APPLICANT

And

RESPONDENT

DETERMINATION

PURSUANT MOTOR VEHICLE INDUSTRY CODE OF CONDUCT

MADE 7th January 2019

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IN THE DETERMINATION OF

A MOTOR VEHICLE REPAIRER (THE APPLICANT)

And

AN INSURANCE COMPANY (THE RESPONDENT)

UNDER

MOTOR VEHICHLE INSURANCE AND REPAIR INDUSTRY CODE OF CONDUCT (CODE)

INTRODUCTION

In this Matter I, Marcel ALTER, accepted a referral from the Resolution Institute to make a Determination in a claim by the Applicant against the Respondent. The Applicant claims that the Respondent had breached the principles as set out in the Motor Vehicle Industry Code of Conduct for failure to act in good faith and transparency in its dealings with the Respondent's Customer (Customer) and Applicant the Customer's preferred repairer. In particular, that the Respondent breached Sections1.1 and 4.2 (a) and 4.2 (b) of the Code. The Applicant further seeks to have the Respondent pay all costs including the difference between what the Insurer paid, and the final account rendered by the Applicant

The Code is in essence a voluntary code regulating how parties should interact in the Motor Vehicle Repair Industry with one another. It attempts to set out a framework for participants to deal with each other in an open, fair and transparent manner, with respect and responsibility as to quality of works performed, the safety of vehicles, and warranties.

In this matter the Applicant, does not believe that the Respondent dealt with the claim in accordance with the principles of the Code.

Given that the Applicant is situated in one State and the Respondent in another it was decided to hold the Determination on the papers. As such, in accordance with Preliminary Orders made, the Parties submitted

- **Initial Submissions**
- **Follow up submissions**
- **Final summaries**

The holding of a Determination on the papers has the disadvantage that the parties were not cross examined or on oath. The advantage being the both parties submitted very full documentation setting out their positions.

The matter stems from a claim brought by the Customer for the repair of damage to a vehicle.

WHAT IS NOT IN DISPUTE

- **The vehicle was damaged in an incident on the 27th March 2018.**
- **The Customer physically attended at the Applicant's premises to obtain an estimate to repair the damage.**
- **That Customer also contacted the vehicle insurer, the Respondent, to commence the claim process.**
- **That the Respondent accepted the claim.**
- **That the Customer at the Request of the Respondent attended one of the Respondent's preferred Repairers for an estimation.**

THE DISPUTE

What the dispute is about is that the Applicant, the Customer's preferred Repairer, believes its estimate, and by implication the Customer, was not accorded the respect, transparency or, dealt with in good faith by the Respondent. The Respondent having received a lower estimation by one of its preferred Repairers (Alternative Repairer) only considered this estimation as the basis for settling the claim. This was despite the Applicant pointing out what it felt were serious deficiencies in the Respondent's Repairers estimation, which would affect the safety and integrity of the vehicle. The Applicant went as far as to obtain an "independent" third party estimation.

The Applicant was aggrieved by its estimation being referred to as "uncompetitive" by the Respondent's initial internal assessor. And its concerns being ignored that the alternate rival estimation would not adequately cover the required repairs and/or restore the vehicle's integrity.

For its part the Respondent at all times believes it carried out its consideration of the claim in accordance with its normal and accepted practice, took in the concerns of the Applicant, and amended its estimate once its State based assessor could physically inspect the full damage. This occurred once the vehicle had been "stripped" by the Applicant in readiness for repair.

The Respondent maintains that whilst, in accordance with its policy, it did request the Customer to obtain an alternate estimation, it did not in any way advise or suggest how the alternative repairer should prepare its estimate. Further that it received the alternate estimate before the Applicant's estimate and considered both. It claims it has not breached the Code and has dealt with the Claim in a fair and open manner. The final "cash" payment to the Customer being based not only on the initial two quotes it received, and the further assessment from the Applicant's independent assessors, but ultimately by its own assessor viewing the stripped-down vehicle. It also reviewed and accepted an assessment for extra works required. For its part it believes it complied with the Code. Furthermore, it believes that the dispute relates to costs which are not covered by the Code.

In its submissions the Applicant refers to not only the Code, but
Acts Interpretation Act 1901 (Cth)
The Insurance Contracts Act 1094 -Section 13
Competition and Consumer Act 2010 Schedule 2

It also refers to the following cases:

Minister for Immigration and Border protection v WZARH [2015} HCA 40
Annets v McCann (1990)170 CLR596and
***Applicant v Respondent [2018]VsBc* 1 a determination under the code**

By its references to these it sought to establish that the Respondent must act in a "Utmost Good Fair "and act in a" Transparent'' manner. Further that the Respondent has a duty to apply the principals of "procedural fairness". The Applicant's claim is that the Respondent has not acted in a manner that complies, and as such is guilty of breaches of the Code.

For its part the Respondent does not dispute that it should act in in accordance with the Code, or in the manner claimed, but contends that in dealing with the claim it has dealt in accordance with the Code. It further contends that the Applicant has not demonstrated how the cases referred to and how legislation cited applies.

THE FACTS ACCORDING TO THE APPLICANT

1. **On the 28th March 2018 the Customer came to the Applicant for an estimate of damage.**
2. **Estimation (Document R1) was prepared and forwarded to the Customer's Insurer. The Estimation to repair the vehicle was for $4,922.79.**
3. **The Applicant believes that on receipt of its quote (assessment), the Customer was directed by the Respondent to its preferred Alternate Repairer, to obtain an alternate assessment.**
4. **The Customer attended the Alternate Repairer's premises and an estimate (Document 2) was received by the Respondent. The Estimate was for $3,550.65 but was reduced by the Respondent's internal assessor to $3,422.50.**
5. **The Customer was advised by the Respondent on the 4th of April that the Applicant's, estimate was not approved. Further that the Respondent was only prepared to offer a cash settlement.**
6. **The conversation was only between the Respondent and the Customer. The Applicant was not been consulted.**
7. **As a result, the Applicant lodged a claim pointing out the Respondent's failure to be transparent with it, the Applicant, as it was offering, unfairly, a cash settlement. Further that it was in breach of the Code and its obligations to it, the Applicant and the Customer. It also put the Respondent on notice as to the future (Document R3).**
8. **The Customer provided a copy of the estimates to the Applicant on the 6th of April 2018 and enquired as to the differences.**
9. **On receiving a copy of the Alternate Repairer's estimate the Applicant reviewed and advised the Customer as to the inadequacies of the estimate, as it failed to cover a number of items that it felt were critical to the safety and integrity of the vehicle.**
10. **These included rewiring, and refitting items such as number plates, lights, splash shields, fuel cap.**
11. **The Applicant advised the Customer that the Respondent failed in its duty to act in good faith and that the safety and integrity of the vehicle would be compromised. Accordingly, the Respondent had failed to act in a fair or transparent manner in accordance with the Code and S13 of the Insurance Act.**
12. **It also arranged for an independent repairer, (Independent Repairer) to review its, the Applicant's Estimate. The Independent Repairer duly did so and prepared am estimate on the 10th of April 2018 that was slightly lower than the Applicant ($4,721.27 document R5). We note at this stage the Independent Repairer does**

not appear to have viewed the vehicle and does not appear to have been given the Alternate Repairer's assessment.

13. **The Independent estimate was provided to the Respondent but does not result in a reassessment, only a denial of any breaches on the 12th April 2018.**
14. **The Applicant rejects the Respondent's position and restates its view on the 15th Of April 2018.**
15. **On the same day the Customer arranges for the Applicant to commence repairs (the 15th off April 2018).**
16. **The Respondent arranges to send its state based assessor to view the vehicle.**
17. **He does so on the 17th of April 2018, and on the 18th the Customer receives an amended cash settlement offer.**
18. **Document R10 attached to the claim sets out the assessor's view. It is provided to the Applicant by the Customer following a query by the Applicant to the Customer as to whether the Customer had heard anything from the Respondent. The Customer forwards a copy of the email he has received. It does not appear this was communicated by the Respondent to the Applicant. The Applicant claims this was an admission that the Alternate Repairers assessment was inadequate and inappropriate.**
19. **On the 27th of April 2018 The Independent Repairer was requested to reassess the vehicle by the Applicant. The Independent Repairer identified extra work required for $769.20 (Document R8). Presumably Independent Repairer must have reviewed the works being carried out.**
20. **The Applicant duly completed the repairs on or about the 21st May 2018 and raised an invoice which was based on Independent Repairer's assessment and extra work for a total of $5,490.57.**
21. **The Customer forwarded the Account to the Respondent and requested that the Respondent pays the Applicant.**
22. **The Respondent readjusted its cash settlement offer incorporating the extra work as per the Independent Repairer's extra account and offered a cash settlement to the Customer of $4,586.11 (less the Excess Of $500.00) on the 11th June 2018.**
23. **A difference of $904.42.**
24. **The correspondence with the Customer was between the Customer and the Respondent Company although the Customer appears to have instructed that the Applicant negotiate for him.**

THE FACTS ACCORDING TO THE RESPONDENT ARE SET PRINCIPALLY IN ITS ANSWERING MATERIAL AND THE TIMELINE BEING ATTACHMENT 2.

Much of the history accords with the Applicant's submission but significant differences appear

1. **The Customer contacts the Respondent by phone to lodge a claim on the 27th of March 2018.**
2. **Whilst lodging the claim the Customer advises that he has a preferred Repairer.**
3. **The Customer is advised that the Respondent's policy is to obtain two assessments and is referred to a preferred repairer (Alternate Repairer). He goes to the Alternate Repairer and the vehicle is assessed.**
4. **Following the claim lodgment on the 27th March 2018 Alternate Repairer is sent a request to assess the damage.**
5. **At about the same time the Respondent receives a call from the Applicant. The Applicant is requested to forward its estimate to the Respondent and is given a claim number.**

6 Later that day the Respondent receives The Alternate Repairers' assessment and refers it for a "desktop assessment" by its internal assessor. He completes his assessment on the next day, the 28th April. He reduces the Alternant Repairer's assessment to $3,422.50. The Customer is advised via SMS. Included in the Report are the words "on report subject to dismantling".

7 At about the same time on the 28th Of April 2018 the Respondent receives the Applicant's assessment of $4,922.50. This is referred to the internal assessor, the following day (according to the time line).

8 After considering both estimates, the assessor, on the 31st of March 2018, advises that the Applicant's estimate is not competitive and recommends the Customer be given the option of a cash settlement or that Alternate Repairer carry out the repairs.

9 The Customer is so advised when he calls on the 3rd of April 2018. The Claim file notes the Customer is advised that his repairer's quote is noncompetitive. He requests that that the estimates be sent to him for consideration.

10 On the 4th April 2018 the Respondent receives the initial Code of conduct dispute.

11 The Code dispute is referred to the Respondent's National Assessing Manager who responds to the Code dispute as then notified on the 12th April 2018. The Respondent receives a rejection of its position on the 16th April 2018 from the Applicant

12 There is a note on File that the Customer rang to request a copy of his Repairer's estimate. Both estimates are emailed to the Customer.

13 The rejection comes with a copy of Independent Repairer's assessment of the 9th April which reduced the Applicant assessment to $4,721.27 (from $4,922.79).

14 The Respondent's State based assessor attends at the Repairers premises. After an initial rejection he views the vehicle on the 17th of April 2018,

15 The vehicle had at that time been partially stripped presumably to commence repairs. This allowed the assessor to fully review the damage.

16 Following that review the Respondent made a revised estimate based on the Alternate Repairer's assessment (as reviewed) with some additions to a revised figure of $3,976.35.

17 The Assessor's revised assessment produced by the Applicant (document R10) and attached to the insurer's initial position paper, indicates that assessors brief was to assess the damage and cross reference the Alternate Repairer's assessment and the Independent Repairer's assessment, as arranged by the Applicant. Further he notes the that the reason for the further assessment was to establish if method of repairs in the assessments were correct and that the assessments used the correct method and to determine that the assessments were complete and competitive.

18 The Respondent contacted the Customer on the 20th April 2018 to advise of the revised estimate. The Respondent again offered a cash settlement or to have the Alternate Repairer do the repairs.

19 The Respondent receives no response and follows up with a call on the 18th May 2018 without a response.

20 On the 5th June 2018 the Customer emails the Respondent with the Repairer's invoice for the completed repairs including a supplementary estimate by the Independent Repairer for $609.76.for additional parts and repairs discovered after the vehicle dismantled and repairs being done.

21 The Respondent claims not to have previously been notified of the extras dated 21st May 2018 (Attachments 3 and 4).

22 On the 11th June 2018 the Customer sent an email as to his options.

23 On 12th June 2018 a Mediation between the Applicant and Respondent was held pursuant to the Code, but it did not resolve the issues.

24 After attempts to contact the Customer failed, the Respondent on the 3rd July forwards a cheque for $4,086.11 (after taking off excess $500.00).

26 A cheque is forwarded on the 3rd July with a letter setting out the Respondent's calculations.

27 The cheque is presented for payment on the 24th Of August 2018 about 6 weeks after further Code dispute notified.

COMPARISONS

I felt it important to set out the two histories as only by reviewing each is it possible to understand why the Applicant believes there are breaches of the Code, and why the Respondent believes it has not breached the Code.

The fundamental belief of the Applicant is that the Respondent, by directing the Customer to obtain an assessment, after being advised of the Customer's preference, then failed to really give the Applicant 's assessment due weight or, respect, even after the Applicant pointed out the flaws in the Respondent's preferred repairer's assessment. The Applicant is further aggrieved that the Respondent appears to be attacking the Applicant, as a repairer, by the initial Respondent's desktop assessors' comments via the Customer. That is that the Applicant's assessment is "uncompetitive". This is compounded by offering to have its preferred Alternate Repairer perform the work, or a cash settlement. In all this the Insurer failed to engage with the Applicant, the Customer's preferred repairer.

The Respondent for its part does believe it followed due process and did take into account the Applicant's assessment. It acknowledges that it was aware from the outset that the Customer had a preference. It followed its normal course by requesting a second estimate and presumably gave the Customer a list of its preferred repairers. It did not direct how the estimate was to be prepared. The Customer duly obtained the estimate. It arrived at the Respondent immediately before the Applicant's estimate and was considerably lower. The Respondent's initial assessor viewed first the Alternate Repairer's assessment and marginally reduced it. He then says he compared it with the Applicant's assessment. He felt they were comparable in method used but that the Applicant assessment was "not competitive". There is nothing in this time line to show that the Applicant assessment was not given due weight or considered.

The Respondent advised the Customer of its view. The Customer advised the Applicant. The Applicant, on being given a copy of the Alternate Repairer's assessment, notes flaws in it, which it believes would affect the integrity of the repairs and presumably was the reason for the lower quote.

To support its view the Applicant engages its own independent assessor who marginally reduces its assessment.

Unfortunately, for the Applicant's position, it does not appear to have provided the "independent Repairer with more than its own assessment. It does not appear to have provided the 'independent' with the Alternate Repairers assessment or, asked its Independent Repairer to comment on the perceived inadequacies. It seems to have been a "desktop" assessment only.

Nor, given the view by the Applicant of the inadequacies and faults with the Alternative Repairers estimate, does it provide any evidence that these are fundamental to the repair. It appears to take the view that these are as self-evident.

The Respondent, and we do note by this stage a Code complaint lodged, does take the step of arranging for its State assessor to physically assess the vehicle at the premises of the Applicant. At this point he does have the three assessments and the Applicant's view as to the inadequacies. After his inspection whilst taking these into account he does upgrade the assessment but not materially. He also confirms that in his view the methodology of assessment is the same. At this point the vehicle is partially stripped and ready for repair.

Whilst it is clear the Customer had faith in the Applicant. the Respondent does not communicate with the Applicant. The Respondent again advises the Customer directly of a revised offer which he can take as cash, or have the Alternate Repairer do the work with an inducement of a guarantee for the lifetime with the repairs.

The repairs are duly completed by the Applicant and a final account submitted to the Customer. The account differs only marginally from the Independent Repairers assessment but includes an account for "extra works required' as now assessed by the Independent Repairer. The Customer provided the account to the Respondent and requests payment to the Applicant.

The Respondent reviews the account but does not change its view. It does accept the extra work required as assessed and notified by Independent Repairer. The Customer is advised the it will pay to him as per previous cash offer, plus the assessed extra.

The Customer does not respond but does eventually bank the cheque. In the meantime, the Insurer and the Applicant engage in the "dispute" as to whether the Code was breached.

The Code attempts to give a framework to the participants as to how to openly interact with each other in a spirit of openness and transparency. What it cannot do is ensure that the parties must agree. In this case it is obvious the Applicant feels it was not listened too. The Respondent for its part could, and should have, copied in the Applicant with its communications with the Customer. It could have used a different term than "non-competitive", and it could have asked its internal assessors to specifically address the "integrity and safety concerns". The "integrity" repair issues do not appear to be specifically addressed at the viewing of the partially stripped vehicle.

FINDINGS

Reviewing the fact histories, whilst there is a failure of communication, I do not find the conduct of the Respondent has breached the Code. It does have three assessments to review. Accepting the lowest is not a breach of the Code. It could have addressed the perceived faults in its responses, but for its part whilst it obtains an independent assessment the Applicant did not get the Independent Repairer to comment or set out the cost of these omissions.

It is clear that when State based assessor for the Respondent assesses the partly stripped vehicle, he has all the assessments and can compare and does so. There is nothing in the Applicant's material, or evidence, that questions that assessor did not know his trade or was in any way biased.

It is noted that the matter is not about money but principles. I accept that the Applicant believes it was not treated fairly, especially that it would be upset at its assessment being referred to as uncompetitive. It is also understandable that the Applicant is aggrieved that its client is advised to either have the Alternative Repairer do the repairs, or a cash settlement. Either of these giving rise to an assumption that the Respondent had no trust in the Applicant. We note these conversations were with the Customer and the Respondent.

However, I do not find the Respondent by its behavior has breached the Code.

AS TO THE SPECIFIC BREACHES ALLEGED

Section 1.1

The Applicant claims that the estimate of the Alternate Repairer was lacking, and if carried out, would not have ensured the safety, integrity or unity of the vehicle. However, it has failed to provide evidence of how the omission would affect the vehicle.

Although this point is central to the Applicant's case, the "independent assessment" it commissioned makes no comment. It does not provide any mechanical or manufacturer's evidence supporting its claim. Nor does it appear to take the opportunity of having a discussion re these items when the Respondent's assessor was at its premises.

The Respondent did not seek to influence the Alternative Repairers estimate. The Alternate Repairer at the time it does its assessment does not have a copy of the Repairer 's estimate. The Alternate Repairer at no time appears to have seen or be asked to comment on the Applicant's assessment. Possibly it should have been, and the dispute may have been resolved by its agreeing or advising why not.

The Respondent receives both estimates and its desktop assessor does assess both prior to initial offer to the Customer. He considers both use the same method in the preparing the assessments.

If anything, the Respondent is at fault in knowing of the Customer's preference of repairers not contacting the Applicant to discuss the differences. But I note the Respondent's client is the Customer, not the Applicant. It has a duty to them and appears to have fulfilled that part of its duty by advising the Customer as to its position. The Respondent leaves it up to the Customer to decide.

The Respondent did not at any time authorise repairs but gives the Customer the option of cash, or the Alternate Repairer's fix. The Customer had a third option and that was to continue with his preferred repairer which he ultimately took.

The Applicant claims that the Code lacks definition and refers to case law and other acts to assist. But it fails to advise how these apply in this case. In the end the facts of the any case will be the determining factor.

Section 4.2 (a)

The same comments are relevant to this section. The Respondent did require estimates. This is consistent with its practice when a claim is made. However, the Respondent did not have a say in how any of the estimates were prepared.

The Respondent's State based assessor had the opportunity of seeing the vehicle partly stripped in readiness for repair when the complete picture was available. The Assessor at that point has all the assessments and the Applicant's view. However, apart from an adjustment which he makes to the initial assessment he does not materially adjust the Respondent's position. Importantly he comments that in his opinion that the assessments use the same method.

The Respondent did accept that extra work was required in the final account. These extra were contained "independent's" further assessment.

Section 4.2(b)

The section contains 5 parts

4.2(b) (1) The Respondent received the claim and directed the Customer to obtain an assessment. It does not direct what should be in the assessment. Similarly, it has no input into the Applicant's assessment. The Applicant will continue to believe the Insurer did not consider its estimate fairly and dismissed it as it had a lower estimate. But in the end the Respondent followed the recommendation of its State based assessors who had the benefit of 3 assessments (the Applicants, the Alternative Repairer and the Independent Repairer) and a view.

4.2(b) (ii) The Applicant may feel the Respondent, or its desktop assessor, may have acted capriciously by advising the Customer its quote was uncompetitive. This was that person's view. It does not prove that the Applicant's quote was not considered. The evidence does reflect that the Respondent preferred the lower quote, but it was transparent as to why to the Customer.

4,2 (b) (iii) There never was an agreed authorised amount. The Applicant provided an invoice to the Customer who passed it on. The Respondent paid what it perceived was the correct compensation based on its estimation. For its part although delaying acceptance by not banking the cheque, the Customer appears to have not queried the Insurer directly as to the final offer.

4.2(b) (iv) Refers to removing a vehicle from the Applicant's premises. The Respondent did not seek to do so but gave the Customer the option. The Customer importantly stayed with the Applicant. Offering a cash settlement is not a breach of this section.

4.2 (b) (v) Not drive an unsafe car.
The Applicant's view has been referred to previously. Importantly the vehicle was repaired to the Repairer's and the Customer's satisfaction.

Clause 6.1

The Respondent did require an alternate competitive assessment it certainly believes it received same. Its initial internal assessor 's view was that the assessments both used the same method. Whilst this is not defined it is also not questioned by the Applicant.

The Applicant's case would have been enhanced had it set out how the Alternate Repairer's assessment breached S4(a) of the Code It is not sufficient for its case to set out some inadequacies. The Respondent did not accept the Applicant's position even though its State based assessor, does amend the initial assessment. The Respondent's position is that the Alternative Repairers assessment falls within the method consistent with either the vehicles warranty conditions or current industry standard (as noted in Clause 4(a). It appears to accept that the Applicant's assessment also does so but is overpriced.

The Respondent had the assessment reviewed by a physical reassessment before finalising its offer to the Customer. I again note that at that time, The Respondent had three assessment and its own assessor viewed the vehicle. The final viewing was when the vehicle was stripped ready for repair.

Section 10,11,12
The Determination does not examine these sections in detail apart from noting that there are real issues for Determination, and the parties certainly appears to have complied with the Dispute Resolution Procedure. Both parties have provided extensive material as to their concerns and their understanding.

THE DETERMINATION

Thus, the Determination is that there was no breach of the Code. At best I would recommend that Insurers communicate more directly with Repairers especially when the Customer has a preferred Repairer. Further where a Repairer brings up issues as to its concerns that are to do with a vehicle's integrity, or safety, or manufacturer specification, these should be specifically addressed.

Whilst the Determination is that on the present facts there is no breach of the Code, I do believe that the principle that the Applicant was perusing was legitimate for a determination. I also believe the dispute was not about differences in costs of repairs.

I do find that the Applicant had a legitimate basis for a determination and in its submission has complied with Clause 5.3 of the Rules attached to the Code. Further that the matter does come within clause 10 and is not merely as a dispute relating to costs but goes to communications and to ensuring a vehicle is properly repaired

COSTS
Whilst the Determination is that the Respondent has not breached the Code and that the action be dismissed, I do believe that there were real issues to be determined. I would advise that parties to the Code should be provided with all relevant communication. In this case the Respondent does not appear to have done so and this has led to the action. Even though the Respondent may have considered that the Customer may have been its client, in this case, it is clear the Customer had a preferred repairer and was expecting the Respondent to communicate with the repairer.

Further if issues are brought up as to integrity and safety these should be discussed directly and specifically with the party alleging same

Accordingly, in accordance with clause 4.3 of the Code Rules allowing the Determination Provider to apportion costs I determine costs in all the circumstances should be as to 80% to be paid by the Applicant and 20% to be paid by the Respondent.

Signed

By Marcel Alter

As a Determination under the MOTOR VEHICLE INSURANCE AND REPAIR INDUSTRY CODE OF CONDUCT

Dated 7th January 2019