

29 October 2015

By email: towtruckreview@esc.vic.gov.au

Submission to the Tow Truck Review
Essential Services Commission
Level 37, 2 Lonsdale Street
MELBOURNE VIC 3000

Dear Commissioners

Accident towing regulation—Draft report

Consumer Action Law Centre (**Consumer Action**) and the Western Community Legal Centre (**WEstjustice**) welcome the opportunity to provide this submission to the Essential Services Commission's (the **Commission**) *Accident towing regulation—Draft Report* (the **Draft Report**).

Our centres appreciate the focus that the Commission has placed on consumer outcomes in the Draft Report. We acknowledge that the Commission has regulatory power in relation to the tow-truck industry but not in relation to smash repairers and other agents (including debt collectors) who contract with consumers at accident scenes or soon after. Despite that, the Commission's draft recommendations go some way to influence the behaviour of consumers and others following an accident, which we support.

In its Final Report, we encourage the Commission to make further recommendations relating to the 'unregulated' aspects of the tow-truck sector. Despite not having regulatory power, the Commission is well placed to offer recommendations to the State Government and other agencies that do have power to take effective action to protect consumers.

The extent of the consumer problem

The Commission has defined the issue well in its Draft Report. At its core, we submit that the problem is that some unscrupulous 'agents', lawyers and smash repairers take advantage of the civil justice system to charge inflated amounts for repair of a damaged vehicle, and seek recovery of that amount from an at-fault driver or their insurer.

Our experience is that some tow-truck drivers target not-at-fault drivers and take their vehicles to smash repairers who then seek recovery of repair costs from at-fault drivers or their insurer. In this circumstance, the not-at-fault driver commonly signs an authority to repair as well as an authority for a lawyer to seek recovery of the costs of the repair from the at-fault driver. Often, the not-at-

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fault driver doesn't realise the nature of the document they have signed. Where at-fault drivers are uninsured, recovery is sought directly from them, but even where they are insured, a dispute between their insurer and the agent/repairer can result in claims being made directly against them.

The Commission states that where at-fault drivers are uninsured, the driver has strong motivation to oversee the cost of the tow and repairs directly to minimize such costs. However, Consumer Action regularly provides advice to consumers who state that repairers have charged in excess of quoted amounts for repairs (often after carrying out unauthorised additional repairs). Repairers sometimes unfairly rely on a mechanic's lien to enforce payment of additional charges. In some instances, the smash repairer gains the work following a tow-truck driver towing the damaged vehicle to their station. While at-fault drivers may have a motivation to constrain costs, our experience is that many drivers lack of knowledge about the appropriate processes and may end up having their car withheld when the repair is unaffordable. This has become known in the consumer sector as "car napping".

As noted above, we acknowledge that the Commission has limited power to influence smash repairers, but we ask it consider the experience of uninsured at-fault drivers in its analysis. It may be that the Commission's draft recommendations (particularly limiting the location of tows) may also benefit this group.

The Commission has stated that it is difficult to gauge the extent of the problems experienced by drivers (and their insurers) following vehicle accidents. The following case studies are provided to demonstrate that the problems can be significant for individual consumers, and that this detriment warrants intervention in order to better protect consumers.

Case study 1

Following a car accident on 31 May 2015, our client made a report to her insurer. Our client's insurer said they thought she was at fault, our client thought she was not. Our client then took her car to a mechanic for a quote for repairs. The mechanic provided our client with some forms to complete and told her that his 'team of people' would sort out her insurance claim and that the most she would have to pay in any event was her insurance excess. Our client left her car with the mechanic. Our client got a letter from EC Legal, a law firm, confirming that they would take care of her insurance claim but she should raise any questions about the matter with the mechanic.

Our client didn't hear anything for a while so called the mechanic —they repeatedly told her, the team was still sorting out the insurance claim. About three weeks later, the mechanic called our client into his workshop and told her that they had fixed her car and that she owed \$7,800 because her insurance didn't come through. The car was only worth \$3,700. It appears that the mechanic and the law firm knew three days after she took her car for a quote that her insurance claim would not be paid, but our client was not informed of this. Our client was without her car for four months as the mechanic refused to return it. The client was forced to initiate legal action to recover her car.

Case study 2

Peter was involved in a car accident, and was the 'at fault' driver. Peter swapped contact details with the other driver, although there was only a small amount of damage to the other driver's car. Peter made a claim with his insurer to cover the damage to his vehicle, which was repaired. He thought the matter was dealt with until he received a Magistrates' Court complaint from a law firm acting for the other driver claiming approximately \$30,000 in damages. Peter claims the damage he caused to the other vehicle would not have cost more than \$10,000 to repair. It appears that the 'not at fault' driver had signed an authority to act which enabled a lawyer to seek recovery from Peter or his insurer.

Because the amount claimed was excessive, there was some dispute between Peter's insurer and the law firm, which resulted in a judgment being entered against Peter. This caused Peter much stress and anxiety, particularly given that the judgment could have resulted in potential enforcement action and a negative listing on his credit report.

Case study 3

Mr R, a newly arrived migrant, was involved in a motor vehicle accident and was the 'not at fault' driver. Mr R held full comprehensive insurance with RACV. However Mr R had very little understanding of his insurance policy and engaged a recovery agent recommended by the towing company instead of lodging a claim with his insurer. Mr R was convinced by the recovery agent that they would recover the cost of repairs from the other driver with no cost to him. A short time later Mr R received a letter from lawyers advising that the other driver has not responded to their letter of demand and that it had become necessary to commence legal proceedings.

Mr R who was initially reluctant, but signed the form sent by the lawyer, because he was advised he would be sued by the recovery agent for the repairs if he refused to proceed. Mr R intends to take the matter to VCAT if the recovery agent was to pursue him for the repairs.

Effectiveness of current consumer laws

We support the Commission's analysis of the effectiveness of current consumer laws, and make the following comments:

- Effectiveness of anti-touting provisions: we agree that the existing anti-touting provisions do not appear to be well enforced. We support the extension of these provisions to the touting of repair or car hire services *after* the vehicle has been towed to a repairer's premises. We also support prohibitions on the offering or provision of an "authority to act" contract at the scene of an accident or at a repairer's premises; and the provision of unsolicited quotes for repair work once a vehicle has been towed to the accident towing operator's premises.. We encourage the Commission to make a final recommendation to the State Government to amend the *Accident Towing Services Act 2007* (Vic) in this regard.
- We agree that the cooling-off provisions are not effective for the reasons described by the Commission. A more effective measure would be a process whereby a consumer could "opt-in" to a repair agreement, subsequent to the initial signing (particularly if this is signed at the accident scene or soon after). This would have the same purpose of a cooling-off protection—to give the consumer an opportunity to reconsider the agreement. A consumer could opt-in after a designated period (without further contact or inducements from the repairer), which could be as short as 24 hours.
- We agree that relying on consumers to initiate legal action to challenge unreasonable costs (for example, in breach of the Australian Consumer Law) is likely to impose further costs in terms of time, money and stress upon the driver following the accident. Moreover, it appears unlikely that consumers will choose legal action in the face of demands for payment, particularly if their vehicle is being held. We also have concerns about the

effectiveness of principles such as the prohibition against unconscionable conduct to provide an appropriate and timely remedy.¹

Commission's Draft Recommendations

We support the Commission's Draft Recommendations and make the following comments:

- Warnings on authority to tow and fact sheet: we support additional, meaningful warnings to be placed on authorities to tow and fact sheets. However, we are not convinced that this alone will be effective. Particularly at the scene of an accident, a driver is unlikely to have time to read through disclosure documents in full. If warnings are to be provided, they should be tested on consumers for effectiveness. Requiring a consumer to acknowledge that they have read and signed the warning may also not be effective. Consumers are generally required to sign existing 'authorities' at the scene of accidents, and are often unaware of the nature of the agreement that they have signed.
- Education campaign: we support the development of an industry education campaign to educate drivers about what to do at an accident scene. However, in our experience it can be difficult to determine the effectiveness of broad consumer education campaigns. Education messages are likely to be more effective at the moment the information is needed, rather than included on websites or in information included with insurance policies or renewals.
- Limiting the location to which an accident-damaged vehicle can be towed. We strongly support this recommendation. We agree that limiting towing destinations to discourage a damaged vehicle being towed immediately to a smash repairer will reduce the opportunity for that repairer or their agent to begin work outside the authority of the driver or their insurer. In turn, this will reduce the opportunity provided to these repairers to recover inflated costs. The Commission notes that the measure would still allow for vehicles to be delivered to a tow operator's own smash repair business if it is co-located at the operator's depot. In this case, we submit that the operator/smash repairer should not be able to begin work without a separate agreement (and for that agreement not to be signed on the day of the accident).

Additional measures

We encourage the Commission to limit the ability of a towing operator or affiliated smash repairer to offer or obtain an 'authority to act', allowing a debt collection agent or lawyer to seek recovery from an insurer or the other driver. In our experience, such an authority to act is often obtained without the driver really being aware of it. In case study 1 (above), an authority to act was obtained. It appears that the lawyer subsequently sought to recover against the other party's insurer but when that was unsuccessful, they ceased acting and the client become liable for the repair costs. The repairer required payment before returning the client's car.

¹ Consumer Action Law Centre, July 2015, *Discussion Paper – Unfair Trading and Australia's Consumer Protection Laws*, available at <http://consumeraction.org.au/unfair-trading-discussion-paper/>

The role of the regulator

The Commission has sought views about whether VicRoads is the appropriate regulator for the tow-truck industry. We submit that it would be more effective for Consumer Affairs Victoria (**CAV**) to have regulatory oversight, at least in relation to consumer protection aspects. CAV is a dedicated consumer protection regulator and is better placed in dealing with consumer issues. CAV could also take an active role in identifying problems with debt collection lawyers, and liaise with the Legal Services Commissioner to take appropriate action.

Please contact Consumer Action on 03 9670 5088 or at info@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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