. However the first point to be made is that the obligation is one about the manner in which the assessor will consider the estimate. It is the manner of his consideration that must be fair and transparent. 22. The *Code* (i.e. section 4(2)(b)(ii)) does not say anything about the fairness of allowing	i) Paragraphs 21 & 22 suggests there was no discussion on 6 July to determine the hourly rate or any adjustment to the *Applicant's* estimate. The rate was unilaterally reduced by the *Respondent*. Any apprehension of whether the *Applicant's* estimate was appropriate was kept from the *Applicant*. [69]

61 The Audanet assessment was not sent on 7 July 2017. It was sent on 10 July 2017 following a request by the *Applicant.*

62 *Applicant's* submissions in reply, p. 7, Item (c).

63 *Applicant's* submissions in reply, p. 7, Item (d).

64 See pages 16 and 18 (above).

65 *Applicant's* submissions in reply, p. 7, Item (e).

66 *Applicant's* submissions in reply, p. 7, Item (f).

67 *Applicant's* submissions in reply, p. 8, Item (g).

68 *Applicant's* submissions in reply, p. 8, Item (h).

69 *Applicant's* submissions in reply, p. 8, Item (i).

any particular quantum of repairs to an insured vehicle, or the fairness or reasonableness of hourly rates to be imposed by an insurer or insisted upon by a repairer. Those matters are left to market forces. The *Code* does not seek to interfere in those market forces. The evidence of the *Applicant's* expert raises issues irrelevant to these proceedings and for that reason has not been addressed. The *Code* does not venture into issues about whether the quantum of an assessment is fair or reasonable, as that is quite properly left as an issue between the insurer and its insureds, and will in each instance depend upon individual terms of individual policies. This is an industry wide *Code*.	j) The *Applicant* also notes that the PDS requires that the *Respondent* pay the "fair and reasonable" cost of repairs to a vehicle. This necessarily requires that an insurer arrive at a fair and reasonable market rate with respect to the repairs. It is unclear how the *Respondent* came to arrive at a market rate which is only two thirds of the rate adopted by NRMA preferred repairers, which are not private repairers as is the *Applicant*. The *Applicant* says that this is representative not only of the failure to act transparently but also the failure to act in accordance with the PDS[70].
23. It is not to the point that the *Applicant's* director a does not understand how Audanet works. The industry wide obligation mandated by the *Code* is not to be determined upon the idiosyncratic position of an individual repairer, whose state of knowledge-or capacity for comprehension, for that matter may vary widely from one individual repairer to another.	k) Paragraph 23, It is not the case that the *Applicant* has not heard of Audanet, he is primarily unaware of the description or grouping of tasks as no explanation of what is included is provided[71].
24. The evidence of The Audatex expert establishes that Audanet has a firm rational basis, grounded in extensive research and based on information harvested from verified and impeccable sources. Over 100,000 customers worldwide consisting of insurers and smash repairers use the product, which has an international staff of approximately 500 people constantly maintaining and updating the data base. Given the small size of Australia, the fact that there are over 800 users in Australia including numerous motor vehicle insurers as well as the smash repairers, is a telling piece of evidence.	l) Paragraph 24, The large sweeping statements put forward by The Audatex expert have not been backed up with documentation or real evidence as to their veracity[72].
27. The term "*transparent*" is descriptive in nature and which has a number of meanings. The online Cambridge Dictionary at https://dictionary.cambridge.org/dictionary/english/transparent lists three meanings: i) see through; ii) obvious; and iii) Without secrets.	m) Paragraphs 27 & 28, The respondent has reviewed two dictionaries but still does not accept that providing a quotation which bulks line items together without disclosing what line items are bulked together and times which are bulked together without disclosing what each time for each item, is clearly is not transparent[73].

70 *Applicant's* submissions in reply, p. 8, Item (j).
71 *Applicant's* submissions in reply, p. 8, Item (k).
72 *Applicant's* submissions in reply, p. 8, Item (k)
73 *Applicant's* submissions in reply, p. 8, Item (m)

28. The online Collins dictionary at https://www.collinsdictionary.com/dictionary/english/transparent i) permitting the uninterrupted passage of light, clear; ii) easy to see through, understand or recognize, obvious; iii) permitting the free passage of electromagnetic radiation; and iv) candid, open, frank.	
31. "*Transparent*" is such a general term with such a range of meanings that it would be impossible to define with certainty where the dividing line lies between behaviour which is transparent in one sense but not in another. For an example, someone may be perfectly '*candid, open and frank*' (one definition above) but not '*easy to understand' or 'obvious*'.	n) Paragraph 31, The *Respondent* suggests that the term 'transparent" is too complex and therefore can be disregarded. For this case it is an easy distinction. A clear response should have been provided to the estimate of the *Applicant*, identifying which line items were accepted and which work was not accepted, at what rate. None of this, in a meaningful way for the repairer was forthcoming. The assessor knew the repairer would not understand an Audanet estimate, as he was told so. To respond therefore in the manner adopted was hardly fair and transparent conduct[74].
34. The solution must be that if the word transparent is to be given any role in section 4 of the *Code*, it must be given a meaning capable of embracing a wide range of behaviour (as contemplated in the various definitions), or else either ignored (a difficult solution since it is there) or treated as ejusdem generis with "fair".	o) At paragraph 34, the *Respondent* submits that the meaning of "fair and transparent" should be tied and limited in meaning. The *Applicant* says that each word needs to be viewed as casting separate obligations on the insurer. "Fair" requires that the manner in which an assessment is undertaken is done fairly, which would include inspection of the car, by way of a visual or desktop inspection and consideration of a repairer's estimate. Contrary to the Respondent's submissions, the requirement that an insurer act in a "transparent" manner requires that the repairer must be able to understand the assessment[75].
35. On the assessor's evidence, he was both fair and transparent in his manner of consideration of the director's shop estimate. He told him he would consider it, and he did. He told him he would be using Audanet, and he did. He was candid, open and frank about the methodology he would adopt, and he was as good as his word. He held back no secrets: he considered the "*shop*" estimate when using Audanet and he generated an assessment as a result of a conscientious effort to reach a result reflecting his honestly held opinion.	p) Paragraph 35, Contrary to what is submitted, the assessor was not candid, open or frank with the director with respect to the *Applicant's* estimate nor his opinion on which items he was prepared to allow[76].
37. The necessary corollary of the director's argument is that for every assessment	q) Paragraph 37, the submission put forward by the Respondent is that the insurer would have

74 *Applicant's* submissions in reply, pp. 8-9, Item (n)
75 *Applicant's* submissions in reply, p. 9, Item (o)
76 *Applicant*'s submissions in reply, p. 9, Item (p)

undertaken in Australia, an insurer would have a potential duty to determine the level of expertise of each smash repairer (maybe each employee in each shop in a position to consider an assessment) and then tailor its assessment process to meet the particular needs and capabilities of each of those individuals. The proposition only has to be expressed to demonstrate its inanity. The director would prefer to have his own assessment marked up and placed in his hand. Another smash repairer may prefer an assessment in a different format. Another may already use Audanet. Another may use the NRMA (IAG) system. Is every insurer required to meet every such contingency on every occasion in order to comply with the *Code*? Obviously not.	to bend to each individual repairers' whim or fancy is not accurate. What is requested is an open and transparent discussion to identify the relevant repair methodology and process to be undertaken, taking careful note of each item and the time and rate estimated by the repairer[77].
39. Was the Assessor's manner of consideration fair? Yes. He observed his usual procedure which is applied to all his assessments. He carefully inspected the vehicle. He raised his concerns and issues with the director. He considered the director's quote, as he promised. He generated the Audanet quote just as he said he would do. The Audanet assessment upon which the director was authorised to repair the vehicle was generated taking into account the matters Mr [*NAME*]had observed and raised. It also accounted for the data provided by specialised assessing software used worldwide and by many of Australia's motor vehicle insurers including the Suncorp group (whose entities include but are not limited to AAMI, GIO, APIA), QBE, ALLIANZ, YOUI and others identified by The Audatex expert. He formed an honest opinion about the nature and extent of the damage. He used his standard office procedures (see statement of the *NSW/ACT Assessing Manager* as to the procedures in place) which ensure, by the consistent application of the Audanet platform with its independently generated times and operations, that all repairers are treated equally and assessed by the same standards and procedures.	r) Paragraph 39, the *Respondent* only provided the Audanet quotation some 3 weeks after the original attendance which is not helpful to the Applicant. The assessor compiled the estimate on his own away from the director and without the director's input or clarification or discussion about items that were in dispute[78]. s) The *Applicant* is well within their rights to know what work is accepted, what work is not accepted, what rate is to be applied and how much time each task should take. The *Applicant* further is within their rights to question or negotiate the times and rates with the *Respondent* and vice versa. Clearly such process can only be undertaken when clear and adequate information is provided. Further, by acknowledging that negotiation may take place, the *Respondent* acknowledges that the result of an assessment may not be fair[79].
41. It is plain that the director from the outset decided he would not accept an Audanet assessment process and insisted on a manual hand written physical assessment of his own	t) At 41, the *Respondent* contends that the *Applicant* refused to accept an Audanet assessment and is attempting to force insurers to adopt whichever method of assessment a

77 *Applicant's* submissions in reply, p. 9, Item (q)
78 *Applicant's* submissions in reply, p. 9, Item (r)
79 *Applicant's* submissions in reply, p. 9, Item (s)

printed quote. It is plain he still insists on this, as evidenced by his extensive evidence about his own lack of understanding of Audanet. These proceedings are a flagrant attempt to force the *Respondent*, and by extension the Australian insurance industry to abandon its impartial and objective assessing criteria under Audanet and to adopt idiosyncratic assessments based on the personal preferences of individual repairers.	repairer elects. This is incorrect. The *Applicant* simply wishes to be provided with an assessment in a format capable of being understood by the 96.6% of repairers in the Australian industry that do not use Audanet[80].
42. It is almost too simplistic to state that where the assessor generates an assessment using Audanet software, he is performing an assessment and not preparing a quote in the sense of being a "*repair*". Even if he did prepare a document styled "*quote*" (Audanet is an Assessment- see statement of Christopher Giles), it is for the purpose of assessing the cost of repairs. He is obviously not "repairing" the vehicle. Moreover this is totally irrelevant to the complaint. The submissions in relation to this are misconceived. Whist this is totally irrelevant to the complaint raised under section 4(2)(b)(ii), it is indicative of the confused and unfocussed approach of the complainant. The evidence and submissions in the complainant's case reveal many red herrings and irrelevancies, distracting from rather than assisting focus on an argument as to why the manner of consideration of the estimate was unfair or not transparent. 54. Paragraph 20 is misconceived and misrepresents the product. Autanet (sic) is an assessing tool: see statements of Christopher Giles and the assessor. It utilises times derived from manufacturers for use in the repair industry by repairers and for use by insurers in assessing repairs. The meaning contended for is non-sensical: Why would manufacturers provide themselves, via Audanet, with information published in their workshop manuals? 55. The submissions at paragraphs 21 and 22 are incorrect. Audanet was developed for the purpose of estimating repair costs. The submission at paragraph 21 compounds the earlier error whilst the submission paragraph 22 is wrong. The evidence is otherwise (see statement of Christopher Giles). Also the RX350 is listed and covered and as The Audatex expert as said, the Assessor used	u) Throughout the submissions, and particularly at paragraphs 42, 54 and 55, the *Respondent* makes mixed statements as to whether Audanet is an assessment tool or an estimation tool. The Audatex expert' own evidence is mixed on this point, referring at paragraph 2 of his statement to assessment, paragraph 9 to estimation and paragraph 6 refers to estimation and assessment. The difference between estimation and assessment is clearly relevant to the *Applicant's* complaint. An assessment of the *Applicant's* estimate by use of Audanet would necessarily include all entries from the *Applicant's* estimate. In contrast, the *Respondent*, after no explanation of items queried, has entered selected items from the estimate into Audanet and generated what can only be considered to be a new estimate, contrary to how it may be titled on the document itself[81].

80 *Applicant's* submissions in reply, pp. 9-10, Item (t)

81 *Applicant's* submissions in reply, p. 10, Item (u)

the appropriate data sheet for the 2009 RX350.	
45. On the matter of credit, the director has engaged in a number of practices which raise questions. He dismantled the Lexus in clear breach of his own obligations under the *Code*, which hindered the assessment. He must have known this would hinder the assessment. He placed unnecessary markings on the vehicle tending to confuse obfuscate the extent of damage and to hinder the assessment. He must have known this. He also must have known that a professional assessor could not be aided by such markings. The assessor found these exaggerated the extent of the damage. He failed to advise the Assessor that he had already quoted over $21,000 for repairs to old damage to the rear of the vehicle, when he must have known that fact would be relevant to the Assessor. He denies receiving documents which were in fact sent to him by email i.e. the Audanet assessment on 10 July 2017 (see Annexure H of the Statement of the assessor). He repaired the vehicle in possession of an authority for $7,800 but would have us believe he did not think he needed to query it, or that he was bound by it. If in fact had he not received the Audanet assessment, why didn't he ask for it before commencing repairs? His evidence in relation to the assessor's verbal approval and taking "*lots of photos*" and that the assessor would sort it out after his holiday is demonstrably false. The assessor gives a totally different account of the conversation, which is corroborated by his subsequent actions and notes. The director's account is inconsistent with the assessor's subsequent actions and contemporaneous file notes. The assessor's version of the conversation should be accepted.	v) Paragraph 45 is irrelevant. There was never any suggestion any prior damage was claimed - if it were considered a possibility by the assessor he should have said so – he didn't. It is clear that the assessor didn't complete the discussion with the director and completed reviewing the quote after the meeting which is in line with the *Applicant's* evidence[82].
47. The evidence of the *Applicant's* expert witness is neither impartial nor temperate. He feels apparently qualified to commence his report with the opinion that the *Respondent's* assessment is unlawful (para 10), based on some completely insupportable assertions, including the astounding and unsupported proposition that "*licenced repairers are the only legal entities legally allowed to compile repair estimates in NSW*" and that, that in	w) Paragraph 47, The evidence of the expert cannot be dismissed as suggested by the *Respondent* it identifies the rules in the Motor Dealer and Repairs Act 2017, The expert has provided his extensive experience of over 25 years within the industry and has extensive experience in repairing and assessing vehicles[84]. x) The expert's assessment of the quotation

82 *Applicant's* submissions in reply, p. 10, Item (v).

84 *Applicant's* submissions in reply, p. 10, Item (w).

assessing a vehicle using "*an Audanet quotation*" the assessor requires a repairer's licence. The leaps of logic are astounding, and insupportable. First, Audanet is an assessment tool (See statement Christopher Giles), and the documents generated are even headed "*Assessment*". The assessor's document is also headed "*Assessment*". The expert proves that he lacks a basic understanding of Audanet, a matter which must call his competence into question given the *Respondent's* evidence about Audanet's widespread use and market penetration worldwide. He has no qualifications to proffer legal opinions, and it counts seriously against his credit that he makes such assertions. As an aside, his assertion that neither the *Respondent* nor the assessor holds a repairer's licence is both inadmissible hearsay, and something which if true, one would expect the claimant to prove by tender of the relevant searches. It is not possible for the expert to prove this merely by asserting his "*personal knowledge*", whatever that might be. It can be no more than an assumption, which has not been proved[83]**.** Whist unimportant in the scheme of the case, it is another pointer to the lack of objectivity and lack of foundation for the evidence of this witness.	must be considered in light of the very limited evidence as to the so-called widespread use of Audanet. It is submitted that none of the assessors of the *Respondent* have attended any courses or have any documentation relating to their training or expertise using Audanet[85].

EXPERT DETERMINER'S REQUEST PURSUANT TO Cl. 5.3(c) of the Determination Rules

94. On 19 September 2018, pursuant to Clause 5.3(c) of the *Rules* I invited the *Parties* (the `*Request*') to make simultaneous submissions on:

1. Whether the Determiner may have regard to Clauses 6 and 7 of the *Code* in deciding this matter?
2. On the assumption that the Determiner may have regard to Clauses 6 and 7 of the *Code*, how should either or both of those clauses be taken into account in deciding this matter?

I also invited the *Parties* to simultaneously serve on each other any comments they wished to make on the other party's submissions. The *Parties* made their respective submissions and comments during the period 20 – 24 September 2018. They are tabulated against each other below.

83 In my opinion, these comment could be applied equally to The Audatex expert' evidence about OEMs and repair shops.

85 *Applicant's* submissions in reply, p. 10, Item (x).

95.

***Applicant's* 20 September 2018 submissions**	***Respondent's* 24 September 2018 comments**
1. The applicant says there appears there should be no barrier to the Determiner having regard to clauses 6 and 7 of the *Code* in deciding this matter, however, notes that each sub-clause of clause 6 appears to be able to be applied separately. Sub-clause 6.4 is not applicable to the current claim[86].	
2 The precursor of sub-clause 6.1 is that the reference to: *"Where competitive estimates are sought'* must refer to: i. *"estimates"* sought by the insurer, not generated by it; ii. as *"estimates"* is plural there must be more than 1 estimate; iii. with use of the word *"and'* after sub-clause 6.1 (b): 1. (a); (b) and (c) of sub-clause 6.1 are cumulative and must be read together; 2. *"competitive estimates"* must refer to estimates provided by repairers[87].	1. The applicant is correct in stating that clause 6.1 does not apply. It correctly states in paragraph 2 that "competitive estimates" must refer to estimates provided by repairers. We would add that the word "*competitive*" refers to the common situation where two or more repairers compete to secure the work by submitting estimates at the invitation of the insurer. That is not the situation in this case. In this case, the owner wanted the *Applicant* to repair the vehicle, and only the *Applicant* provided the insurer with an estimate. The language used is also in the plural, which confirms this construction[88].
3. The corollary must be, if [2], above, is correct, that sub-clause 6.1 only applies when: i. *"estimates"* are provided by repairers; and ii. there is no contemplation that the provision will apply when an *"estimate"* is provided by the insurer, itself[89].	
4. The *Applicant's* earlier submissions were directed to the insurer, by using the AudaNet estimating software, generating its own *"estimate".* The *Applicant* submitted that the insurer was not entitled to generate its own estimate and subclause 6.1(c) tends to support that submission, in that there is no reference to an estimate generated other than by a repairer. The insurer submitted to the contrary - that the insurer did not generate an estimate but carried out an assessment of the repairer's estimate - see references [7 (d); (e); (f)]; [9]; [10]; [11];	

86 *Applicant's* Request submissions, p. 2, par. 1.
87 *Applicant's* Request submissions, p. 2, par. 2.
88 *Respondent's* Request comments, p. 1, par. 1.
89 *Applicant's* Request submissions, p. 2, par. 3.

[12]; [16]; [18]; [22]; [25]; [26); [35]; [36]; [37]; [39]; [41]; [42]; [45]; [47]; [48]; [49); [51]; [52]; [53]; [59]; [61]; [65]; [67] [90].	
5. In particular, the insurer submitted at [59] that: *"On the facts it is an assessment',* which contrasted with its admission at [49]: " ... *(all items in the Applicant's quote are not referred to in the Audanet estimate)"* [emphasis added] [91].	2. The *Applicant* submits that the single use of the word "*estimate*" at paragraph 49 of the *Respondent's* submissions in relation to the Audanet assessment is an "*admission*". It is not. It is a normal use of the language to describe an assessment of a price as an estimate of the likely reasonable cost of repairs. The tenor and the balance of the submissions can leave no doubt that the Audanet assessment was in fact an assessment. It may be an "*estimate*" in the sense of being a reasoned calculation of the fair and reasonable cost of repairs, but not an "estimate" in the sense of being a quotation for doing the job. The "*estimate*" provided by a repairer is his quote, or offer, for doing the repair job. Self evidently, all assessments are estimates in the sense of being reasoned calculations before the job is undertaken. They cannot be anything else. It is for this reason that the repair industry allows "*additional*" quotes or estimates for further work, or changed methodology, where that work or change is required after the vehicle is stripped down and the full extent of damage is discovered, or say new parts are unavailable and recycled parts need to be repaired instead of replaced[92].
6/ In the definition section of the *Code* a paraphrased definition of "assessor" is of *a person engaged to assess motor accident damage and negotiate repair estimates.* This appears to differentiate between an estimate from a repairer and an assessment by an assessor, which the insurer's submissions seek to highlight[93].	
7. If the insurer's submissions are preferred, that being the AudaNet software develops an assessment "of the cost of repairs" - see [42] of insurer's submissions - *"it is for the purpose of assessing the cost of repairs"* then sub-clause 6.1 may not apply as an estimate goes beyond merely the cost of repairs, as it also includes what repairs are required. If it is accepted, contrary to the insurer's submissions, the AudaNet assessment is actually an estimate the same as that provided by a repairer, then	

90 *Applicant's* Request submissions, pp. 2-3, par. 4.
91 *Applicant's* Request submissions, p. 3, par. 5.
92 *Respondent's* Request comments, p. 1, par 2.
93 *Applicant's* Request submissions, p. 3, par.6.

sub-clause 6.1 may still not apply, as that estimate was not generated by a repairer, but by an insurer[94].	
8. For sub-clause 6.1 to be avoided by an insurer providing its own estimate certainly seems contrary to the spirit of the *Code*, as well as being contrary to the subject of the *Applicant's* initial complaint, that an insurer cannot generate its own estimate[95].	3. The submission at paragraph 8 that it is contrary to the spirit of the *Code* that the insurer not be caught by clause 6.1 seems to ignore the intent of clause 6.1, which is to ensure that where 2 or more repairers are invited to submit competitive tenders, they all know what is required and have a level playing field to ensure fairness[96].
9. That aside, whether sub-clause 6.1 applies or not, the applicant submits the balance of clause 6 could, if relevant, be applied in the current circumstances[97].	
10. Where the above submissions are relevant is that at no time did the insurer *"state clearly* (to the repairer) *the preferred estimation methodology to be applied"* – as referred to in sub-clause 6.2 (a). Further, any *"alternate estimate"* referred to in sub-clause 6.2 (b), if obtained, should be from another repairer (emphasis added) not internally generated by the insurer[98].	4. Further, clause 6.2 specifically provides that insurers are free to obtain further estimates, without reference to the source or nature of such estimates. It states that: *"(a) Insurers will state clearly the preferred estimation methodology to be applied;* *(b) Subject to sub-clause 6.2(a), Repairers may submit an estimate in realistic times and rates recognising the Insurer's right to obtain an alternative estimate…"*[99] 5. Hence, even though an insurer may require an estimate on one basis, the *Code* provides the insurer is still free to obtain a further estimate on another[100]. 6. It would be procedurally unfair to proceed with the consideration of clause 6.2 in the determination of these proceedings because this was not a matter covered by the initial complaint and no evidence was addressed to the issue of what had previously been said to this repairer about the preferred methodology of his estimation methodology. What became clear, however, from the assessor's evidence, was that the repairer was using no established or even describable methodology in estimating his times[101]. 7. Further, the repairer must have previously known that the *Respondent* used the Audanet

94 *Applicant's* Request submissions, p. 3, par.7.
95 *Applicant's* Request submissions, p. 3, par.8.
96 *Respondent's* Request comments, p. 2, par 3.
97 *Applicant's* Request submissions, p. 3, par.9.
98 *Applicant's* Request submissions, p. 3, par.10.
99 *Respondent's* Request comments, p. 2, par 4.
100 *Respondent's* Request comments, p. 2, par 5.
101 *Respondent's* Request comments, p. 2, par 5.

	methodology because he made it abundantly clear to the *Assessor* at the outset that he would not accept Audanet methodology. It might be inferred that the *Respondent* had informed him of this some time previously, but this is a matter which could have been addressed by precise evidence but was not because of the parameters of the complaint which was made. Natural Justice requires that a party know what case it has to meet and to have the opportunity to do so[102].
11. Finally, the nub of clause 6, relevant to this matter, is referred to in sub-clause 6.3. There is no cumulative application of the sub-clauses of clause 6, each component can stand alone. Accordingly, if the insurer submits that clause 6 cannot apply because: a. the insurer worked off an AudaNet assessment rather than an estimate; or b. the estimate was internally generated and not from another repairer such a submission should be rejected, again because by an insurer doing so: i. it is acting contrary to the *Code*; ii. seeking to avoid the constrictions placed on it by an artificiality not available to insurers that act according to the Code[103].	8. The applicant goes on to deal with clause 6.3 and argues at paragraph 11 that the insurer cannot argue that it was working off an Audanet assessment rather than an estimate, or that the estimate was internally generated and not from another repairer, because "*to do so would be contrary to the Code*" and "*seeking to avoid the constrictions placed on it by an artificiality not available to insurers…under the Code*". The argument is circular. The argument begs the relevant question: what is the conduct complained of and what is the alleged breach of clause 6.3 it entails? [104]
12. Sub-clause 6.3, in particular, spells out that an insurer may not: a. *Unreasonably or arbitrarily alter the repairer's estimate; unless* b. *It insists on changing the repair process* ...[105].	
13. The applicant says in this instance, the insurer did *"unreasonably or arbitrarily alter the repairer's estimate"* but failed to give any details of *"changing the repair process"*[106]*.*	9. In paragraph 13, the assertion is made that the insurer "*did unreasonably or arbitrarily alter the repairer's estimate*". No example of any alteration of the repairer's estimate is given. This is no doubt because no alteration to the estimate was made. The estimate was not altered. It was not accepted as the basis for an assessment in the first place, and the assessment of the reasonable cost of repairs was made on a different basis: a basis the repairer knew (or must have known) would be applied and which he made clear to the assessor he would refuse to accept. The assessor told him the assessment would be made under Audanet and that he would take

102 *Respondent's* Request comments, p. 2, par 7.
103 *Applicant's* Request submissions, p. 3, par.11.
104 *Respondent's* Request comments, p. 2, par 8.
105 *Applicant's* Request submissions, p. 3, par.12.
106 *Applicant's* Request submissions, p. 4, par.13.

	his assessment for consideration only. It was in fact subsequently assessed under Audanet[107]. 10. The *Applicant* is unable to point to any alteration complained of[108].
14. When applying sub-clause 6.3 with sub-clause 4.2 (b) (ii) any *"changing the repair process"* must be done in a *"fair and transparent manner".* The applicant says the insurer has never done so and its conduct throughout has only ever amounted to an arbitrary alteration to the repairer's estimate and was unreasonable[109]. 15. The insurer, although subsequently submitting the 7 July 2018 email was sent by mistake, only included in that email an amount it was prepared to authorise for repairs without any transparent, the applicant also says unfair, detailing of why an amount less than the repairer's estimate was being allowed. Sub-clause 6.3 says such is not allowed as it inhibits any *"fair and transparent negotiation"* on the repairer's part, particularly when the insurer knew at the time: a. The repairer did not understand the AudaNet system; b. The repairer would not know what had or had not been allowed from the original estimate of the repairer; c. The repairer would not know what: i. repair methodology the insurer had in mind; ii. what parts were or were not allowed; or iii. what materials could be used[110]. 16. Whilst not particularly relevant to this issue, the repairer had already commenced the repairs when the 7 July 2018 email arrived - relying on the verbal authorisation he says was given by the assessor. However, the next communication from the insurer was to forward its arbitrary alteration to the repairer's estimate on 10 July 2018, once requested by the repairer. Thereafter, no communication followed for a significant period of time[111].	11. To form an argument, the applicant conflates clause 6(2) with the requirement under 4.2.(b)(ii), it submits at paragraph 14 that "*changing the repair process*" must be done in a "*fair and transparent manner*", and it asserts without giving examples, that the "*insurer's conduct throughout has only ever amounted to an arbitrary alteration to the repairer's estimate and was unreasonable*". That is not what clause 4.2(b)(ii) says. It says: *"The insurer Insurers will:* *(b) in their dealings with repairers in relation to their repair work:* *(ii) consider estimates in a fair and transparent manner, and will not refuse to consider an estimate on unreasonable or capricious grounds".* [112] 12. Submissions have previously been made on the effect of clause 4.2.(b)(ii). It is concerned with the way in which the insurer internally considers the estimate: that it be transparent (i.e. met by telling the repairer the insurer would consider the estimate but would be applying an Audanet assessment to determine repair costs) and fair (i.e. the repairer was told what system would be used, and in fact that system was used, and in fact that system was used "*across the board*" with the *Respondent's* repairers so all were on an equal footing). To do what the director required would place him on a different footing to all the other the *Respondent's* retained repairers, and be unfair to the rest. [113] 13. There was no arbitrary alteration to the estimate. There was no element of unreasonableness. The *Respondent* applied

107 *Respondent's* Request comments, p. 2, par 9.
108 *Respondent's* Request comments, p. 2, par 10.
109 *Applicant's* Request submissions, p. 4, par.14.
110 *Applicant's* Request submissions, p. 4, par.15.
111 *Applicant's* Request submissions, p. 4, par.16.
112 *Respondent's* Request comments, p. 3, par 11.
113 *Respondent's* Request comments, p. 3, par 11.

	the "*across the board*" standard to this assessment as it would to any other[114]. 14. What clause 6.3 in fact says is this: *"Without limiting Insurers' and Repairers' rights to fair and transparent negotiation, the Insurer may not unreasonably or arbitrarily alter the Repairer's estimate unless the Insurer insists on changing the repair process, parts or materials to be used (subject to sub-clause 7.4)"* [115]. 15. Clause 6.3 authorises a repairer (sic) (insurer?) to arbitrarily or unreasonably alter a repairer's estimate IF the insurer insists on changing the repair process, parts or materials. This is the necessary corollary of the clause[116]. 16. Clause 6.3 must impose an objective test of arbitrariness and unreasonableness. This must necessarily take into account the standpoint of both sides, not just one[117]. 17. The **right** to fair and transparent negotiation does not come from clause 6.3, nor is there any absolute prohibition on a repairer arbitrarily or unreasonably altering an estimate. An example might be an insurer enforcing an hourly rate which it apples across the board. To a specific repairer who might have higher overheads or be less efficient than most, the alteration of his hourly rate would be both arbitrary and unreasonable. To the insurer it would be neither arbitrary nor unreasonable, because for business reasons and taking into account the amount of work it might bestow, it wold be sound economically and reasonable (and fair) to treat everybody the same way. If the offer is uneconomical for the individual repairer because of his higher overheads or less efficient business, he can refuse it[118]. 18. In applying the same standard to all repairers it deals with (the Audanet platform), the *Respondent* is ensuring fairness of treatment between repairers and the *Respondent* and transparency of

114 *Respondent's* Request comments, p. 3, par 13.
115 *Respondent's* Request comments, p. 3, par 14.
116 *Respondent's* Request comments, p. 3, par 15.
117 *Respondent's* Request comments, p. 3, par 16.
118 *Respondent's* Request comments, pp. 3-4, par 17.

	process. Arbitrariness is removed from the process, because the Audanet based the *Respondent* assessment provides a rational foundation for the times based on established factual times, not "*guesstimates*". It bases operations on the manufacturers' own workshop technical manuals, which a competent repairer must have regard to in order to estimate a vehicle and to repair it to manufacturers' standards (see primary submissions) [119]. 19. In any event, the Applicant has no complaint as on 10 July 2017, the Audanet assessment was sent to the repairer detailing the repairs, parts and any altered methodology in writing[120]. 20. The Applicant says that by the time it received the Audanet assessment, it had already started repairs "*based on Mr [NAME] verbal authority*". This allegation was disputed and Mr *[NAME]* contemporary notes established that he had not authorised repairs and that repairs should not be authorised with this repairer. In fact, he wanted to remove the vehicle to another repairer. As from 7 July 2017, the repairer knew the sum authorised and if he had a problem with that sum, he ought to have contacted the *Respondent* and could have done no further work on the vehicle (assuming he had done anything by that time)[121].
17. The importance of the obligations arising through clause 6 is highlighted by the relevant obligations that arise via clause 7[122].	
18. In this instance sub-clauses 7.4; 7.5 and 7.7 do not apply and 7.6 is not relevant. It would appear the insurer failed to comply with sub-clause 7.1. It may or may not have relevance to subsequent events, although it is another demonstration of the insurer not complying with the *Code*[123].	21. The Applicant submits clause 7.4, 7.5. 7.6 and 7.7 do not apply or are not relevant. The Respondent agrees[124]. 22. Paragraphs 18-22 of the *Applicant's* recent submissions are all hypothetical. On the evidence, the repairer repaired the vehicle without regard to the *Respondent's* assessment. In his evidence, the director did not admit that his business received the

119 *Respondent's* Request comments, p. 4, par 18.
120 *Respondent's* Request comments, p. 4, par 19.
121 *Respondent's* Request comments, p. 4, par 20.
122 *Applicant's* Request submissions, p. 4, par.17.
123 *Applicant's* Request submissions, p. 4, par.18.
124 *Respondent's* Request comments, p. 4, par 21.

	Audanet Assessment on 10 July 2017. It seems to be conceded in submissions now[125]. 23. On the facts, had he repaired it according to the Audanet assessment he would have been fully covered at law on a number of fronts. Firstly, he would have had available a cross-claim against the *Respondent* based both on contract and estoppel in relation to any warranty claim arising out of the repair if done according to the *Respondent's* specifications. He would have been further protected by the fact that the repair methodology and processes were generated directly from the manufacturer's technical repair manuals and therefore demonstrably done in accordance with manufacturer's requirements. The amount of time spent would have been justified by reference to the same manufacturer's recommendations, thus providing persuasive and independent evidence of expenditure of appropriate time on tasks. The written estimate he received on the 10 July 2017 along with the email authority he received on 7 July 2017 provided written confirmation of times, operations parts and methodology to be used in the repair of the vehicle. Had he conformed with the *Respondent's* estimate he would have been covered at law for the types of warranty claims envisaged in clause 7[126]. 24. In addition, if he had had any qualms he could have activated clause 7 by raising an issue with the *Respondent* and seeking to negotiate the appropriate protection[127]. 25. Clause 7.2 relates ONLY to a warranty to repairers about poor workmanship. Where a repairer follows the methodology, parts etc. stipulated by a repairer, a failure say of a part or a failed repair method would not be covered by the warranty in any event[128]. 26. As an aside, clause 7.2 is a difficult clause and can be read in two ways. In terms, it only applies "*unless otherwise required by law…*". "*Otherwise*" is one of the widest terms used in law, and embraces both positive and negative alternative propositions. The term "*unless otherwise*" is somewhat similar to a double negative. It could mean that if there is no other

125 *Respondent's* Request comments, p. 4, par 21.
126 *Respondent's* Request comments, p. 4, par 23.
127 *Respondent's* Request comments, p. 5, par 24.
128 *Respondent's* Request comments, p. 5, par 25.

	legal liability, there is a requirement for a warranty. But it could also mean that if the law requires there be no warranty, then no warranty shall be given. The passage is quite ambiguous. In terms of the analysis contained in paragraph 23 above, there would be strong grounds for arguing – if the *Respondent's* Audatex Assessment was followed - that the warranty would not be required or be appropriately limited[129]. 27. As it was not raised at the time of putting on evidence, there is no evidence whatsoever about compliance or otherwise with clause 7.1. It is procedurally unfair to consider it, and any finding could not be based on evidence and would thus be erroneous[130].
19 Alteration to the repairer's estimate can significantly affect the obligations that are cast on a repairer pursuant to sub-clauses 7.2 and 7.3. If an insurer can unreasonably or arbitrarily alter a repair methodology this must affect the capacity of a repairer to provide the mandatory warranty referred to in sub-clause 7.2[131].	28. Paragraph 19 talks about alterations of a repairer's estimate affecting the repairer's obligations under clause 7.2 and 7.3. This is entirely hypothetical and, when considered in the abstract, any scenario may be possible. An insurer may propose a better methodology and thus improve the repairer's potential vis a vis his obligations or liability[132].
20 Further, without knowing what methodology the insurer expected may inhibit a repairer's ability to rely on a warranty provided by a manufacturer or distributor, etc., if the repairs are properly undertaken by the repairer[133].	29. Paragraph 20 is speculative and abstract. It raises one of many possibilities and has not been related to the evidence. It is an example of the unfairness and prejudicial nature of attempting to consider sections of the Code after the evidence is closed and when these sections were not flagged as relevant at the time of presentation of the case. It is equally viable to say the opposite based on some other set of factual propositions[134].
21 When estimating necessary repairs and their cost, the repairer takes into account the necessities arising to rely on a manufacturer's or distributor's warranty. Any arbitrary alteration to the estimate must put that warranty at risk for possible failure allow the warranty to be relied on, the repairer is entitled to understand this[135].	
22 Ultimately, if the insurer insists on a methodology that excludes, for example, a manufacturer's warranty, the repairer may refuse to do the repair. If the insurer bases its	30. At paragraph 22, the applicant correctly says that if the repairer so wishes, he may refuse the repair. The grounds of refusal are not as limited as suggested in paragraph 22. If

129 *Respondent's* Request comments, p. 5, par 26.
130 *Respondent's* Request comments, p. 5, par 27.
131 *Applicant's* Request submissions, p. 4, par.19.
132 *Respondent's* Request comments, p. 5, par 28.
133 *Applicant's* Request submissions, p. 4, par. 20.
134 *Respondent's* Request comments, p. 5, par 29.
135 *Applicant's* Request submissions, pp. 4-5, par. 21.

re-estimation on another repairer's estimate, and the re-estimation is based on the second estimate, the repair can still proceed - but via the second repairer. When an insurer generates its own estimate this, of course, cannot apply[136].	he feels the proposed methodology is bad, or he does not feel competent to carry it out, or he does not understand it, or own the relevant equipment, of feel there is not sufficient profit in it, he should in the first instance discuss it with the insurer, and if a mutually agreeable position cannot be negotiated, refuse to do the job.
23 The applicant answers the questions posed by the determiner as: i. yes to question 1; and ii. as to question 2 says the obligations arising through clauses 6 and 7 of the *Code* demonstrate why compliance, by the insurer, with sub-clause 4.2 (b) (ii) is necessary.	

96. The *Respondent's* submissions and the *Applicant's* comments follow.

Respondent's 20 September 2018 submissions	**Applicant's 24 September 2018 comments**
The *Respondent* submits that the determiner should not have regard to clauses 6 or 7 of the *Code* in deciding the matter[137].	
1. The complaint was one raised specifically under clause under Clause 4(2)(b)(ii) of the *Code*. The evidence which was put on by the *Respondent* addressed the specific matters raised by Clause 4(2)(b)(ii) of the *Code*[138]. The clause is concerned not with the level or extent of interaction between the assessor or insurer and the repairer, but the way in which the insurer conducts its assessment of the repair cost estimate.	1. The insurer's primary submission to question 1 is no. The basis is said to be, as best as the applicant can conclude, is because the applicant's complaint was based solely on clause 4.2 (b) (ii) of the *Code.* 2. This submission should be rejected. 3. The document headed "Certificate – Mediation was unable to resolve the dispute" signed by the appointed mediator, Mr Massey, listed the "Unresolved Issues" arising from the mediation, as follows: i. The value of the claim; ii. Whether the generally agreed actions of the *Respondent* constituted unfair, unreasonable conduct in breach of the *Code* and whether those actions were transparent; iii. The future methodology for dealing with estimates and repairs. 4. Certainly, clause 4.2(b)(ii) of the *Code* was significant but not singled out by the applicant as being the only clause relevant to the breach alleged against the insurer. There was only one specific reference to the sub-clause in the origina submissions that accompanied the current application. If the insurer limited its evidence, directed only to part of one sub-clause of the

136 *Applicant's* Request submissions, p. 5, par. 22.
137 *Respondent's* Request submissions, p. 1, 1st par.
138 *Respondent's* Request submissions, p. 1, par 1.

	Code, without addressing what remained as the "unresolved issues", was a matter for the insurer. That forensic decision should now not limit the ultimate determination of the "unresolved issues"[139].
2. This raised for consideration the **manner** by which an insurer considers an estimate. …. The evidence directly addressed the manner in which the repairer's estimate had in fact been considered, and the manner in which the insurer went about assessing the cost of repairs to that vehicle. ….. **The clause is concerned not with the level or extent of interaction between the assessor or insurer and the repairer, but the way in which the insurer conducts its assessment of the repair cost estimate.**[140]	5. [2] of the insurer's submissions dated 20 September, last seek to confine the terms of reference of the current dispute to the "manner" in which an insurer considers an estimate. In other words, the "unresolved issues" were to be confined by the definition then imposed by the insurer, rather than as detailed by the mediator and dealt with in the *Applicant's* evidence and submissions. The *Applicant* does not agree the determination should be so confined and if any alleged "procedural unfairness" arises for the insurer, at this point in time, it has only arisen through its approach to the expert determination, and no other[141].
3. Consideration of clause 6 brings into play different elements which fall outside the scope of Clause 4(2)(b)(ii). Whilst that clause deals with the internal assessing procedures of the insurer, clause 6 changes the focus to the insurer's relations with the repairer[142].	**6.** The respondent's earlier submissions, as referred to in the applicant's submissions dated 20 September 2018 at [4], stressed the insurer "**assessed**" the cost of repairs, as estimated by the repairer. At [5] of its submissions in reply, the insurer described the *Assessor* as (its) " assessor" - an assessor in the *Code* is a person defined, in clause 3, as: *"means an employee, assessing contractor or agent of an insurer, who is engaged to* assess *motor vehicle accident damage and/or negotiate* r*epair estimates between insurers and repairers."* In [6] of those submissions, appears reference to *"utilising the Respondent's standard Audanet assessing system."* **7.** '**Assess**' or '**assessment'** appears approximately 70 times and the word '**assesso**r' appears 15 times in the insurer's submissions in reply. The submissions now made by the *Respondent* (dated 20 September 2018) are that the Audatex software produced an estimate, which is the same word it applied to the document produced by the repairer, which it previously said it assessed. The *Applicant* now expects the *Respondent* to submit the words "**estimate**" and "**assessment**" are interchangeable - which the *Applicant* respectfully submits they are not and which the *Respondent*, in its earlier submissions went to significant lengths to say it was not undertaking an estimate.

139 *Applicant's* Request comments, p. 2, pars 1-4.
140 *Respondent's* Request submissions, p.2, par 2.
141 *Applicant's* Request comments, pp. 2-3, par 5.
142 *Respondent's* Request submissions, p.2, par 3.

	8. Further, the *Applicant* submits that the Code of Conduct should be read in its entirety. The *Respondent* appears to be suggesting that the only relevant consideration in the application is with respect to the insurer's obligations as to its dealing with the repairer. However, clause 4.2(b)(ii) specifically refers to consideration of "estimates". It is therefore difficult to read clause 4.2(b)(ii) without reference to clause 6, which is titled "Estimate, Repair and Authorisation Process". The *Applicant* submits that clause 6 of the *Code* necessarily provides further direction on the manner in which both insurers and repairers are to behave when engaging in that process. To consider clause 4.2(b)(ii) in a proper manner, it is necessary to have in mind clause 6[143].
4. This was not the focus of the evidence which was led in the case, and procedural unfairness would result if it were now attempted to apply clause 6 or 7 to the evidence which was presented in answer to a specific complaint under Clause 4(2)(b)(ii) [144].	
5. Clause 6.1 is irrelevant, so should not be referred to. …. Clause 6.1 does not apply[145].	
6. Clause 6.2 does not appear to be relevant. No enquiry or evidence was addressed to ascertain how, when and what was stipulated to the repairer in relation to the insurer's preferred estimation methodology in relation to clause 6.2.(a). The following subclauses (b) and (c) are merely permissive[146].	
7. Clause 6.3 introduces fresh concepts into the proceedings about insurers not "*arbitrarily*" or "*unreasonably*" altering repairers' estimates unless the insurer insists on changing the repair process parts or materials to be used. These matters are well outside the scope of Clause 4(2)(b)(ii) [147]. …	
8. Clause 6.4 appears irrelevant[148].	
9. Clause 7 is concerned with warranties[149]. ..	9. Similarly, clause 7, which details each party's responsibilities as to Repair Warranties, assists with respect to understanding the circumstances that comprise part of the subject of the applicant's complaint. The applicant rejects that it is possible to consider any complaint made pursuant to any clause of the Code without

143 *Applicant's* Request comments, p. 3, pars 6-8.
144 *Respondent's* Request submissions, pp.2-3, par 4.
145 *Respondent's* Request submissions, p.3, par 5.
146 *Respondent's* Request submissions, p.3, par 6.
147 *Respondent's* Request submissions, p.3, par 7.
148 *Respondent's* Request submissions, p.3, par 8.
149 *Respondent's* Request submissions, pp.3-4, par 9.

	proper consideration to the Code in its entirety, including not only clauses 6 and 7 but also the Preamble, which reference for the *Code* to provide minimum standards as to transparency, disclosure and fairness[150].
10. Without knowing what facts are to be applied to which sections of Clause 7, it is impossible to embark on an analysis of the efficacy of any of the parts of Clause 7, which may be affected by the Consumer Law (Cth) and the residual State consumer protection laws[151].	
11. The question by the Determiner in relation to clause 7 is answered in the negative. It is impossible to know which of the provisions is envisaged as potentially relevant, and to expect the parties deal with all of them on a speculative basis absent the application of any particular fact scenario so onerous as to be futile, and without knowing what case one has to meet, it is procedurally unfair[152].	
12. In relation to clauses 7.2, 7.3, 7.4, 7.5, 7.6 and 7.7, none of these formed part of the complaint and were therefore not addressed in the evidence. They should not now be considered at a time when only submissions, not founded in evidence, can be made and when those submissions must be speculative and non specific absent some guidance as to their relevance[153].	
On the assumption that the Determiner may have regard to Clauses 6 and 7 of the *Code*, how should either or both of those clauses be taken into account in deciding this matter?	
1. Clause 6.1 (a) is not a competitive estimate. The section does not apply[154].	
2. Clause 6.2 (a) has not been the subject of evidence. It was not relevant to the complaint under clause 4. Procedural fairness precludes reliance upon it. Clauses 6.2 (b) and (c) are merely permissive[155].	
3. Clause 6.3[156] a. .. clause 6.3 is not activated just because the assessor and the repairer disagree. …. It cannot be said that, if there was an alteration to	

150 *Applicant's* Request comments, p. 3, par 9.
151 *Respondent's* Request submissions, p.4, par 10.
152 *Respondent's* Request submissions, p.4, par 11.
153 *Respondent's* Request submissions, p.4, par 12.
154 *Respondent's* Request submissions, p.4, par 1 re Cl. 6.
155 *Respondent's* Request submissions, p.4, par 2 re Cl. 6.
156 *Respondent's* Request submissions, pp.4-6, par 3 re Cl. 6.

the estimate, that it was either arbitrary or unreasonably altered. b. …. This was not a case of "*altering*" the repairer's estimate. It was a case that the process of the insurer rendered the repairer's estimate otiose from the outset. The *Assessor* did not require it, and only accepted a copy "*for consideration*" in the context that he said he was always going to use Autadex (sic) as the estimating tool. c. The Autadex (sic) report sets out the repair process operations, times, parts and materials which in the *Assessor*'s view, represented a generous assessment. If there are differences between the parts, methodology and times, they are set out in the Audatex assessment. For this further reason there is no breach of clause 6.3. There was no arbitrary or unreasonable alteration of the estimate. There was a new methodology and extent of repair reflecting the actual claim related damage, not the inflated repairer's version.	
4. No evidence or complaint relates to clause 6.4.	
Clause 7 1. We repeat the comments above in paragraphs 9 -12[157].	
2. In relation to clause 7.4, the *Respondent* did not address this in the evidence as it was not a matter raised in the complaint. Attention needs to be given to what constitutes, relevantly, a "*repair method*". It is now too late to address this in the evidence, and to explore the boundaries of repair methods which might or might not be caught. What is necessary to activate the section is that "*the repairer and insurer are unable to reach agreement on that change*". This entails a dispute, and a failure to negotiate or to reach agreement. This did not occur because the repairer, after receiving the authorization, failed to contact the *Respondent* and failed to initiate any dispute in relation to either the repair methodology, parts, or price. Rather, as was submitted above, he simply elected to repair the vehicle on his own terms and in his own way[158].	
3. There is no occasion for clause 7.4 to arise because on the facts the repairer repaired the vehicle according to his own estimate[159].	
4. There is also thus no reason to consider clause 7.5[160].	

157 *Respondent's* Request submissions, p.6, par 1 re Cl. 7.
158 *Respondent's* Request submissions, p.6, par 2 re Cl. 7.
159 *Respondent's* Request submissions, p.6, par 3 re Cl. 7.

160 *Respondent's* Request submissions, p.6, par 3 re Cl. 7.

CONSIDERATION

The *Code*

Background

97. In response to ongoing complaints from the sector, the Federal Government announced, on 31 August 2004, a Productivity Commission (`*PC'*) inquiry into the commercial relationship between smash repairers and insurance companies, including the rates paid by insurance companies for smash repair work[161].

98. The PC's Report into the Smash Repair and Insurance Industry and the Government's Response to the Report were released on 19 August 2005. The Report found that conflict, disagreement and disputes have characterised relations between repairers and insurers for many years. There is disagreement about, amongst other things, quotation systems, which types of parts to use, repair methods, and rates … of payment. Overall, this has led to an adversarial environment between the industries, characterised by high levels of mistrust.[162]

99. The PC found the relationship between smash repairers and motor vehicle insurance companies had deteriorated to the degree that it recommended that the Australian Government facilitate and promote the development and implementation of an industry-wide Code of Conduct (the *Code*) in respect of the relationship between insurers and repairers as soon as possible.

100. In its response to the PC Report (`*Response*') the Government considered that many of the problems identified in the PC report stem from a lack of clarity in business relationships between insurance companies and smash repair businesses and that transparent markets are innately less vulnerable to manipulation and make risk easier to manage[163].

101. In its Response the Government restated its commitment to industry self-regulation to address marketplace problems as an alternative to regulation. The Government's proposal was firstly, that all voluntary approaches should be explored prior to imposing a mandatory industry-wide code of conduct on the parties[164]. Secondly, if voluntary agreement cannot be reached between the four major insurers and the Motor Trades Association of Australia within six months from the release of the Response, the Government will require the four major insurers to develop a voluntary code, in accordance with the Response, within an additional three months[165]. However, should all voluntary approaches fail, the Government said it would examine further regulatory options, including the prescription of an industry code under the *Trade Practices Act* 1974.[166]

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161 Terms of Reference, Item 1(b)(i).
162 PC Report, Chapter 6, p.123, par 6.3.
163 Government's Response to PC Report, p.4, par 9.
164 Government's Response to PC Report, p.5, par 15.
165 Government's Response to PC Report, pp.5-6, par 16.
166 Government's Response to PC Report, p.6, par 17.

102. The Government also recommended in the Response that an Implementation Taskforce, with representation from the insurance and repair sectors, be established to oversee the development of an industry code for a period of six months. The Taskforce was to be responsible for developing a voluntary code as outlined in the Response and to provide progress reports and an implementation plan, to Government. By way of encouragement, the Government said that it would review the situation in nine months from the date of the Response, or sooner if required, with a view to assessing the extent to which the problems identified in the PC report had been addressed by industry. Should the review find that significant problems remain, or that no agreement has been reached, the Government would consider the appropriateness of further regulatory options, including the prescription of an industry-wide code of conduct under the *Trade Practices Act* 1974.

103. As it happened, a Chair was appointed to the Smash Repair and Insurance Industry Implementation Taskforce (`*Taskforce*') on 10 November 2005. The Taskforce comprised ten representatives from: the Insurance Council of Australia, Suncorp Metway, Allianz Australia, Insurance Australia Group, AAMI, (2 from) Motor Trades Association of Australia, Motor Trades Association of Queensland, Motor Traders Association of New South Wales and the Victorian Automobile Chamber of Commerce.

104. The Taskforce agreed to the *Code* on 23 May 2006 acknowledging that not all aspects of the *Code* would be ready for implementation on the first day of operation. The *Code* commenced on 1 September 2006. The current iteration of the *Code* commenced on 1 May 2017.

The text of the *Code*

105. The text of the *Code* follows.

> ***Code Preamble***
>
> It is in the interests of government, Insurers, Policyholders and Repairers to promote the efficient operation of, and consumer confidence in, professional and competitive Motor Vehicle insurance and repair industries in Australia.
>
> The economic activity created by a competitive Motor Vehicle insurance market and repair Industry market will create and maintain skilled employment, efficient customer service and viable and cost effective Motor Vehicle repair and insurance industries.
>
> The content of the Code and matters covered by it have been guided by the Australian Government's requirements and response to the Productivity Commission and the Terms of Reference, set by the Australian Government, for the Smash Repair and Insurance Industry Implementation Taskforce.
>
> Repairers and Insurers acknowledge that for the purposes of promoting an efficient and competitive Industry:

a. In recognition of Repairers right to freely structure their business arrangements, this Code provides for minimum, Industry-wide, standards in matters such as:
   - Transparency, disclosure and fairness in relation to Insurers' NSR schemes;
   - Transparency, disclosure and fairness in relation to quotation processes, times and rates, Repairer choice and use of parts;
   - Responsibility for quality, safety and warranties;
   - Minimum terms of payment; and
   - An independent external dispute resolution mechanism.

b. In recognition of Insurers' right to freely structure their business arrangements, and as required by the Government Response to the Productivity Commission's recommendations, this Code does not specify, on an Industry-wide basis, matters such as:
   - Minimum hourly rates or prices;
   - 'standard' hours for repair jobs;
   - Types of parts to be used;
   - Industry-wide PSR selection criteria and/or weightings for PSR criteria;
   - Compulsory choice of Repairer;
   - Requirements to spread work among Repairers; or
   - Particular conditions of guarantees.

Principles of the Code

This *Code* is intended to promote transparent, informed, effective and co-operative relationships between smash repairers and insurance companies, based on mutual respect and open communication.

Signatories agree to observe high standards of honesty, integrity and good faith in conducting their business with each other and in the provision of services to Customers, and observe Australian Law.

The *Code* will specify standards of fair-trading, process and transparency in the relationship between Insurers and Repairers. There should not be any alteration to the commercial relationships between individual Insurers and Repairers, other than as provided in this *Code* and in accordance with the principles of the *Code*.

The *Code* will provide efficient, accessible and transparent dispute resolution processes for issues arising between individual Repairers and individual Insurers.

The *Code* should also provide Signatories with access to the *Code Website* in which disputes can be lodged and recorded. Insurers and Repairers agree they have a responsibility to ensure vehicle repairs are authorised and carried out in a professional manner and to ensure that the safety, structural integrity, Presentation and utility of the vehicle are restored. In doing so:

1.1 Insurers will authorise repairs covered by the Policy with the objective of:
(a) restoring the safety, structural integrity, Presentation and utility of the Motor Vehicle;

(b) complying with relevant Australian law; and
(c) Fulfilling their obligations to the Policyholder in accordance with the provisions of their Policy and the provisions of the General Insurance Code of Practice relating to insurance claims.

1.2 Repairers will carry out repairs with the objective of:
(a) restoring the safety, structural integrity Presentation and utility of the Motor Vehicle;
(b) complying with relevant Australian law; and
(c) Fulfilling their obligations to the Insurer under the provisions of the applicable contract of repair.

1.3 Signatories agree that at all times they, their staff and their representatives will behave in a professional and courteous manner. This includes not engaging in, condoning, or permitting behaviour that is offensive, harassing, threatening, inappropriate, abusive, bullying or intimidating.

1.4 Signatories should seek to resolve their disputes informally wherever possible.

Code Sections

2 SCOPE

The *Code* is mandatory in New South Wales and is a voluntary *Code* in other jurisdictions across Australia and applies to all Signatories.

Signatories agree to be bound by the *Code*. Signatories agree that they will promote the *Code* and encourage non-Signatory Repairers and Insurers to become Signatories. Repairers and Insurers are encouraged to use the *Code* as a good practice guide in helping to settle disputes even if they are not Signatories.

This *Code* does not give rise to any legal relationship between Insurers and Repairers, other than any *Code* compliance required by law.

Where there is any conflict or inconsistency between this *Code* and any Australian law, that law prevails.

Nothing in the *Code* shall override existing legal rights and requirements between Insurers and their Customers.

The provisions of this *Code* are subject to relevant Australian law, including common law rights and obligations.

Nothing in this *Code* effects or prohibits the rights of either party to pursue dispute resolution elsewhere.

2.1 Signatories

A Person may become a Signatory by lodging a Code Signatory Notification Form with the CAC.

A Person ceases to be a Signatory by lodging a written notice advising the CAC they no longer wish to be a Signatory.

A Person may be required to comply with this Code by law.

3. DEFINITIONS

In this Code:

"Applicant" means the Person who starts an IDR, Mediation or Determination dispute process set out in clause 10, 11 or 12 of the *Code*.

"**Approved Determination Provider**" means a person, business, agency or group named in Schedule 2 of the Code.

"Approved Determination Scheme" is a dispute resolution process which follows the completion of both IDR and Mediation under this *Code*, as established by the CAC and published on the Code Website.

"Approved Mediation Provider" means a person, business, agency or group named in Schedule 1 of the *Code*.

"Assessor" means an employee, assessing contractor or agent of an Insurer, who is engaged to assess Motor Vehicle accident damage and/or negotiate Repair Estimates between Insurers and Repairers.

"AUR Training Package" means a national training package as approved by the Australian Government.

"Business Ownership Structure" means the principal owners of the business, or parent entity, which includes any other Person taking a financial interest in the business ownership.

"**CAC**" means the Code Administration Committee established in accordance with subclause 12.1 of this Code.

"Choice of Repairer Policy" means an Insurer's Policy terms in relation to whether it allows the Policyholder any choice, or otherwise, as to selection of Repairer.

"Claimant" means a Person covered by a Policy or a Person who has a claim against a Person covered by a Policy.

"Code" means the voluntary national Motor Vehicle Insurance and Repair Industry Code as agreed by the Smash Repair and Insurance Industry Implementation Taskforce on 23 May 2006 and any changes as agreed from time to time by the CAC.

"Code Approved Assessor" means an Assessor who complies with clause 4.3 of this code.

"Code Approved Estimator" means an estimator who complies with clauses 4.4 of this Code.

"Code Website" means www.abrcode.com.au .

"Customer" means a Policyholder and or Claimant.

"Determination" means the binding dispute resolution process referred to in clause 12 of the Code.

"Event" means an ICA classified event.

"ICA" means the Insurance Council of Australia Limited.

"IDR" means Internal Dispute Resolution process established by an Insurer under clause 11.2 of this Code.

"Industry" means the Motor Vehicle insurance and repair industries in Australia.

"Insurer" means a member of the ICA or any other Person who is in the business of insuring Motor Vehicles in respect of property damage and which, in the course of its business, engages or authorises Repairers to perform Repairs to Motor Vehicles.

"Mediation" means the mediation process referred to in clause 11.3 of the Code.

"Mediator" means an independent Person who is appointed to facilitate discussion between the Parties to a dispute to assist them to find a mutually acceptable resolution to their differences.

"Motor Vehicle" means a motor vehicle covered for damage under a Policy or which the Insurer otherwise requests the Repairer to Repair.

"MTAA" means the Motor Trades Association of Australia.

"NSR" means a network smash repairer being a Repairer promoted by an Insurer under an accreditation scheme operated by the Insurer and who is licensed to use the Insurer's insignia or trademarks.

"Parties" means the Applicant and the Respondent to a dispute arising under clauses 10, 11 or 12 of the Code.

"Parts Policy" means the policy established by an Insurer in relation to a Policyholder's insurance Policy, which explains the use of repair components in the Repair of the Motor Vehicle, which may include, but is not limited to, new, recycled (used or second hand) or non-genuine (aftermarket) or parallel parts.

"PDS" means a product disclosure statement required to be issued by an Insurer under Chapter 7 of the *Corporations Act* 2001.

"Person" means an individual or entity within the Industry.

"Policy" means a Motor Vehicle insurance policy over a Motor Vehicle issued by an Insurer, who is a Signatory to the Code.

"Policyholder" means an individual or entity who holds a Policy for a Motor Vehicle with an Insurer.

"Presentation" means the visual appearance of the repair work performed on the Motor Vehicle.

"Publicly Available" includes being published on the public pages of an Insurer's websites.

"Repair" or **"Repairs"** means any work done by a Repairer to repair a Motor Vehicle or any of its components, systems or parts, where the work is covered by a Policy and where a claim is or will be made by a Claimant including but not limited to:
(a) dismantling or assembling;
(b) part or component replacement, adjustment, modification, installation or fitting; or
(c) painting.

"Repairer" means any Person lawfully engaged in the business of effecting Repairs to Motor Vehicles in Australia.

"Repairer Representative Organisation" means the MTAA, any of its member or affiliated associations, or any other trade group or association representing Repairers.

"Respondent" means the Person with whom the Applicant has a dispute.

"**Serious Criminal Offence**" means any criminal offence under any Australian law for which an individual may be liable on first conviction to imprisonment for a period of not less than 2 years.

"Signatories" means those Insurers, Repairers and Repairer Representative Organisations which are listed on the Code register of Signatories and which have agreed to be bound by the provisions of this Code and which have not ceased to be bound by the Code.

"Sub-let Repairer" means a Person and/or entity, other than the Repairer, who carries out Repairs on a vehicle at the request of, or under contract with, the Insurer.

"Sub-let Repairs" means Repairs to be carried out by a Sub-let Repairer.

4. INSURER AND REPAIRER RELATIONS

4.1 Repairers:

(a) will provide estimates and carry out repairs that are in accordance with:
  (i) the documented manufacturer's technical specifications including those supplied by other Industry recognised authorities; or
  (ii) any lawful mandatory specifications and/or standards; or
  (iii) methods that are consistent with standard Motor Vehicle warranty conditions; or
  (iv) current Industry practice;
  while having regard to the age and condition of the Motor Vehicle.

(b) will in their dealings with Insurers in relation to Repairs:
  (i) prepare estimates that provide for an appropriate scope of Repairs, ensuring that all Repairs are carried out in a safe, ethical, timely and professional manner and in accordance with the method of Repair and the parts specified by the Insurer and/or its agent;
  (ii) not dismantle a Motor Vehicle for the purpose of preparing an estimate or report unless requested or authorised to do so by the Insurer; and
  (iii) not hinder or prevent the Insurer or Claimant from seeking to obtain an alternative estimate.

(c) may take clear digital images of the vehicle and all damage on the vehicle estimated in accordance with any CAC prescribed guidelines. The CAC may develop guidelines associated with the taking, submission, storage, data security and supply of digital images.

(d) will not commence any insurance Repair without having the relevant Insurer's agreement and authorisation to proceed, excluding emergency repairs subject to a customer's PDS.

4.2 Insurers will:

(a) not require Repairers to provide estimates, or carry out repairs that are not in accordance with:
  (i) the documented manufacturer's technical specifications including those supplied by other Industry recognised authorities; or
  (ii) any lawful mandatory specifications and/or standards; or
  (iii) methods that are consistent with standard Motor Vehicle warranty conditions; or
  (iv) current Industry practice; while having regard to the age and condition of the Motor Vehicle.

(b) in their dealings with Repairers in relation to Repair work:
  (i) provide Repairers with relevant details relating to the insurance claim that the Repairer reasonably requires in order to prepare an estimate or undertake the Repair, including their Parts Policy, details of Sub-let Repairs and payments by Customer including any excess or contribution charges;

  (ii) consider estimates in a fair and transparent manner, and will not refuse to consider an estimate on unreasonable or capricious grounds;

  (iii) pay the agreed amount for all work completed, that has been authorised or requested by the Insurer;

  (iv) not remove a Motor Vehicle from a Repairer's premises without notifying the Repairer in advance and in writing, and compensating the Repairer for any legitimate or reasonable towing or storage costs associated with the Motor Vehicle and in compliance with relevant law; and

  (v) not knowingly ask Claimants to drive unsafe or unroadworthy Motor Vehicles.

(c) in non-Event periods, consider estimates and commence assessor communication with the Repairer within:
  · for the period commencing 1 July 2017, an average of five (5) working days per repairer from the system receipt of the repairer's estimate subject to 4.2(d) and the reasonable availability of the vehicle and /or the customer's availability.

(d) If the time period in clause 4.2(c) cannot be achieved for an estimate/s due to vehicle location, repair complexity, periods of high volume or staffing shortages, the repairer must be notified of the delay and the reason for the delay, and a new assessing timeframe agreed.

4.3 Code Approved Assessors

(a) In the assessment of a Motor Vehicle under this Code, Signatories will only utilise the services of a '*Code Approved Assessor*'.

(b) A Code Approved Assessor is a Person who, by no later 12 months after commencing their employment has:

(i) a trade qualification and a minimum of five years of post-apprenticeship experience in their profession as a panel beater, spray painter or motor mechanic; or
(ii) more than five years of experience as a motor insurance Assessor; or
(iii) completed the CAC approved units, as set by the CAC from time to time, of the Certificate IV Vehicle Loss Assessing Course, being in the first instance August 2015, and until further such review:
- AURVNA4001 Provide vehicle loss assessment and identify repair requirements;
- AURVNA4004 Apply insurance knowledge to vehicle loss assessment;
- AURVNN4001 Evaluate vehicle bodywork for damage and identify repair requirements;
- AURVNP4001 Evaluate vehicle paintwork for damage and identify refinish requirements; and
- AURVNA4002 - Provide vehicle total loss assessment;

or their equivalent in the AUR Training Package.

(c) Signatories who employ a Code Approved Assessor must ensure that they are provided with ongoing training and/or development through their employer or via membership of a relevant professional body.

(d) Insurers who utilise the services of independent Code Approved Assessors must require that those Assessors have access to ongoing training and/or development through their employer or via membership of a relevant professional body. This provision only takes effect in any contracts entered into or renewed after the implementation date of the Code.

4.4 Code Approved Estimators

(a) In the estimation of a Motor Vehicle under the *Code*, Signatories will only utilise the services of a *Code Approved Estimator*, except when providing paintless dent repair estimates.

(b) A Code Approved Estimator is a Person who, by no later than 12 months after commencing their employment, has:
(i) a trade qualification as a panel beater, spray painter or motor mechanic; or
(ii) more than five years of experience in a motor trade or as an estimator; or
(iii) completed the CAC approved units, as set by the CAC from time to time.

(c) Signatories who employ Code Approved Estimators should ensure that those estimators are provided with ongoing training and/or development.

5. NETWORK SMASH REPAIRER SCHEMES (NOT RELEVANT, NOT REPRODUCED)

6. Estimate, Repair and Authorisation Process

6.1 **(NOT RELEVANT, NOT REPRODUCED)**

6.2 Signatories acknowledge ongoing changes in the Industry in relation to the development of realistic times and rates, such that:
(a) Insurers will state clearly the preferred estimation methodology to be applied;
(b) Subject to sub-clause 6.2(a), Repairers may submit an estimate in realistic times and rates recognising the Insurer's right to obtain an

alternative estimate; and

(c) Repairers in their estimation methodology may separately cost paint, parts, significant consumables and mandatory government environmental levies/charges in so far as they apply to a repair.

6.3 Without limiting Insurers' and Repairers' rights to fair and transparent negotiation, the Insurer may not unreasonably or arbitrarily alter the Repairer's estimate unless the Insurer insists on changing the repair process, parts or materials to be used (subject to sub-clause 7.4).

6.4 **(NOT RELEVANT, NOT REPRODUCED)**

7. **REPAIR WARRANTIES**

(7.1 – 7.3 & 7.6 – 7.7) NOT RELEVANT, NOT REPRODUCED)

8. PAYMENT FOR REPAIRS, 9. SIGNATORY OBLIGATIONS, 10. REPAIR DISPUTE RESOLUTION, 11. DISPUTE RESOLUTION PROCESS, 12. APPROVED DETERMINATION SCHEME UNDER THE CODE & 13. ADMINISTRATION WERE NOT THE SUBJECT OF EVIDENCE OR SUBMISSIONS AND ARE NOT REPRODUCED.

MATTERS FOR DETERMINATION

106. At the completion of evidence and all submissions the following matters require determination:

a. What, if any, limitations should be placed on reception into evidence of any of the written testimony of the witnesses for the *Applicant* and the *Respondent*?

b. What, if any, consequences flow from the visit of the *Respondent's* employees to the *Applicant's* premises on 3 November 2017.

c. Is the best way to interpret Clause 4.2(b)(ii) of the *Code* that propounded by the *Applicant* or that propounded by the *Respondent*?

d. If an Insurer, such as the *Respondent*, prepares its own estimate of repairs to a vehicle does it need to hold a licence under any relevant legislation?

e. If it does need to hold a licence, what, if any, effect does a failure to have such a licence on any duties the Insurer may have under Clause 4.2(b)(ii) of the *Code*?

f. Is an Insurer, such as the *Respondent* entitled under the Code to prepare its own estimate of repairs?

g. What, if any, consequences flow from the *Applicant* commencing repair of the vehicle 7 July 2017?

h. What, if any, consequences flow from the *Applicant* receiving the *Respondent's* Claim Authorisation Letter on 7 July 2017?

i. What, if any, consequences flow from the *Applicant* receiving the *Respondent's* Audanet estimate on 10 July 2017?

j. What findings does the evidence support/not support?

k. Has the *Respondent*, as an Insurer under the *Code*, committed breaches of any of its obligations under Clause 4.2(b)(ii) of the Code? If so, what breaches?
l. Is the *Applicant* entitled to any payment from the *Respondent*? If so, on what basis and in what amount?
m. Is the *Applicant* entitled to any of the other relief sought by it in its application?

What, if any, limitations should be placed on reception into evidence of any of the written testimony of the witnesses for the *Applicant* and the *Respondent*?

***Applicant's* director**

107. The *Respondent* says[167] that on the matter of credit the *Applicant's* director has engaged in a number of practices which raise questions. I have set these out at paragraph 79 (above) of these reasons. As to sub-paragraphs (a) - (d) the *Applicant* has explained[168] that as the *Assessor* was originally to do a desktop investigation, the dismantling of the vehicle to assess transfer damage and provide photographic evidence of internally damaged parts to the *Assessor* was not unreasonable. In any event, although there is a lack of specificity in the *Respondent's* submissions about the panels to which reference is being made, those submissions concede that an appropriate estimate could still be made, albeit more difficult. I accept the *Applicant's* submissions and do not accept that the matters raised by the *Respondent* go to the *Applicant's* director's credit.

108. I am unable to discern the relevance of the director failing to tell the *Assessor* that he had already quoted over $21,000.00 for repairs to old damage of the rear of the vehicle[169] when the repairs the subject of this determination are to the front of the vehicle. The *Assessor* did not provide any explanation in his statement. The *Applicant* submits that this is an irrelevant consideration and I accept that it has no bearing on the director's credit.

109. As to sub-paragraph (f), I note that the documents sent on 10 July 2017 by the *Respondent* to the *Applicant* were not sent to the director's personal email address, rather to the "info@" email address used by the *Applicant*. Whether the director was being literal about not receiving it to his personal email address or through oversight or some other reason said he did not receive it, I am unable to determine. I consider it has no impact on the director's credit.

167 At paragraph 45 of its submissions.
168 *Applicant's* Submissions in Reply, page 3, paragraph 2 and page 7, sub-paragraph (b) - see paragraphs 85 and 91(b) (above) of these reasons.
169 At sub-paragraph (e) of paragraph 45 of the *Respondent's* submissions.

110. As to sub- paragraph (g), the director's evidence is that the sequence of events on Friday 7 July 2017 was the commencement of repairs and subsequent receipt of the repair authority, not as suggested by the *Respondent*. The *Respondent's* criticism of the director for not seeking the Audanet assessment is surprising, given the repeated references in the *Assessor's* statement about the director not accepting an Audanet assessment. Accordingly, I don't accept that the matters raised by the *Respondent* in sub- paragraph (g) in any way diminish the director's credit.

111. As to sub-paragraphs (h) and (i), given the documents generated by the *Assessor* later the same day, I accept that it is unlikely that there is a rational basis for the director's belief that he had received verbal approval to go ahead with the repairs during the *Assessor's* visit on 6 July 2017.

112. Earlier in these reasons I set out in a table the responses of the *Respondent's* expert witness, The Audatex expert, to the evidence of the director about the operation of Audanet. Except as I have indicated below when dealing with The Audatex expert's evidence, I prefer the evidence of The Audatex expert to the director about the operation of Audanet.

The *Applicant's* expert witness

113. I have summarised the *Respondent's* attack on the expert witness in paragraph 80 (above) of these reasons. I accept that the expert is not qualified to proffer legal opinions about who is and who is not legally allowed to compile repair estimates in New South Wales. I disregard that part of the expert's evidence. However, I am unable to accept that his expression of that opinion goes seriously against his credit for the remainder of his evidence as is suggested by the *Respondent*. I do not accept the *Respondent's* submission based on Audanet being an assessment tool given that its own witnesses alternatively refer to it as an estimation tool and assessment tool, including the Audatex expert, and the *Respondent's* concession that it is both[170]. Although the *Respondent* complains about "leaps of logic" in the expert's evidence there seems to me to be a similar leap of logic in the *Respondent's* submission that the expert's lack of familiarity with Audanet calls into question his competence in the area of smash repairs, even more so, given that the *Applicant's* submissions in reply significantly undermine the *Respondent's* assertion of the widespread use of Audanet by smash repairers.

114. What I do think is significant is that none of the *Respondent's* witnesses, all of whom have significant experience in smash repairs and the assessment of smash repair quotations, in any way challenge the expert's analysis and conclusions of the *Applicant's* quotation. Accordingly, apart from those matters I have mentioned above, I accept the evidence of the *Applicant's* expert witness.

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170 *Respondent's* 20 September 2018 Request comments, p. 1, par 2.

115. The *Respondent* did not in any way address in its evidence the reason for the *Respondent's* labour rates of about $60.00 an hour, when the *Applicant's* evidence is that the market rate used in its estimate was nearly double the *Respondent's* rate at $110.00 an hour. It only addressed the issue in submissions by its assertion[171] that the *Code* (i.e. section 4(2)(b)(ii)) does not say anything about the fairness of allowing any particular quantum of repairs to an insured vehicle, or the fairness or reasonableness of hourly rates to be imposed by an insurer or insisted upon by a repairer. Those matters are left to market forces. The *Code* does not seek to interfere in those market forces. The evidence of the *Applicant's* expert raises issues irrelevant to these proceedings and for that reason has not been addressed. The *Code* does not venture into issues about whether the quantum of an assessment is fair or reasonable, as that is quite properly left as an issue between the insurer and its insureds, and will in each instance depend upon individual terms of individual policies.

116. I am unable to accept those submissions, firstly, because they are substantially based in the *Respondent's* narrow interpretation of the meaning of section 4(2)(b)(ii), which I don't accept and, secondly, because the *Respondent* unilaterally and without explanation reduced the Applicant's rate by about a half to the rate of about $60.00 an hour it allowed in the Audanet estimate.

117. In the absence of any other evidence of what the market hourly rate for labour is I accept the evidence of the *Applicant's* independent expert which confirmed the director's evidence that the $110.00 an hour charged by the *Applicant* was similar to the market rates charged by independent smash repair businesses in Sydney and was fair and reasonable[172] .

The *Respondent's Assessor*

118. I have both set out and summarised the *Assessor's* evidence at paragraphs 47-49 (above) of these reasons. The director says that 6 July 2017 the *Assessor* was at his premises for 15-20 minutes. The *Assessor* does not give any estimation of the time he spent. The *Assessor* denies that he said to the director that he had to "rush off", however, he does not deny that in fact he had to rush off as he was going overseas on holiday the following day, Friday 7 July 2017. He then says he had to do other assessment appointments and then carried out his assessment on the Lexus which is a subject of this determination. Also that evening he telephoned his manager and then prepared an email to him which was not sent until 1:25 a.m. the following morning, Friday 7 July 2017. I consider it more probable than not that the *Assessor* was in fact in a rush during the whole of Thursday 6 July 2017, including the time he was with the *Applicant's* director, because he was leaving overseas on holiday the following day. Accordingly, I accept the director's estimate of the time the *Assessor* spent with him on 6 July 2017.

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171 *Respondent's* 3 August 2018 submissions, par. 22.

172 *Applicant's* expert report, paragraph 9.

119. In paragraph 27 the *Assessor* says that he had formed the view that the repairer had quoted for non-existent damage and "exaggerated damage";[173] had used incorrect repair methods;[174] and had produced an inflated quote due to including unnecessary operations;[175] and that he had discussed these issues with the director. Given the critical nature of this opinion by the *Assessor* I would have expected it's transmission to the director to be given in direct speech which particularised the non-existent damage and any other matters which went to the quote being inflated. In light of the nature of the allegations being made by the *Assessor*, I would also have expected the director to have a recollection of them and to have included evidence about the making of those allegations in his statement. No such evidence is given by the director.

120. Further, the *Assessor* does not particularise these allegations in his evidence about his telephone call to his line manager, in his email to his line manager or in his evidence in this determination, notwithstanding the ready availability of assistance from solicitors and experienced counsel. This is a matter on which the *Respondent* bore the persuasive burden and I have not been persuaded on the balance of probabilities. Consequently, my finding is that there was no discussion between the *Assessor* and the director on 6 July 2017 about allegations of non-existent damage and inflating the quotation. Another matter on which the *Respondent* carries the persuasive burden is that there were in fact non-existent damage, exaggerated damage and unnecessary operations leading to the *Applicant's* quotation being inflated. I have set out above the opportunities which the *Respondent* had to particularise these allegations but has failed to do so. Accordingly, I do not find that the *Applicant's* quotation included any of non-existent damage, exaggerated damage, incorrect repair methods or unnecessary operations or that the quotation was inflated.

The *Respondent's* Audatex expert

121. I have both set out and summarised the Audatex's evidence at paragraphs 55-56 (above) of these reasons. At paragraph 89 of these reasons I have set out the *Applicant's* criticisms of the Audatex expert's evidence. I consider those criticisms, particularly the observation that the Audatex expert nowhere states that Audanet is either used by smash repairers or designed for their use, are aptly made and I accept them, which considerably limits the utility of the Audatex expert's evidence. I accept as correct, apart from the instance to which I will refer below, the observation that the Audatex's references to "repairers" fails to specify whether this means smash repairers or other types of vehicle repairers. The Audatex expert does not provide any documents, not even Audatex' own documents, to support the assertions he makes. This is in marked contrast to the

173 Assessor's statement, par 39.
174 *Assessor's* statement, par 45.
175 *Assessor's* statement, par 39.

director who has attached to his statement 2 Audatex training manuals. The Audatex expert simply makes no reference to those manuals and, importantly, does not deny that the documents attached to the director's statement are Audatex training manuals or deny that they apply to the use of Audatex that is, according to his earlier evidence, worldwide.

122. Another matter which limits the utility of his evidence are his description of his role within Audatex as "head of estimatics" when "estimatics" is not a word recognised by the online Macquarie Dictionary and the Audatex expert does not explain what it means. This is not mere semantics, as without that information I am unable to determine what the Audatex expert's 18 years' experience with Audatex qualifies him to express opinions about. Under clause 21 of the Expert Determination Agreement entered into by the parties and me, I am not bound by the rules of evidence. However, where evidence is to be given about the operation of Audanet, I consider I am entitled to expect that the *Respondent* will present this critical testimony in compliance with the rules of evidence. The evidence is critical because the *Respondent* is placing such reliance on Audatex in its dealings with the *Applicant* and its assertion that Audanet is a real-time platform[176] which rendered the repairer's estimate otiose from the outset[177].

123. It is evident from the Audatex expert's evidence that both he and Audatex do not have direct knowledge of the processes underpinning Audatex but rely on what they have been told by others (paragraphs 11, 14, 15, 16, 17, 19, 26, 38, 41 and 43). Nonetheless, no attempt has been made by the *Respondent* to produce any evidence which might allow such hearsay statements into evidence. That may be because it is not possible to do so. It hasn't been done and for that reason I don't accept the Audatex expert's evidence about what happens in businesses other than Audatex, such as OEMs and OEM research centres.

124. It can be seen from the tabular comparison above, that in paragraph 39 of his statement the Audatex expert responds to the director's assertion in paragraph 83 of his statement (which I have set out at paragraph 56 (above)) to the effect that " … *Removing a damaged item … will take significantly longer to remove in an accident claim compared to a warranty claim because access is impeded and the area is crumpled and the part is in a restricted area and is not as easily accessible if it is damaged*" firstly, by not denying that what the director says about it taking longer to remove a damaged item in an accident claim and secondly, by asserting that the OEM removal times Audatex uses factor in time taken for removal of damaged parts. I reject that latter evidence because firstly, the Audatex expert cannot from his own knowledge know that it is true. He has relied on what someone else has told him. Secondly, I reject it because, at the very least, it is inconsistent with the statement from page 49 of the Audatex Database Reference Manual Cars and Light Trucks (`the *Manual* '), which is an

176 *Respondent's Assessor's* statement, paragraph 53.
177 *Respondent's* Request submissions, paragraph 3 (b).

annexure to the *Applicant's* director's statement. In the Section 4-1 Labour Overview Introduction there appears the following:

> "Labor supplied in an Audatex estimate is intended for use as a guide for collision repair. Labor allotments suggested by Audatex estimates are for replacement of new and undamaged parts. .... Because each vehicle's collision damage is unique, automation cannot cover every situation. The flexibility of the Audatex system, coupled with the estimate preparer's knowledge and expertise, provides for adjustment of any estimate to meet the needs presented by each collision situation."

125. At pages 53-54 of the Manual under the heading "Section 4-2 Labour Exclusions[178]" it is stated:

> "**Labor Exclusions**
> Because each vehicle's collision damage is unique, labor to perform some of the following operations may vary. In other cases, the operation is performed less than 80% of the time and may or may not be required due to the collision damage. To address these situations, Audatex provides:
> - 'Standard Manual Entries' that are entered by the estimate preparer (for a complete listing, see Section 5-1)
> - 'Additional Labor' operations which are Audatex pre-stored labor for many of these operations.
>
> When the operation has a 'Standard Manual Entry' or an 'Additional Labor' operation available, a note will appear next to the appropriate exclusion.
> - Additional labor for removal of parts that have been impeded by crash damage (access labor). (Standard Manual Entry M62 is available)."

126. Standard Manual Entry M62 is "COLLISION ACCESS TIME" and is found in Section 5.1 on pages 169 and 170 of the Manual. Those pages refer to page 15 of the Manual for an explanation of "Standard Manual Entries". The relevant explanation is found on page 16 and is as follows:

> "**M Code – Manual Entry**
>
> This column allows the estimate preparer to enter:
>
> - parts or operations not provided by Audatex
> - labor operations at a specific Labor Rate Code
>
> The estimate preparer can:
>
> - input these entries manually or use the Standard Manual Entries provided by Audatex (see Section 5-1.) Standard Manual Entries provide the description and a default rate code.
> - override default rate codes to provide for local accepted practice. All other information must be supplied by the estimate preparer.

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178 As set out in the response to question 2 of the Frequently Asked Questions, "Labour Exclusions" means items that are **never automatically included** in Audatex labour times.(emphasis supplied)

> The totals will be added to the gross estimate total."

127. At page 194 of the Manual is found the entry in "Section 5-5 Glossary of Audatex Terms" for ""Manual Entry" as follows:

> "A damage entry made in the Audatex system for a part or operation that is not assigned a guide number."

128. Also of significance on this issue, in my view, is that the Audatex expert does not in any way address par. 92 of the director's statement, much less deny it. In particular, none of the *Respondent's* witnesses deny the truth of the director's statement in par. 92(iii) that there are 21 items on the *Respondent's* Audanet quote which have asterisk (*) symbols. The best inference from that fact is that the *Respondent's Assessor* has inputted the asterisk (*) symbols himself. There is no documentation or explanation provided (in the Audanet quote) for any of the items with an asterisk (*). However, the Audanet Training Manual, Section 2-2 "An Explanation of the Audatex Estimate", page 12 states:

> "**OP – Operation Codes**
> The Audatex system uses one- or two-character operation codes to specify the work to be done. These codes are explained below.
> *** – User-Entered Value**
> Indicates Price, Labor, or Rate Code entered by estimate preparer, and appears next to the amount or code."

and on page 17 states:

> "**Hours**
> The suggested labor after overlap and included operations are considered.
> - An asterisk (*) means the hours have been manually entered."

129. In consequence, in my opinion, so far as removal of collision-damaged motor vehicle parts is concerned, there is no evidence that Audanet:
    a. is a real-time system;
    b. is based on independent expert research of operation times;
    c. provides a rational foundation for times based on established factual times;
    d. is based on the manufacturers' workshop technical manuals;
    e. generates the time for the removal operations without manual input from the estimate preparer.

What, if any, consequences flow from the visit of the *Respondent's* employees to the *Applicant's* premises on 3 November 2017.

130. Paragraphs 51 - 54 of the director's statement, together with statements from two of the Applicant's employees, concern a visit to the Applicant's premises by the Respondent's manager of the assessor who attended on 6 July 2017. The Applicant has submitted that the alleged conduct by the manager " *… does not fit with the Industry Code of Conduct*" (paragraphs 12 and 13, 35(a)(i)). The *Respondent* submits that it is not relevant to Clause 4.2(b)(ii) [179].

131. Assuming for the sake of the argument that I was satisfied that the conduct as alleged had occurred, I consider it that it goes only to a breach of Principle 1.3 of the Code which proscribes behaviour which is offensive, harassing, threatening, inappropriate, abusive, bullying or intimidating. As this dispute through the various stages of IDR, the Mediation and the current determination process has always been founded on Clause 4.2(b)(ii) of the Code, I am not persuaded that the material in paragraphs 51 - 54 is relevant to the determination of that issue.

Is the best way to interpret Clause 4.2(b)(ii) of the *Code* that propounded by the *Applicant* or that propounded by the *Respondent*?

132. Clause 4.2(b)(ii) reads as follows:

> "**4.2 Insurers will:**
> ……
> (b) in their dealings with Repairers in relation to Repair work:
> ……
> (ii) consider estimates in a fair and transparent manner, and will not refuse to consider an estimate on unreasonable or capricious grounds; "

133. The *Respondent* argued[180] that a standard canon of construction is that words are to be accorded their natural meaning in their context but confined the context to the text of Clause 4.2(b)(ii) itself. In reply, the *Applicant* submitted[181] that the *Respondent* seeks to confine the words "*fair*" and "*transparent*" to a single definition referable only to the *Assessor's* conduct or way he carries out an assessment. The *Applicant* says each word should be given its own work to do in the regulation of the *Code* and apply not only in the manner in which an assessment, not estimate, is compiled, but the end product submitted to the repairer, so that both parties understand what each contends if there is a dispute as to repairs. The *Applicant* contends that this is a primary function of the *Code* and in particular section 4(2)(b)(ii), which should be given an expansive application rather than that contended by the *Respondent*.

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179 *Respondent's* 3 August 2018 submissions, paragraph 44.
180 *Respondent's* 3 August 2018 submissions, paragraph 29.
181 *Applicant's* 13 August 2018 Submissions in Reply, paragraph iv, page 1.

134. I accept the *Applicant's* submission that the *Respondent's* confining of the context to the text of Clause 4.2(b)(iii) alone is too narrow and that the *Code* should be given an expansive interpretation. In my opinion, when interpreting a provision such as Clause 4.2(b)(iii) it would be normal to look to the whole document in which it was found as the context, rather than only the clause itself.

135. Further, given the remedial purpose of the *Code*, I consider that not only should an expansive view of context be taken in interpreting Clause 4.2(b)(iii) and the *Code* generally, but also it should be given a purposive interpretation.

136. I am reinforced in this view because, whatever the juridical status of the *Code*, it is very similar to remedial subordinate legislation. In New South Wales, section 33 of the *Interpretation Act* 1987 provides that regard is to be had to the purposes or objects of acts and statutory rules in the following terms:

> **33 REGARD TO BE HAD TO PURPOSES OR OBJECTS OF ACTS AND STATUTORY RULES**
> In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

137. I say that the *Code* is similar to remedial legislation because of its antecedents, which I have set out at paragraphs 97 - 104 (above). The Productivity Commission recognised the adversarial environment between the smash repair and insurance industries, characterised by high levels of mistrust, and recommended the implementation of an industry-wide Code of Conduct. The Preamble to the *Code* acknowledges this in its third paragraph in stating:

> The content of the Code and matters covered by it have been guided by the Australian Government's requirements and response to the Productivity Commission and the Terms of Reference, set by the Australian Government, for the Smash Repair and Insurance Industry Implementation Taskforce.

138. The first Principle of the *Code* states the objective of the *Code* in the following terms:

> This Code is intended to promote transparent, informed, effective and co-operative relationships between smash repairers and insurance companies, based on mutual respect and open communication.

139. I consider section 33 of the *Interpretation Act* 1987 to provide the guiding principle for determining the meaning of Clause 4.2(b)(iii). Before moving to that consideration it is necessary to consider whether I may have regard to Clauses 6 and 7 of the *Code* and, if so, in what way?

Subsidiary question - the relevance and use of Clauses 6 and 7 of the *Code*

140. In paragraph 55 of his statement the director argues that the *Respondent* is not complying with Clauses 4.2(a) and (b), 6.1, 6.2 and 6.3, setting out the text of those clauses. In paragraph 56 he sets out the basis of his belief about the *Respondent's* breach of Clause 6.3. None of the Respondent's submissions address this evidence but the Respondent stated this is because its submissions (and the Respondent's evidence) were limited to responding to the matters the subject of the reference[182]. That is the reason I sent the Request of 19 September 2018.

141. I have set out the parties' respective submissions responding to the Request and commentary on those submissions in tabular form at paragraphs 96 - 97(above). In essence the Respondent contended that the complaint was one raised specifically under Clause 4.2(b)(ii) of the *Code*. The evidence which was put on by the *Respondent* addressed the specific matters raised by Clause 4.2(b)(ii) of the *Code*. It would be procedurally unfair to proceed with the consideration of clause 6.2 in the determination of these proceedings because this was not a matter covered by the initial complaint and no evidence was addressed to the issue of what had previously been said to this repairer about the preferred methodology or his estimation methodology[183] .

142. The *Applicant* submitted that the *Respondent's* submissions should not be accepted because the certificate issued by the Mediator, Mr Massey, listed the "Unresolved Issues" arising from the mediation, as follows:
    a. The value of the claim;
    b. Whether the generally agreed actions of the *Respondent* constituted unfair, unreasonable conduct in breach of the *Code* and whether those actions were transparent;
    c. The future methodology for dealing with estimates and repairs.

143. Certainly, Clause 4.2(b)(ii) of the *Code* was significant but not singled out by the *Applicant* as being the only clause relevant to the breach alleged against the insurer. There was only one specific reference to the sub-clause in the original submissions that accompanied the current application. If the insurer limited its evidence, directed only to part of one sub-clause of the Code, without addressing what remained as the "unresolved issues", it was a matter for the insurer. That forensic decision should now not limit the ultimate determination of the "unresolved issues"[184].

182 *Respondent's* 3 August Submissions, paragraph 2.
183 *Respondent's* Request comments, p. 2, par 5.
184 *Applicant's* Request comments, p. 2, pars 1-4.

144. Further, the *Applicant* submits that the Code of Conduct should be read in its entirety. The *Respondent* appears to be suggesting that the only relevant consideration in the application is with respect to the insurer's obligations as to its dealing with the repairer. However, Clause 4.2(b)(ii) specifically refers to consideration of "estimates". It is therefore difficult to read Clause 4.2(b)(ii) without reference to Clause 6, which is titled "Estimate, Repair and Authorisation Process". The *Applicant* submits that clause 6 of the *Code* necessarily provides further direction on the manner in which both insurers and repairers are to behave when engaging in that process. To consider Clause 4.2(b)(ii) in a proper manner, it is necessary to have in mind Clause 6[185].

145. Because in my view the *Respondent's* confining the context to Clause 4.2 alone was too narrow and the interaction between Clauses 4.2 and 6 was raised squarely by the director's statement, I considered that there was no issue of procedural unfairness to the Respondent in proceeding to deal with those issues. Nonetheless, for more abundant caution, I sent the 19 September 2018 Request. Having done that, and the Respondent having made submissions and commented on the Applicant's submissions, I consider there is no question of any procedural unfairness to the *Respondent* in considering the Code of Conduct in its entirety as suggested by the *Applicant*.

The meaning of Clause 4(2)(b)(ii)

146. The immediate context of this Clause is that in their dealings with Repairers in relation to Repair work Insurers are required to do certain things. Before moving on to considering the meaning of Clause 4.2(b)(ii) it is useful to consider the meaning of some of the terms used in the clause in the context of the *Code* by reference to the definitions in Clause 3 of the *Code.*

"Assessor" means an employee, assessing contractor or agent of an Insurer, who is engaged to assess Motor Vehicle accident damage and/or negotiate Repair Estimates between Insurers and Repairers.

"Insurer" means a member of the ICA or any other Person who is in the business of insuring Motor Vehicles in respect of property damage and which, in the course of its business, engages or authorises Repairers to perform Repairs to Motor Vehicles.

"Repair" or "Repairs" means any work done by a Repairer to repair a Motor Vehicle or any of its components, systems or parts, where the work is covered by a Policy and where a claim is or will be made by a Claimant including but not limited to:
(a) dismantling or assembling;

185 *Applicant's* Request comments, p. 3, pars 6-8.

(b) part or component replacement, adjustment, modification, installation or fitting; or
(c) painting.

"Repairer" means any Person lawfully engaged in the business of effecting Repairs to Motor Vehicles in Australia.

147. In relation to estimates (which is not a defined term in the *Code*) the role of the repairer is to provide estimates (Clause 4.1(a)) and in their dealings with Insurers in relation to Repairs, to prepare estimates that provide for an appropriate scope of Repairs, ensuring that all Repairs are carried out in a safe, ethical, timely and professional manner and in accordance with the method of Repair and the parts specified by the Insurer and/or its agent.

148. Thus, in considering the meaning of Clause 4.2(b)(ii) it is preferable to adopt a meaning which promotes transparent, informed, effective and cooperative relationships between smash repairers and insurance companies, based on mutual respect and open communication, in accordance with the first Principle of the *Code*. I have set out the *Respondent's* approach above. It says that the clause is concerned not with the level or extent of interaction between the assessor or insurer and the repairer, but the way in which the insurer conducts its assessment of the repair cost estimate[186]. However, the *Respondent* correctly recognised that consideration of Clause 6 brings into play different elements which fall outside the scope of Clause 4.2(b)(ii). Whilst that clause deals with the internal assessing procedures of the insurer, clause 6 changes the focus to the insurer's relations with the repairer[187].

149. In my view the insurer's relations with the repairer is also clearly in contemplation in subparagraph (b) of Clause 4.2 by use of the words "in their dealings with repairers in relation to repair work". The first Principle of the Code expects those relationships to be based on mutual respect and open communication. The requirement for open communication, when overlaid on the obligation to consider estimates in a fair and transparent manner, in my opinion means not only that the insurer consider the estimates fairly and transparently within their organisation but communicate to the repairer the outcome of that consideration fairly and transparently in a way which respects the repairer. The *Respondent* clearly recognises the need for communication at this critical stage of the insurer/repairer relationship as its *NSW/ACT Manager of Motor Assessing* gave evidence[188] that the *Respondent's* standard operating procedure for motor vehicle assessments and utilisation of Audanet included a requirement that once the assessment is completed through Audanet, the Assessment Report is sent to the repairer via email and the Assessor then calls the repairer to discuss the outcome.

186 *Respondent's* Request submissions, p.2, par 2.
187 *Respondent's* Request submissions, p.2, par 3.
188 *Respondent's NSW/ACT Manager of Motor Assessing's* statement, p.2, par 3(a)(viii).

150. The online Macquarie Dictionary gives the following meanings for "*fair*"

> *adjective* 1. free from bias, dishonesty, or injustice: a fair decision; a fair judge.
>
> 2. that is legitimately sought, pursued, done, given, etc.; proper under the rules:

This is similar to the definition in the Collins online dictionary favoured by the *Respondent*. However, and contrary to the *Respondent's* argument, because fairness (as defined) is in the context of the whole *Code* including the Principles and Clause 6, "fair" does not just mean being fair towards repairers as a class, but also being fair to the particular repairer whose estimate is being considered and in the context of that particular estimate.

151. The online Macquarie Dictionary gives many meanings for "*transparent*", the most relevant of which for this discussion is the fifth, namely, "*open to public scrutiny, as government or business dealings*". In my opinion "transparent" in the sense of "open to scrutiny" in the relationship between insurers and repairers with respect to repair work, means that the insurer's estimate/assessment must be open to scrutiny by the repairer. Scrutiny necessarily requires communication between both parties. Where the insurer has assessed the damage to a vehicle, considered the repairer's estimate and there are differences between the insurer's assessment and the repairer's estimate, the insurer must communicate with the repairer, in a way which shows respect for the repairer, setting out what differences there are between the insurer's assessment and the repairer's estimate and why those differences exist. Reading Clause 4.2(b)(ii) in the context of the *Code* as a whole is what the clause requires. In so doing the insurer will also facilitate the parties' rights to fair and transparent negotiation recognised by Clause 6.3 of the *Code*.

Is an Insurer, such as the *Respondent* entitled under the *Code* to prepare its own estimate of repairs?

152. It is clear from the Audatex expert's evidence that Audanet's users include repairers. It is a repair estimating tool used in the motor vehicle repair industry worldwide intended to be used, and in fact used, to quote for repairs to collision damaged motor vehicles. It is also used by insurers and others to assess times that various repair operations will take for the purpose of assessing repairers' quotations or estimates. From that evidence I find that the Audanet software has the same functionality no matter which group of users use it. However, it is used for different purposes by each group of users.

153. The question is, whether there is anything in the *Code* which prevents the *Respondent* from doing so? The arguments have been refined through the course of evidence and submission as I have set out above. Having considered all of that material I have concluded that this is a matter in which the *Respondent* has the last word:

> "2. …. It is a normal use of the language to describe an assessment of a price as an estimate of the likely reasonable cost of repairs. The tenor and the balance of the submissions can leave no doubt that the Audanet assessment was in fact an assessment. It may be an "*estimate*" in the sense of being a reasoned calculation of the fair and reasonable cost of repairs, but not an "estimate" in the sense of being a quotation for doing the job. The "*estimate*" provided by a repairer is his quote, or offer, for doing the repair job. Self evidently, all assessments are estimates in the sense of being reasoned calculations before the job is undertaken. They cannot be anything else. It is for this reason that the repair industry allows "*additional*" quotes or estimates for further work, or changed methodology, where that work or change is required after the vehicle is stripped down and the full extent of damage is discovered, or say new parts are unavailable and recycled parts need to be repaired instead of replaced.
>
> ……
>
> 4. …. clause 6.2 specifically provides that insurers are free to obtain further estimates, without reference to the source or nature of such estimates. It states that:
>
> *(a) Insurers will state clearly the preferred estimation methodology to be applied;*
>
> *(b) Subject to sub-clause 6.2(a), Repairers may submit an estimate in realistic times and rates recognising the Insurer's right to obtain an alternative estimate…*"
>
> 5. Hence, even though an insurer may require an estimate on one basis, the Code provides the insurer is still free to obtain a further estimate on another."[189]:

154. In my respectful opinion that accurately sets out the basis on which I have concluded that an Insurer, such as the *Respondent*, is entitled under the *Code* both to prepare its own estimate of repairs and to use Audanet/Audatex as a tool when doing so.

If an Insurer prepares its own estimate of repairs to a vehicle does it need to hold a licence under the *Motor Dealers and Repairers Act* 2013?

155. The *Applicant's* evidence and arguments are set out at paragraph 67 - 78 of his statement, but not referred to in the initial Outline of Submissions. The *Applicant's* 13 August 2018 Submissions in Reply simply state that the *Respondent* should not be entitled to create its own estimate as it is not a licensed repairer and does not operate a repair facility. The *Applicant* must argue that, as it is clear on the evidence that the *Respondent* at all times has no intention of repairing the customer's vehicle itself. The *Applicant's* "evidence" is in fact, not evidence, but argument.

189 *Respondent's* Comments on *Applicant's* Request submissions, p.1, par 2.

156. The *Applicant* refers to the definition of "*motor vehicle repairer*" in section 6 of the *Motor Dealers and Repairers Act* 2013 which is "a person who carries on the business of carrying out repair work on motor vehicles, where the classes of "*repair work*" are prescribed by Regulation 34 of the *Motor Dealers and Repairers Regulation* 2014 as automotive electrician, body maker, compressed natural gas mechanic, liquefied natural gas mechanic, liquefied petroleum gas mechanic, motorcycle mechanic, motor mechanic, panel beater, trailer and caravan mechanic, transmission specialist, underbody work and vehicle painter. Thus, nothing in the Regulation suggests that the process of estimating falls within the definition of "repair work" in the *Motor Dealers and Repairers Act* 2013.

157. The *Applicant* argues that collision repairs are a type of repair work which includes the process of estimating as an integral activity included in the process of repairing the structural components, frames or panels of motor vehicles. I do not consider that proposition to be self-evident. However, in paragraph 72 of his statement the director purports to attach the Hansard record to reference the intention of Parliament. No such document appeared in my bundle of documents and the document actually included, described as *Motor Dealers & Repairs* (sic) *Act* commentary, is of unknown provenance. I do not accept the commentary as authoritative. I was unable to find any reference to such a parliamentary intention in the Second Reading Speech. Accordingly, I do not accept the *Applicant's* argument that the *Respondent*, as insurer, was required to be licensed under the *Motor Dealers and Repairers Act* 2013 in order to use Audanet to prepare estimates for the purposes of assessing estimates from smash repairers such as the *Applicant*[190].

158. Having come to that conclusion, I now do not need to consider what, if any, effect a failure to have such a licence has on any duties the Insurer may have under Clause 4.2(b)(ii) of the *Code*.

FINDINGS

What findings does the evidence support/not support?

The course of the relationship between the Parties in relation to the estimating and assessment process

159. Between 2 June and 28 June 2017 the *Applicant* prepared estimate No. 19020 for the repair of a Lexus RX 350 motor vehicle for an amount of $11,896.82 under the insurer's Claim No. XXXXXXXX.

160. On 28 June 2017 the *Applicant* sent estimate No. 19020 to the *Respondent* as the insurer for the owner of the vehicle.

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190 I note that the *Code* requires signatories to use the services of "*Code Approved Estimators*" and imposes minimum qualifications and experience in cl.4.4. However, this is not a prohibition on an employee of an insurance company, who meets these minimum standards set out in Cl.4.4 from preparing a repair estimate.

161. On 6 July 2017 the *Respondent's Assessor* attended the *Applicant's* premises.

162. On 6 July 2017, during a period of between 15 - 20 minutes conducted an inspection of the vehicle, took photographs, conversed with the Applicant's director about his disappointment in the dismantling of the vehicle prior to his inspection, and his disagreement with the director about the scope of the repair work, the *Applicant's* proposed work methodology, the manner of communicating his eventual assessment of the estimate to the *Applicant* and also about the director's refusal to accept Audanet, the *Respondent's* preferred estimating/assessing tool.

163. During the time he spent with the director the *Assessor* initially told him he did not need the *Applicant's* estimate No. 19020 because of his reliance on the Audanet estimate but agreed to take a copy "for *Code* purposes".

164. The *Assessor* told the director any assessment might be the subject of negotiations.

165. The *Assessor* made notes on the copy of the *Applicant's* estimate and took it away with him when he left.

166. The *Assessor* then left the *Applicant's* premises, completed his other assigned assessing duties for the remainder of that day, made further notes on the *Applicant's* estimate No. 19020, entered data into the *Respondent's* Audanet system and at 1.25 a.m. the following morning, Friday 7 July 2017, emailed his immediate superior about his concerns around the *Applicant's* estimate including not authorising the quote and getting a comparative quote from another smash repairer. The *Assessor* noted the electronic file and the Audanet estimate accordingly.

167. On Friday 7 or Saturday 8 July 2017 the *Assessor* went overseas on holidays.

168. On Friday 7 July 2017 the *Applicant* started the repair work on the vehicle.

169. At the time the repair work started it is unlikely that there was any reasonable basis for the director's stated belief that he had been verbally authorised to do so on the preceding day by the *Respondent's Assessor*.

170. At 10:18 a.m. on Friday 7 July 2017 one of the *Respondent's* claims officers, notwithstanding the *Assessor* ‘s “Do Not Authorise” note, sent by email to the *Applicant* with a document styled" Client Repair Authority" for an amount of $7,894.90 stated to authorise "Repair Costs As Listed". No such list accompanied the Client Repair Authority.

171. The director considered that the *Respondent* had made a mistake in issuing the Client Repair Authority in that amount.

172. Because of that belief, and in order to confirm the appropriate repair methodology for the vehicle, on Friday 7 July 2017, the director contacted an independent assessment company to arrange for an independent assessor to inspect the vehicle and produce an expert report. The *Applicant* continued with the smash repairs.

173. On Saturday 8 July 2017 the independent expert attended the *Applicant's* premises and conducted his initial inspection. As the *Applicant* was working on the vehicle they found additional processes were needed which required variations to the original quote.

174. On Monday, 10 July 2017 the director contacted the independent assessor about the variations.

175. Also on Monday, 10 July 2017 one of the *Applicant's* employees contacted the *Respondent* and requested a copy of the Audanet estimate which was emailed at 9:30 a.m. that day.

176. On Thursday, 13 July 2017 the smash repair work continued and the independent expert attended for a further inspection.

177. On Friday, 14 July 2017 the smash repairs to the front of the vehicle were completed and the *Applicant* prepared and sent its tax invoice No. 12542 for $14,796.28.

178. On Monday 31 August 2017 the *Applicant* received an email from the *Respondent* with a further copy of the Client Repair Authority and the Audanet estimate. The *Applicant* sent an email to the *Respondent* requesting that they supply an actual assessment report with the quote previously provided by the *Applicant*. In the covering email the *Assessor* states (amongst other things): "*I accepted your quote for record purposes only as per the code*."

179. On Thursday 19 October 2017 the *Applicant* lodged an IDR with the *Respondent*.

180. On Thursday, 26 October 2017, having obtained written authority from the owners of the vehicle, the Applicant requested the full file from the Respondent, which refused to provide it.

181. The remainder of the procedural history of this matter is set out at paragraphs 4 – 15 (above) of these reasons.

Audanet

182. The evidence does not establish that any of the *Respondent's* employees who provided statements had received any training in Audanet.

183. Even if I infer from his use of it that the *Assessor* had received some training in Audanet, the evidence does not establish the recency of that training, the extent of that training, if it had been refreshed, and if so, when, or the *Assessor's* competence to use Audanet[191].

184. The evidence of the Audatex expert, the *Respondent's* expert, establishes that Audanet is an estimating tool used by insurers and some repairers worldwide.

185. The evidence of the Audatex expert, the *Respondent's* expert on matters Audanet, establishes that the Audatex system does not concern itself with the hourly labour rate. The hourly labour rate variable is entirely up to the individual user.

186. The evidence of the Audatext expert, the *Respondent's* expert, establishes that the Audatex system does not concern itself with time estimates for repairs as that variable is entirely up to the individual user.

187. The evidence of the Audatex expert, *the Respondent's* expert, establishes that the Audatex system does not concern itself with the time estimates for panel beating repairs as that variable is entirely up to the individual user.

188. When the *Assessor* says that Audanet is an estimating tool, I accept that evidence.

189. When the *Respondent's NSW/ACT Manager of Motor Assessing* says that Audanet is the *Respondent's* assessing methodology or preferred methodology and its submissions make assertions to the same effect, I reject that as inconsistent with the evident of its expert, the Audatex expert.

190. The evidence does not establish that Audanet is based on the manufacturers' workshop technical manuals for removal of collision-damaged motor vehicle parts.

191. The evidence does not establish that Audanet is based on independent expert research of operation times for removal of collision-damaged motor vehicle parts.

192. The evidence does not establish that Audanet by its software generates the time for the removal operations of collision-damaged motor vehicle parts and parts whose removal is impeded by collision-damaged motor vehicle parts, without manual input from the preparer of the Audanet report.

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191 The *Assessor's* evidence in par. 58 of his statement does not assist as it does not deal with Audanet training and the Regulation on which he relied, Reg. 105 of the *Road Transport (Vehicle Registration) Regulation* 2017, falls within Part 7 Division 4 of the Regulations dealing with the assessment of written off vehicles as a total loss and has no relevance whatsoever.

193. The evidence does not establish that Audanet is a real-time system so far as, at the very least, removal of collision-damaged motor vehicle parts, parts whose removal is impeded by collision-damaged motor vehicle parts and panel beating repairs, is concerned.

194. The evidence from the international Audatex manuals is that labour allotments suggested by Audatex estimates are for replacement of new and undamaged parts and because each vehicle's collision damage is unique, automation in the form of the Audanet software cannot cover every situation.

195. The evidence from the international Audatex manuals is that Audatex classifies these items as "Labour Exclusions" because they are items that are never automatically included in Audatex labour times.

196. The evidence from the international Audatex manuals is that where such items are not automatically included in Audatex labour times they must be entered manually and such manually entered labour hours are represented by an asterisk (*).

The market hourly rate

197. The $110.00 an hour charged by the *Applicant* was similar to the market rates charged by independent smash repair businesses in Sydney and was fair and reasonable[192].

What, if any, consequences flow from the *Applicant*:

- **commencing repair of the vehicle 7 July 2017?**
- **receiving the *Respondent's* Claim Authorisation Letter on 7 July 2017?**
- **receiving the *Respondent's* Audanet estimate on 10 July 2017?**

198. I consider it is convenient to deal with all of these matters together. I find that the director was the person best placed to give evidence about when the *Applicant* started the smash repairs to the vehicle. I have no reason not to believe the director's evidence that work on the vehicle started before the Claim Authorisation Letter was received on 7 July 2017. It follows that the director had no written authority to start work when it commenced. I have already found that it is unlikely that there was any reasonable basis for the director's belief that the *Assessor* verbally authorised commencement of the work during the course of the inspection conversation 6 July 2017.

199. Whatever may have been the *Applicant's* position with compliance with the *Code* about commencing work only after an authority has been received, I find that the *Applicant* had already commenced work when the Client Authorisation Letter was mistakenly sent to the *Applicant*. It follows that the *Applicant* did not rely on the

192 *Applicant's* expert report, paragraph 9.

Client Authorisation Letter in commencing the smash repair work. When the director received the Client Authorisation Letter he considered it had been sent by the *Respondent* by mistake. It is simply not open to be argued that at this stage of receipt of the Client Authorisation Letter the director had an intention for the *Applicant* to enter into a contract with the *Respondent*. What the director did in response to the Client Authorisation Letter was to organise a second opinion by an independent expert on scope, work methods, labour rates and other matters.

200. Whether the evidence given by the director in paragraphs 44 - 47 of his statement took place on 31 August 2017 when the *Applicant* secondly received the Audanet estimate or on 10 July 2017 when it was first received, I am unable to discern. However, it is clear from the terms of the *Assessor's* note in the Audanet estimation that the repairs were not authorised. Whoever at the *Applicant's* premises received the email with the Audanet report would have had confirmation of the director's opinion of the mistaken issue of the Client Authorisation Letter. Again, it cannot be inferred from that circumstance that the *Applicant* had any intention to enter into a contract with the *Respondent*.

201. Another way of analysing the facts is to consider the *Applicant's* 29 June 2017 quotation as its offer to carry out the work in the quote at the stated price. The *Respondent's* 7 July 2017 email would have been a counter-offer at that time, had it been complete. However, it was not complete as it referred to "listed repairs" and none were listed. It could not take effect as a counter-offer until the the Audanet report listing the repairs was received by the *Applicant* on 10 July 2017. By that time the *Applicant* was at least 2 days into the repairs with no reliance on the counter offer and no reference to it.

202. It follows, contrary to what is submitted by the *Respondent,* that there is no opportunity for the doctrine of approbation and reprobation to arise. The point of election was when the *Applicant* started the smash repair work on the customer's vehicle.

Has the *Respondent*, as an Insurer under the *Code*, committed breaches of any of its obligations under Clause 4.2(b)(ii) of the Code? If so, what breaches?

203. In paragraph 55 of his statement the director argues that the Respondent is not complying with Clauses 4.2(a) and (b), 6.1, 6.2 and 6.3, setting out the text of those clauses. In paragraph 56 he sets out basis of his belief about the Respondent's breach of Clause 6.3 because the Respondent has not provided the Applicant with any breakdown of the rejected items, has not negotiated on the costs of repairs and has not explained how the Audanet quote was calculated. He says that the Respondent presented the Audanet quote as an "assessment report" which arbitrarily altered the Applicant's repair estimate by reducing the scope of work[193], without attempting to negotiate any of the key

193 Director's statement, par. 86, p. 16.

items including labour rate, repair times or repair methodology. That the repair methodology was changed is conceded by the *Respondent's Assessor* in the 4th bullet point of his 6 July 2017 email to his line manager and in the *Respondent's* Request submissions, pp.4-6, par 3 re Cl. 6.

204. In my view the *Respondent* was not considering the repairer's estimate No. 19020 in a fair manner within the meaning of Clause 4.2(b)(ii), as I have set out above, when:

a. the *Assessor* told[194] the *Applicant's* director he did not need the estimate as he would be assessing with Audanet; and

b. the *Respondent* submitted[195] that the process of the insurer rendered the repairer's estimate superfluous or useless[196] from the outset.

205. As to that latter submission, it is, as the *Respondent* has previously submitted, proper to infer instructions from submissions[197]. Accordingly, I am entitled to treat the *Respondent's* submission that its processes rendered the repairer's estimate superfluous or useless from the outset as a considered statement of its position in this Determination. That submission seeks to vindicate the approach of the *Assessor* which denied the *Applicant*, as repairer, the role in estimating repairs given it under the *Code*. Additionally, treating the repairer's estimate as superfluous or useless, in my opinion, amounts a refusal to consider the estimate on unreasonable grounds.

206. The Online Macquarie Dictionary gives the following relevant definitions for "unreasonable":

1. not reasonable; not endowed with reason.

2. not guided by reason or good sense.

3. …….

4. not based on or in accordance with reason or sound judgement.

207. In those senses, the refusal to consider is unreasonable because of the role given the repairer under the *Code*.

194 *Assessors* statement, par 11.
195 *Respondent's* Request submissions, pp.4-6, par 3 re Cl. 6.
196 *Macquarie Dictionary*, giving the meaning of `*otiose*'.
197 *Respondent's Submissions* of 3 August 2018, p.15, par 50.

208. Similarly, when the *Assessor* told[198] the *Applicant's* director he would only be considering his quote for comparative purposes to validate whether or not the estimated costs are fair and reasonable, it is then not fair to the repairer to fail to communicate the differences between the repairer's estimate and the Audanet assessment and the reasons for those differences which have occurred as a result of the consideration by way of comparison. It's also unfair to the repairer not to communicate those matters as it's a breach of the *Respondent's* operating procedures. That is because those procedures recognise that mere service of the Audanet report without engagement by the *Assessor* with the repairer is not sufficient.

209. The *Respondent's* reliance on the Audanet system rather than the repairer's estimate amounts to a refusal to consider the repairer's estimate. In my opinion, as the Audanet software cannot automatically generate the times for removal of collision-damaged motor vehicle parts, parts whose removal is impeded by collision-damaged motor vehicle parts and panel beating repairs and other entries made manually, such a refusal is not based on reason and sound sense, and is therefore unreasonable.

210. In my view the *Respondent* was not acting in a transparent manner in relation to its purported consideration of the *Applicant's* estimate No. 19020 when it served the Audanet report on the *Applicant* without both identification of and explanation of the reason(s) for:

    a. the Manual Entry items represented by an asterisk (*);

    b. the changed scope of repairs; and

    c. the change in the repair methodology

    by reference to the repairer's estimate.

211. In my view the Respondent was not acting in a transparent manner in relation to its purported consideration of the Applicant's estimate No. 19020 when it served the Audanet report on the Applicant without explanation of the reason for the *Respondent's* labour rates of about $60.00 an hour, when the market rate used in the *Applicant's* estimate was nearly double those rates, at $110.00 an hour. In acting in that way the *Respondent* was also not acting in a fair manner towards the *Applicant*.

198 *Assessors* statement, par 25.

212. In my view the *Respondent* was not acting in a transparent manner in relation to its purported consideration of the Applicant's estimate No. 19020 when, after being told by the *Applicant's* director the estimation methodology he used was RTRM (real time real money), its *Assessor* said to the *Applicant's* director "*AudaNet … is based on many years of research in conjunction with many sources, in particular actual times from vehicle manufacturers"*. I infer from that statement that the *Assessor* was informing the director that the insurer's preferred estimating methodology was RTRM also.

213. Even if the *Assessor* had only used Audanet once previously, he would know that the statement he made was only true of operations which did not require manual entry, that many entries were required to be made manually and that Audanet did not supply the hourly rate. In those circumstances, the *Respondent* was using FTFM (funny time funny money) [199] while stating it was using RTRM and refusing to consider (other than for comparison purposes, or record purposes – see below) the *Applicant's* estimate which in fact used the RTRM methodology. It was unreasonable for the *Respondent* not to consider the *Applicant's* estimate other than for comparison purposes[200].

214. The RTRM methodology was said to be preferred by the *Respondent*, and the *Applicant's* estimate was prepared using the RTRM methodology. Accordingly, I find that the *Respondent* was not considering the estimate in a fair manner to only consider the *Applicant's* estimate for comparison purposes, when the *Respondent* was in fact using FTFM in Audanet.

215. In the *Assessor's* email to the repairer of 31 August 2017 the *Assessor* does not say that he accepted the repairer's quote for comparison purposes but "*for record purposes only as per the Code*" which suggests that the *Assessor* did not consider the estimate at all and that he thought that the *Respondent's* obligations under the *Code* only required mere formal observation from insurers. In failing to consider the estimate because the *Assessor* considered all he had to do to comply with the *Code* was take the estimate from the *Applicant*, the *Respondent* was refusing to consider the estimate on unreasonable grounds.

216. Likewise, to consider the estimate for record purposes only as per the *Code* is not to consider the estimate in either a fair or transparent manner.

Is the *Applicant* entitled to any payment from the *Respondent*? If so, on what basis and in what amount?

217. The repair work to the vehicle was completed on 14 July 2017. The *Respondent* has received the benefit of that work by the discharge of its obligations to the insured owner under the insurance policy and PDS. It would be unjust for the

199 As recognised by the *Applicant's* director in par 94 of his statement.

200 Or record purposes – see below.

Respondent to have received that benefit from the *Applicant's* supply of labour and materials without paying a fair price for it.

218. It is the opinion of the *Applicant's* expert that the repair estimate 19020 was fair and reasonable and outlined the most appropriate and cost effective repair methodology to restore the vehicle to its pre-accident and pre-repair condition. It is also the opinion of the *Applicant's* expert that the hourly rate charged by the *Applicant* of $110.00 per hour is fair and reasonable.

219. I accept the evidence of the *Applicant's* director that during the course of working on the vehicle the *Applicant's* staff realised that additional processes were required necessitating variations to the original quote, which had the effect of increasing the amount of tax invoice No. 12542 from its estimated $10,815.29 exclusive of GST to $13,451.17[201] exclusive of GST.

220. I find that $13,451.17 exclusive of GST is a fair price for the *Applicant's* supply of labour and materials in the repair of the *Customer's* vehicle under Claim No. XXXXXXXX[202].

221. As the *Respondent* has received the benefit of the *Applicant's* supply of labour and materials, I find that the *Applicant* is entitled to be paid by the *Respondent* $14,796.28 inclusive of GST, being the amount of its 14 July 2017 tax invoice No. 12542. I will make an order accordingly.

222. Under Clause 8.2 of the *Code* where the Repairs undertaken, price, work or documentation is disputed, payment of the undisputed component should be paid in accordance with the payment terms of sub-clause 8.1, namely, no more than 30 days from receipt by the Insurer of the final repair invoice. As the *Respondent* offered to pay the *Applicant* $7,894.90 for the work and there is no evidence that amount has been paid, the *Respondent* is to pay interest on $7,894.90 from 14 August 2017 (being 30 days after it received the *Applicant's* tax invoice No. 12542) until payment at the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before 14 August 2017. I will make an order accordingly.

Is the *Applicant* entitled to any of the other relief sought by it in its application?

223. As to the outcome sought by the *Applicant* of a higher level of transparency by the *Respondent* when assessing quotations from the *Applicant*, I consider that outcome is too general to be the subject of an order under Clause 6.4 of the *Determination Rules*. I have made more specific orders below which have transparency as part of their basis.

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201 As set out in the *Applicant's* 14 July 2017 tax invoice No. 12542.

202 As set out in the *Applicant's* repair estimate 19020.

224. As to the outcome sought by the *Applicant* of the *Respondent* (being ordered) to address delays in the repair and assessment process, the evidence before me did not allow me to make and findings of delays in either of the *Respondent's* repair or assessment processes.

225. As to the outcome sought by the Applicant, of the Respondent (being ordered) to conduct its operations in an honest and fair manner and to provide feedback or clarity on items removed from quotations, I consider that outcome is already mandated by the Principles of the *Code*, in respect of honest and fair conduct, and is therefore unnecessary. The outcome in respect of providing feedback or clarity on items removed from quotations I consider is too general to be the subject of an order under Clause 6.4 of the Determination Rules. I have made more specific orders below which have feedback or clarity on items removed from quotations as part of their basis.

226. As to the outcome sought by the *Applicant* of an order for cessation of the *Respondent's* Quotations being compiled or written by the *Respondent's* employees or agents, I have specifically found against the *Applicant* on this point[203].

227. As to the outcome sought by the *Applicant* of an order for cessation of the *Respondent's* Quotations being compiled using Audanet, I have specifically found against the *Applicant* on this point[204].

228. As to the outcome sought by the *Applicant* of the *Respondent* (being ordered) to use appropriate assessment processes, I consider that outcome is too general to be the subject of an order under Clause 6.4 of the *Determination Rules*.

229. As to the outcome sought by the *Applicant* of the *Respondent* (being ordered) to confirm what repair methodology they follow, I consider that outcome is already mandated by Clause 6.2(a) of the *Code*, and is therefore unnecessary.

230. As to the outcome sought by the *Applicant* of the *Respondent* (being ordered) to rely on and use industry times and rates, I consider that outcome is contrary to the express recognition in Clause 6.2 of the *Code* (acknowledged by the *Applicant*) of the ongoing changes in the motor vehicle repair industry in relation to the development of realistic times and rates and the insurer's right under Clause 6.2(b) to obtain an estimate alternative to an estimate submitted in realistic times and rates. Accordingly, I consider making such an order is precluded by the *Code* and I decline to make it.

231. For clarification I state that the findings I made above in relation to the fairness and reasonableness of the hourly rate charged by the *Applicant* is confined to the facts in this particular Determination and was not a finding as to minimum hourly

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203 At par. 154 above.

204 At par. 154 above.

rates and prices. I consider making an order as to minimum hourly rates and prices is specifically excluded from consideration by paragraph (b) of the Preamble to the *Code*.

232. As to the outcome sought by the *Applicant* of the *Respondent* (being ordered) to negotiate in good faith using the estimate that has been provided, I consider that outcome is already mandated by Clauses 4.2(b)(ii) and 6.3 of the *Code*, and is therefore unnecessary.

233. As to the outcome sought by the Applicant, of the Respondent (being ordered) to communicate in an open and transparent manner, I consider that outcome is already mandated by Principles of the *Code*, in respect of honest and fair conduct, and is therefore unnecessary.

234. As to the outcome sought by the Applicant, of the Respondent (being ordered) to provide in its policy with its *Customer* for the *Customer* to nominate a repairer of their choosing for the repairs, I find that the relationship between the *Respondent* and insured customers is beyond the scope of the *Code* and the *Customer* is not a party to this Determination. Accordingly, I consider making such an order is precluded by the *Code* and the general law in the absence of an affected party, and I decline to make it.

ORDERS

235. However, I consider that the evidence and my findings allow the making of the following orders under Clause 6.4 of the *Determination Rules*, namely THAT:

a. The *Respondent* and its Assessing Team cease to assert to repairers and others that Audanet provides realistic times for repair operations, OEM safe repair methods and all statements to similar effect, unless none of the repair operations for the vehicle under consideration require manual entry into the Audanet system;

b. The *Respondent* and its Assessing Team cease to assert that Audanet is an assessing methodology;

c. The *Respondent's* Assessing Team undergo training on the limitations of Audanet as an estimating tool where manual entry of data is required, including hourly rates for labour;

d. The *Respondent* revise its assessing practices to mandate communication by its assessors to the repairer of all differences between the repairer's estimate and the assessor's assessment together with the reason(s) for those differences;

e. The *Respondent* revise its assessing practices to mandate active consideration by all assessors of repairers' estimates, not just receiving

the estimates for either comparison purposes, record purposes or *Code* purposes;

f. That the *Assessor* undergo revision training in the *Respondent's* assessment operating procedure, in particular, the need for the *Assessor* to communicate with the repairer about the outcome of the Audanet assessment;

g. The *Respondent* pay the *Applicant* $14,796.28 inclusive of GST;

h. The *Respondent* pay the *Applicant* interest on $7,894.90 from 14 August 2017 until payment at the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before 14 August 2017; and

i. The *Respondent* pay the whole of the Expert Determination fees in the sum of $2,420.00 inclusive of GST pursuant to the Clause 4.3 of the *Expert Determination Rules*, to the Office of the Small Business Commissioner.

David Francis

Expert Determiner

12 December 2018