

**PURSUANT TO RULE 6 OF THE APPROVED DETERMINATION SCHEME RULES MADE PURSUANT TO THE MOTOR VEHICLE INSURANCE AND REPAIR INDUSTRY CODE OF CONDUCT ALL REFERENCES IDENTIFYING PARTIES OR THEIR REPRESENTATIVES HAVE BEEN ANONYMISED TO MAINTAIN CONFIDENTIALITY IN THE DETERMINATION'S SUPPLY TO THE CODE ADMINISTRATION COMMITTEE**

**FURTHER REDACTIONS HAVE BEEN IMPOSED AT PARAGRAPHS 4 AND 7 TO MAINTAIN ANONYMITY DENOTED IN EACH CASE BY THE SYMBOL "XXXXXX"**

Determination of a Dispute pursuant to Section 5(2)(e)  
by the Victorian Small Business Commissioner under the  
*Small Business Commission Act 2017*  
BETWEEN:

**APPLICANT**

And

**RESPONDENT**

Concerning alleged breaches of the Motor Vehicle Insurance and Repair Industry Code of Conduct ("the Code") dated 1 May 2017, pursuant to Clause 12 of the Code

**IN ORDER TO MAKE THIS ANONYMISED DETERMINATION COMPREHENSIBLE THE FOLLOWING CONVENTIONS HAVE BEEN OBSERVED:**

**THE APPLICANT REPAIRER IS REFERRED TO AS A AND ITS SERVANTS OR AGENTS ARE REFERRED TO AS A1, 2 ETC**

**THE RESPONDENT INSURER IS REFERRED TO AS R AND ITS SERVANTS OR AGENTS ARE REFERRED TO AS R 1, 2 ETC**

## ISSUES

Issues numbered 1 to 14 below repeat (in renumbered form) the three sets of Issues which were set forth at pages 4, 6 and 14 of the Agenda for the Preliminary Conference conducted on 1 August 2018. At the Preliminary Conference, after the Issues had been articulated, both sides were invited to advance additional/alternative issues. Neither side availed itself of that opportunity.

1 I have not been provided with copies of the CAC approved units.

2 There is no evidence as to the attainment by the two Respondent's Assessors (named as R1 and R2) involved in the quotations of 5 vehicles of the relevant qualification(s).

3 How did the Applicant and the Independent Assessors demonstrate the competencies referred to in AS paragraphs 15,16 & 17 ?

4 Are there facts, apart from the alleged lack of qualifications, which the Applicant relies upon as "failure to enter into genuine negotiations" or "unreasonable and capricious actions".?

5 What is the basis for the alleged practice of the Insurance Assessor(s) preparing an alternative estimate rather than simply assessing the Applicant's quote?

6 Was the Respondent's quote based on an inspection of each or any vehicle?

7 Is xxxxxx equivalent to Audinet? Is each or are both simply quoting templates?

8 Did the Insurer's Assessors base their quotes on photographs?

9 Did the Applicant or the vehicle owners create any obstacle to physical inspection of any vehicle(s) by the Insurer?

10 Paragraphs 14 and 15 of the Applicant's Reply were present in the hard copy but not in the electronic version. Is it necessary to adjudicate on them or is the contest laid out in the material recited above?

11 The interpretation of Clause 6.3 requires consideration of Clause 7.4 and the respective parties' compliance.

12 How are the differences between the three quotations relating to five separate vehicles to be addressed to determine the real cost of repairs? Should there be evidence in some form and/or interrogation of the persons who prepared each quote?

13 Given that the Insurer did not authorise the Applicant to carry out any of the repairs, what are the facts and circumstances surrounding the Applicant's decision to proceed with the repairs without authorization?

14 Subject to what emerges in relation to 4 above, what is the basis for the Applicant's claim for financial compensation?

It will be seen that what was sought from the parties was largely primary evidence of relevant facts. That primary evidence was sought because the contradictory character of the matters asserted in the Application, the Response and the Reply ("the submissions") could not be evaluated without reference to primary materials.

For whatever reason(s) the primary materials supplied (summarized below) were surprisingly limited considering the volume of material supplied initially in the submissions and attached material.

In the circumstances, I am called upon to make findings and determinations on the standard of the balance of probabilities although there appear to be relevant materials which have not been put forward (for whatever reason(s)).

### **DETERMINATION ON ISSUES**

1 I have not been provided with copies of the CAC approved units

These units, namely AURVNA 4001, 4002 and 4004, AURVNN 4001 and AURVNP4001, were provided on 31 July 2018.

2 There is no evidence as to the attainment by the two Respondent's Assessors (named as R1 and R2) involved in the quotations of 5 vehicles of the relevant qualification(s).

Statutory Declarations declared on 21 August and 4 August 2018 respectively evidence qualifications apparently satisfying the requirements of the **Motor Vehicle Insurance and Repair Industry Code of Conduct** ("Code"). There has been no reply disputing those Declarations. I find that the Assessors were relevantly qualified.

3 How did the Applicant and the Independent Assessors demonstrate the competencies referred to in AS paragraphs 15, 16 & 17 ?

**The Applicant** has supplied the Statutory Declaration dated 11 August 2018 of its Managing Director A1 evidencing his pursuit of the Certificate III Automotive Body (Panel Beating) qualification between 1981 to '84 and of his occupation of Tradesman-

Panel Beater 1984 to 1992. He thereby satisfies the qualification requirements of Code Clause 4.3 (b) (i) and 4.4 (b) (i).

### **Independent Assessors**

The independent Assessments are contained within Attachments C to F of the Application. A total of five vehicles are referred to in the Attachments (two vehicles within D). None of the Assessments contains any recital of qualifications satisfying the requirements of Code Clause 4.3 (b). Similarly, the materials provided on behalf of the Applicant on 21 August 2018 contained no evidence of qualifications conforming with the Code. Accordingly, I am unable to find that they possess the competencies referred to in paragraphs 15, 16 and 17.

4 Are there facts, apart from the alleged lack of qualifications, which the Applicant relies upon as "failure to enter into genuine negotiations" or "unreasonable and capricious actions"?

This issue has reference to Clauses 4.2 (b) (ii) and 6.3 of Code

The content of Applicant's Attachments C to F, being restricted to the Applicant's quotations, Assessments by independent Assessors, fragmentary communications regarding dispute processes and the Insurer's Assessments by R1 and R2 gives little or no content nor flavour of the communications between the Applicant and the servants/agents of the Insurer. The Applicant through AN INDUSTRY REPRESENTATIVE provided various materials on 21 August 2018 including diary notes of contacts between the Applicant and representatives of the Insurer and copy emails.

### **The Diary Notes**

These relate to Cases 1, 2 and 3 referred to in Attachments C to E. I was not provided with Diary Notes for the other claims.

#### Case 1, Claim No xxxxxx

After vehicular damage was reported on 15 September 2016, the Applicant's quote was emailed to the Respondent on 19 September. On 7 October R1 of R rang to give a price on his Assessment based on a labour rate of \$xxxxxx per hour which was one-half of that applied by the Applicant. R1 was asked about the code and said he did not know much about it. On being asked about being happy to negotiate R1 said he would have to speak to his leader about this. He was asked to fax out a copy of his adjustments to the Applicant's quote so negotiations could take place and he responded that he would have to get back to the Applicant before he faxed it. On 10 October the Applicant rang R1 and agreement was reached on the time required to repair the vehicle but R1 said that the contents of the PDS allowed him no further room for negotiation of the hourly rate, ie \$xxxxxx. R1 then asked for the Applicant's "bottom line" to do the job. When that was provided he said he could not come to that. The diary record proceeds to note two attempted telephone contacts with R1 followed by the email of 23 November referred to

below requesting a copy of R1'S estimate. It records R1 as responding on 24 November that he would have to speak to **THE INSURER'S REPRESENTATIVE** first then respond to confirm if he is able to do so. The diary records an email from R1 in early January 2017 providing a copy of the estimate.

Case 2, Claim No xxxxxx

The diary note records emailing of the Applicant's estimate and images to the Respondent on 19 October 2016. On 26 October R1 rang to go over the quote and arrived at a figure ½ of the Applicant's. R1 said he might be able to raise it by \$100. We agreed on the hours but his hourly rate killed it. On 28 October an Assessor, R3 rang and A1 enquired what format had used to assess and was told Auditex at \$xxxxxx per hour.

Case 3, Claim No xxxxxx

The diary note records emailing of the estimate and images on 19 October 2016. On 27 October R1 called to say he would do his comparison quote and call back to discuss. On 14 November, after two unsuccessful attempts to speak to the Assessor, R1, the assessed quote was received from him.

**Emails**

Dated 19 April 2017 Claim No xxxxxx

From A1 of the Applicant to R1 (and others) of the Respondent. A1 commences by noting his attempts to contact R1 "over the last week or so" to discuss the file. He then states that the client informed him a few days ago that R1 had requested that the client obtain a second estimate. He then complains that R1 has failed to contact the "repairer of choice" to "at least attempt a discussion with the repairer".

Dated Thursday 4 May 2017 Claim No xxxxxx

A1 enquires of R1 whether he has had a chance to speak to R4 "as we discussed "at the start of the week".

What is clear from Attachments C, D and E is that the process for Internal Dispute Resolution provided by Clause 11 Code had been initiated by the Applicant on 11 November 2016. The same process regarding Case No 5 in F was initiated on 11 May 2017.

Materials were provided by **THE INSURANCE REPRESENTATIVE** of the Respondent on 21 August 2018 but they do not respond nor relate to the content of the Diary Notes or Emails summarised above.

**Finding on Issue 4**

Acknowledging the fragmentary nature of the Diary Notes and Emails but, as noted, in the absence of relevant Responding materials and on the balance of probabilities I find that the inflexible insistence by the Respondent on an hourly labour rate of \$xxxxxx, the

failure to respond promptly to requests for responses and the delay(s) in providing the Respondent's estimates amounted to failure to negotiate and unreasonable and capricious behaviour in contravention of the Code.

5 What is the basis for the alleged practice of the Insurance Assessor(s) preparing an alternative estimate rather than simply assessing the Applicant's quote?

At the Preliminary Conference both sides agreed that the Respondent had accepted the times quoted by the Applicant but applied a labour rate of \$xxxxxx per hour without variation instead of the labour rate quoted by the Applicant.

6 Was the Respondent's quote based on an inspection of each or any vehicle?

No. As noted in 5 above, the Respondent simply accepted the hours quoted by the Applicant and applied a rate of \$xxxxxx to those hours.

7 Is xxxxxx equivalent to Audinet? Is each or are both simply quoting templates?

This is irrelevant because of the outcome of Issue No 6.

8 Did the Insurer's Assessors base their quotes on photographs?

This is irrelevant because of the outcome of Issue No 6.

9 Did the Applicant or the vehicle owners create any obstacle to physical inspection of any vehicle(s) by the Insurer?

No. As noted in 5 above, the Respondent simply accepted the hours quoted by the Applicant and applied a rate of \$xxxxxx to those hours.

10 Paragraphs 14 and 15 of the Applicant's Reply were present in the hard copy but not in the electronic version. Is it necessary to adjudicate on them or is the contest laid out in the material recited above?

At the Preliminary Conference the Parties declined the need for such adjudication.

11 The interpretation of Clause 6.3 requires consideration of Clause 7.4 and the respective parties' compliance.

At the Preliminary Conference both sides agreed that the Respondent had accepted the times quoted by the Applicant but applied a labour rate of \$xxxxxx per hour without variation instead of the labour rate quoted by the Applicant.

12 How are the differences between the three quotations relating to five separate

vehicles to be addressed to determine the real cost of repairs? Should there be evidence in some form and/or interrogation of the persons who prepared each quote?

On 21 August 2018 I was provided by **THE INDUSTRY REPRESENTATIVE** for the Applicant with a number of Statutory Declarations by Declarants who wished to be anonymous. The burden of their testimony was that an hourly rate of \$xxxxxx was unviable. On the same date I was provided with five Statutory Declarations by **THE INSURANCE REPRESENTATIVE** each of which was in identical terms (such that each was from a standard form) affirming the conduct of motor vehicle body repairs at the labour rate of \$xxxxxx per hour.

As I warned in my email to both sides on 17 August, "it may be necessary to seek expert opinion from loss adjuster(s) at the parties' cost to resolve the matter".

Resolution of this conflict has not been advanced. I am not entitled as Determiner to arbitrarily select one or other of the asserted hourly rates without some guidance as to what is reasonable commercially. I am conscious that there are competing commercial interests and that each may be advancing ambit claims. I direct the Parties to confer and then approach VSBC with a proposal for resolution of the hourly rate eg by an expert Assessor agreed by both parties by no later than 14 days. Failing such Agreement the Victorian Small Business Commissioner may appoint an independent expert to assess a reasonable hourly rate for the carrying out the repairs to the five vehicles. The fees of any agreed or appointed expert are to be paid in equal shares by the Parties.

13 Given that the Insurer did not authorise the Applicant to carry out any of the repairs, what are the facts and circumstances surrounding the Applicant's decision to proceed with the repairs without authorization?

The materials provided to VSBC following the Preliminary Conference on 1 August 2018 shed no light on this issue. Accordingly, I am unable to make any finding of fact on this issue.

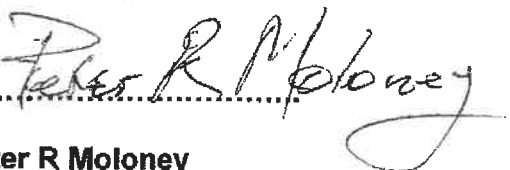
14 Subject to what emerges in relation to 4 above, what is the basis for the Applicant's claim for financial compensation?

My understanding is that all vehicles have been repaired at the cost of the Applicant, although there is no documentary evidence of this. If this is so, in light of the findings in issue 4 above, I find a breach of the obligation of the Respondent to act in accordance with Code.

Finally, on 21 August 2018, when delivering the Respondent's Reply to the Applicant's Material, **THE INSURANCE REPRESENTATIVE** for the Respondent sought to expand the issues beyond those enumerated above. The parties had been invited at the

conclusion of the Preliminary Conference on 1 August 2018 to nominate any issues additional to the fourteen set forth above and omitted to do so. The Applicant has objected to this proposed enlargement and I, therefore, refrain from addressing it.

DATED 16 October 2018

A handwritten signature in cursive script, reading "Peter R. Moloney", is written over a horizontal dotted line.

**Peter R Moloney**  
**Determiner for VSBC**