



Address to

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“Taxis & Trade Practices”

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1. INTRODUCTION

I would like to thank Victorian Taxi Association for inviting me to participate in your conference here in Ballarat.

A major part of my brief as an ACCC Commissioner is to communicate with and respond to small business groups such as those in the taxi industry in their dealings with matters connected to the Trade Practices Act (the Act).

The taxi industry is an important part of the Victorian economy, accounting for approximately 320 million dollars in revenue each year. The industry accounts for an estimated 10,000 active drivers, the majority of whom are considered a 'small business', for the purposes of the Trade Practices Act. The ACCC therefore takes a strong interest in the taxi market.

It is essential for the taxi industry and the individuals operating within it to understand their rights and responsibilities under the Act.

It is encouraging that the ACCC is having more dialogue with taxi organisations about how to assist improve understanding of and compliance with the TPA. We have worked closely with the Victorian Taxi Industry Association in dealing with local issues and their preparation of a Guide. In other States there is regular consultation involving the ACCC and the taxi industry.

My paper today addresses a number of topics, falling into two main areas; the relationship between networks and operators, and the relationship between drivers and the general public. I have outlined those activities of the ACCC relevant to the challenges and opportunities of the taxi industry, indicating:

- How the ACCC operates, paying particular attention to the Small Business and Rural & Regional Programs
- The role of the TPA in the taxi industry
- Booking services and restrictive trade practices

- How Unconscionable Conduct provisions in the TPA may affect networks and operators
- Dealing with consumers
- Authorisation and notification procedures and their application to the taxi industry

2. HOW THE ACCC OPERATES

The object of the Trade Practices Act is to enhance the welfare of Australians with the promotion of competition and consumer protection through fair and informed markets. The role of the ACCC is to apply the TPA properly without fear or favour, for the benefits of consumers of all kinds throughout Australia including:

- household consumers;
- small, medium and big business;
- farmers; and
- Local, State and Federal Governments

Open and vigorous competition benefits all participants in the market place. Sellers benefit from having others compete for their products, ensuring they can achieve the best combination of sales and price, while those purchasing goods and services have access to high quality goods and services at competitive prices.

Put in simple terms the TPA covers some key areas of relevance to the taxi industry:

- Restrictive trade practices – price fixing, market sharing, boycotts, anticompetitive mergers
- Misleading and deceptive conduct
- Unconscionable conduct

- Authorisation of potentially anti-competitive conduct where it is offset by public benefits

The ACCC has a dual role as:

- a national enforcement agency; and
- a provider of education and information for business and consumers in relation to compliance with the Trade Practices Act.

It is the first role that gains most publicity. But it is the information and support role, especially to small business, that secures wider business understanding and acceptance of good trade practices compliance. For sectors like the taxi industry which have been facing structural change over recent decades it is important to have an understanding of ACCC functions in respect of small business, codes of practice, authorisation and mergers. Knowing how to deal with trade practices issues is an important part of good business management.

The Small Business Program

Since the 1998 government decision to strengthen the protection offered to small businesses under the TPA, the ACCC has upgraded the level and style of its dealing with small businesses, and implemented a strategy of small business outreach and education.

In the ACCC's experience, education and information support are key elements in ensuring compliance with the TPA, avoidance of problems and emphasising dispute resolution as a first option. This is particularly so when the subject matter is as complex as unconscionable behaviour or the anticompetitive provisions. To this end, the ACCC Small Business Program has focussed on innovative and "user friendly" ways of getting this information and skills out to the small business communities.

More recently, the ACCC has developed some "high impact" ways to help people to understand the law of unconscionable conduct. This includes a video on the subject which has been well received by larger businesses as a useful training tool. In addition

the Commission last year launched a Rural and Regional Program which will build on the ACCC's information and support program outside metropolitan areas.

3. ROLE OF THE TRADE PRACTICES ACT IN THE TAXI INDUSTRY

The Trade Practices Act has a large role to play in the taxi industry. An affordable, reliable taxi service is an essential part of everyday life in Australia maintaining this level of service and pricing is achieved through a mixture of competition and regulation.

Despite state-based pricing and other regulatory controls, the TPA plays a role in respect of any restrictive trade practices within and between taxi networks. The prohibitions against unconscionable conduct also protect the interest of operators when dealing with more powerful players.

The TPA also ensures that mergers and acquisitions within the market will not be permitted where they may substantially lessen competition. Effective competition requires suppliers competing against each other for the available business. The merger provisions in the TPA prevent a network from purchasing all of its competitors, affording it a monopoly over taxi services in a specific area.

The consumer protection provisions of the TPA have a great bearing on the taxi industry. Prohibitions against misleading and deceptive conduct and monetary penalties for price misrepresentation ensure that networks, operators and drivers must be up-front and honest with consumers in relation to fares and surcharges. In return, the increase in consumer confidence in taxi services increases patronage; everyone benefits from fair trading.

4. BOOKING SERVICES

An essential part of any taxi network is a radio booking service. Such services ensure that potential passengers can quickly and easily book a trip, without having to contact a large number of individual drivers before they find one which is available. And they ensure that taxi drivers can easily find a fare near their present location. Current estimates state that around 50 percent of all taxi bookings are via a radio booking service.

This system puts the booking services in a powerful position in relation to taxi drivers. In order to operate in this highly competitive environment, it is practically a necessity that owners/drivers belong to a radio booking network; and as you would know, it is a requirement of state law that vehicles belong to a depot. In order to join such a network, owners and drivers are generally required to abide by a set of rules or bylaws.

Radio booking services must ensure that their rules and bylaws comply with the Trade Practices Act. Broadly speaking, they must not encourage or allow any anticompetitive conduct. Depots and radio booking services must also ensure that they do not use their position in the market to impose harsh or unreasonable terms and conditions upon owners or drivers or which may impact adversely on the long term interests of consumers.

Radio network providers who are the sole providers of services in a particular region should be especially cautious not to impose any of these kinds of terms or conditions.

Taxi operators are an important part of the small business community and they are entitled to reward for vigorous competition, including competition to provide a timely, clean and efficient taxi service to consumers.

Booking service case study

In one case, a radio booking service in a small Victorian town introduced a set of rules, designed to set certain standards for the operation of taxi cabs in the town. One of the main features of this set of rules was a roster system, which effectively limited the amount of time that drivers were permitted to work. Allegations were also raised that the rules may have contained a provision which prevented drivers from accepting work via their mobile phones.

Obviously, rules such as these are inherently anticompetitive, and thereby outlawed under the Act, unless formally authorised or notified to the ACCC. Where appropriate, the ACCC aims to achieve compliance with the TPA through liaison and negotiation, rather than enforcement. In this case, the ACCC met with the booking company in question, and explained the contraventions of the TPA contained in their rules. The company then formally agreed to abolish the roster system, explicitly allow drivers to accept bookings via mobile phone and ensure that any future amendments to the rules would be checked by a qualified legal practitioner for compliance with the Act. In doing so, they not only endorsed a pro competitive approach but also avoided potentially expensive litigation.

5. MERGER ISSUES

Section 50 of the TPA prohibits mergers and acquisitions that would have the effect of substantially lessening competition in a substantial market in a State or Territory.

In the experience of the ACCC, most mergers do not raise competition concerns and therefore do not raise problems under the TPA. The ACCC opposes only a small number of merger applications each year, those where there is a likelihood of a substantial lessening of competition.

One merger the ACCC did oppose was the proposed acquisition by Silver Top Taxi Services Ltd of North Suburban Taxis Ltd. A number of factors were considered including barriers to entry and reduced choice of services to customers.

In 1995 Silver Top Taxi Services Ltd applied for authorisation to acquire the assets of North Suburban Taxis Ltd. The ACCC considered that the public benefits Silver Top had been able to demonstrate were not sufficient to allow the acquisition. The ACCC was also aware of a large body of evidence that North Suburban Taxis offered a differentiated service to its customers and that this was an effective competitive factor in an otherwise highly regulated industry.

In March 2002 the ACCC approved the merger between North Suburban Taxis Ltd and Black Cabs Combined Ltd. Both parties are involved in the running of taxi depots in metropolitan Melbourne. North Suburban taxis primarily service the northern suburbs of Melbourne, whilst Black Cabs primarily services the south-eastern suburbs of Melbourne. Black Cabs provides radio network services to North Suburban affiliated drivers under a bureau services agreement arrangement.

The ACCC found that there was only a limited degree of competition between the two, as they primarily serviced different areas. Furthermore, the level of regulation applying to the taxi industry - both in relation to fare prices and quality standards - and the considerable market share held by the largest competitor would act as competitive constraints preventing the merged firm from increasing prices or reducing the quality of its services.

It is well recognised that mergers can yield significant benefits. These might take the form of internal efficiencies such as economies of scale and scope, or transaction cost savings through vertical integration.

6. UNCONSCIONABLE CONDUCT

The inequality of bargaining power between depots and owners/drivers also raises the possibility of unconscionable conduct arising in negotiations – conduct which extends beyond mere ‘hard bargaining’ between parties, and strays into harsh or oppressive territory.

The court may consider many factors when determining whether unconscionable conduct has occurred, but those of particular relevance in the relationship between depots and owners include:

- The relative bargaining strengths of the two parties
- Whether the conduct of the supplier was necessary to protect its own business interests
- Whether the weaker party was able to understand any documentation provided
- The ability of the weaker party to acquire similar services elsewhere

As you can probably see, many of these factors are inherent in the relationship between operators and depots itself, even mandated by state law; therefore, depots need to be careful not to take unfair advantage of their position when negotiating with owners/drivers for the provision of services.

In order to avoid breaching the Act, depots should not use their position to impose terms or conditions which are harsh or unreasonable, or conditions which are not necessary to protect their legitimate business interests. Any conditions which extend beyond this may be considered unconscionable conduct.

In addition, depots should be willing to negotiate terms and conditions in good faith with owners/drivers. As there are a limited number of depots which drivers may

obtain service from, offering contracts on a ‘take it or leave it’ basis is inherently risky.

The ACCC has recently launched its Guide to Unconscionable conduct, which details what kinds of behaviour may breach the Act, and how businesses can avoid it. The Guide is available free of charge from the ACCC website. A brief, simplified guide will also be available shortly, and is particularly aimed at preventing unconscionable conduct in your business dealings, using real life examples.

Safety Cameras

In itself, the fact that taxi depots are in a strong bargaining position relative to owners/drivers is not anticompetitive or unconscionable. A breach will only occur where the company in the stronger position attempts to use this power for an unfair or anticompetitive purpose.

An issue raised by taxi operators on numerous occasions relates to ‘depot fees’, and any depot-provided equipment which is charged to the operators.

In October 2001, the Victorian Taxi Directorate issued a directive to all taxi operators licensed to operate in the Melbourne metropolitan, Dandenong, Frankston and Geelong areas, requiring them to install approved security cameras by April 2002.

Following this directive, two major taxi companies sent letters to their operators advising them that they did not need to do anything in relation to security cameras, as the company had decided to provide security cameras as part of the ‘in-car’ equipment on all taxis, in return for an increased depot fee for the next five years.

With the exception of a few requests for quotations by one of the companies, the depots in question failed to engage in any substantive consultation with operators, gave little regard to the differences between camera makes and models, and showed

no willingness to negotiate in good faith. They also gave no commitment to operators in relation to the terms of the total cost and duration of the ongoing fees.

Due to the conduct of depots, operators had no opportunity to investigate the options available to them. The combined conduct of the two depots effectively closed the market for the provision of security cameras to Victorian taxi operators. The three other brands initially available on the market at the beginning of the process withdrew from the market when it appeared that the depots had nominated another company to supply the cameras. As a consequence, they failed to engage in any serious marketing or promotion of their products, and halted production shortly thereafter.

Following investigations by the ACCC, both companies entered into agreements with the ACCC to remedy their behaviour, allowing operators to select a camera of their choice, refunding them for the cost of the cameras provided by the depots and offering to remove the cameras fitted by the depot at no cost to the taxi operators.

7. DEALING WITH CONSUMERS

In contrast to the relationship of depots and owners/drivers, taxi drivers and the general public are generally not in an ongoing commercial relationship. Usually, any arrangements are also on more or less equal terms - drivers need the fare to make money, and the consumer needs the taxi to get to their destination.

In the vast majority of cases, this system presents no problems; however, should a disagreement occur, both consumers and drivers have legal avenues to protect them.

The major concern raised with the ACCC in relation to taxi drivers concerns alleged overcharging. While taxi regulation is state based, and therefore best dealt with via local taxi administration or office of fair trading, the ACCC still receives an around 100 calls per year in connection to taxi fares.

The prohibitions against misleading and deceptive conduct form one of the core principles of the consumer protection provisions of the Act. Businesses must not mislead consumers in any way, else they risk breaching the Act. Specific prohibitions are also attached regarding misrepresentations about price.

Price Misrepresentations and Misleading/Deceptive Conduct

When a person hails a taxi, they have an expectation that the driver will take the most efficient route, minimising the final fare or minimising the time taken. They rely on the driver's knowledge and experience, but above all their honesty. A small number of the complaints raised with the ACCC concern cases where the consumer feels that the driver has 'taken them for a ride', that is that they have chosen a longer route to the destination to inflate the fare for the journey.

In almost all cases, this is a result of the driver avoiding traffic congestion or blockages to arrive in the shortest possible time. Drivers deliberately running up fares, while telling the passenger that they are taking the most expeditious route is a clear breach of the Act, as well as state based regulations. However I have noticed that many Australian operators adopt the sensible approach of advising a passenger of the alternative routes available and letting the customer decide.

In addition, where a passenger requests an approximate quote for a journey, drivers should give their best possible estimate. Deliberate under or over quoting is likely to mislead consumers.

The more common confusion occurs where a passenger has taken a journey, and subsequently had a surcharge applied to the final amount, either for particular time, location or method of payment. Taxi owners and depots should ensure that all pricing information is prominently displayed within the taxi, so that passengers can easily become aware of all the charges that shall be liable for. Drivers should also inform customers of any applicable surcharges when asked, and before any payment occurs.

8. AUTHORISATION AND NOTIFICATION

The ACCC recognises that not all anticompetitive conduct is undesirable; in some cases, conduct that would usually breach the TPA can sometimes actually enhance competition; in other instances, there are important social benefits that may not be achieved in the competitive market. In addition, some markets require a degree of these arrangements to operate efficiently and provide an effective service for consumers.

The taxi industry is an example of the kind of industry in which some forms of anticompetitive arrangements are sometimes necessary. The taxi industry is vital part of society; over 35 million trips per year are made in Victoria alone, by all kinds of consumers. An efficient taxi service gives people an affordable, efficient and accessible form of transport.

Due to these kinds of concerns, the ACCC is empowered to grant authorisations for a wide variety of conduct, including anti-competitive agreements such as the radio booking service discussed previously. Authorisation will only be granted in cases where there is a net public benefit.

The consideration of applications for authorisation is a transparent and public process but does not involve formal public hearings prior to the issuing of a draft determination.

In assessing applications for authorisation, the ACCC must determine both the public benefit and anticompetitive detriment that would result from the proposed conduct. In general, the ACCC must be satisfied that the benefit to the public of the conduct in question would outweigh the possible anticompetitive detriment. The onus to prove that the proposed authorisation will give a net benefit is upon the applicant.

The term ‘public benefit’ is not defined in the Act; it is a continuously evolving concept. In previous cases the Commission and the Australian Competition Tribunal have recognised a wide variety of factors as having public benefit, such as:

- increased business efficiency
- expansion of employment or prevention of unemployment
- promotion of industry cost savings resulting in contained or lower prices
- promotion of competition in industry
- assistance to efficient small business
- improvement in the quality and safety of goods and services and expansion of consumer choice

Once in place, authorisations are periodically reviewed to ensure that the public benefit still outweighs any detriment as a result of the authorisation. Material changes in the structure of the industry, needs of consumers and legal position of the ACCC may result in an authorisation no longer providing a net benefit, and therefore the need to revoke that authorisation.

Review of Taxi Authorisations

As part of a broad review of longstanding authorisations, the ACCC is currently reviewing 12 authorisations granted in the taxi industry during the period 1986 to 1994.

The authorised conduct relates to radio booking services to taxi operators and drivers on the condition they accept the Cabcharge Account System and display the decals of that system. Drivers who choose not to accept these conditions risk suspension from the radio booking service or the imposition of a penalty. The authorisations cover the acceptance of most major credit and debit cards, as well as Cabcharge vouchers. It

does not extend to the equipment and facilities to process cards, such as EFTPOS systems.

In total there are twelve taxi authorisations under review across Victoria, New South Wales and South Australia.

Between late 2003 and mid 2004, the ACCC issued Notices proposing to revoke twelve separate authorisations, as it appeared there had been a material change of circumstances since the granting of authorisations.

In the Notices, the ACCC explained that universal acceptance of most major cards amongst consumers and businesses made it seem likely that most taxi drivers would accept these cards in the normal course of business. The increase in credit and debit card transactions, coupled with an increase in the number of EFTPOS terminals per head of population, is indicative of consumers' acceptance of card based payments.

This consumer driven demand for efficient payment methods is likely to ensure taxi drivers continue to accept card transactions. The ACCC considered that these changes in consumer behaviour appeared to affect the public benefits which were recognised by the Trade Practices Commission at the time it granted the authorisations.

The issuing of Notices was the first step in the review process. It is a process which provides the opportunity for the ACCC to detail its reasons for the issuing of the Notices concerned, and invite submissions from applicants and interested parties. As mentioned earlier, the ACCC then assesses the public benefits and detriments flowing from the authorised conduct. The ACCC must not revoke the authorisation if the public benefits are greater than the detriments.

The review concerns only the authorised conduct. It is not a wider inquiry into the taxi industry generally. No decision has yet been made on the outcome however the review is in its final stages.

The ACCC has consulted widely with the taxi industry on this matter to ensure that those interested have had the opportunity to express their view. The ACCC is reviewing all 12 taxi authorisations concurrently and will issue a single determination on these.

Collective Negotiation

Collective negotiation, or group bargaining is another form of conduct that, while outlawed by the Act, may be authorised by the ACCC, assuming that there is a net benefit arising from the authorisation.

The most common form of collective negotiation occurs where a number of small businesses must deal with larger and more powerful business for supply or purchase of their goods and services. In order to redress this imbalance in bargaining power, small businesses will sometimes apply for authorisation to negotiate terms and conditions as a group, usually allowing them to come to a more beneficial agreement.

In the taxi industry, the ability to collectively negotiate could be of interest to taxi operators, particularly when negotiating the terms and conditions of their service contracts with depots. Such arrangements could also prove beneficial when negotiating for supply of vehicles, equipment (such as security cameras) or supplies.

The same public benefit test as I outlined earlier applies to collective negotiation. However, the process of authorisation can be relatively complex, time consuming and expensive. As such, small business groups often find it difficult to apply for authorisation for collective negotiation.

Due to these difficulties, in June this year the Government introduced amending legislation covering a notification scheme for collective bargaining, with provision for collective boycott arrangements. This legislation aims to afford small businesses a quicker and easier way to obtain immunity from the TPA. It reflects Government's recognition that some forms of collective negotiation between small business in dealing with larger suppliers or purchasers may well be in the public interest.

By lodging a notification allowed under the proposed new collective negotiation notification process, small businesses will be given the same immunity from the TPA to collectively bargain as the authorisation currently allows. However, such immunity can be obtained sooner and more cheaply. Immunity will be automatically granted after 14 days and will remain in place unless, and until, the ACCC is satisfied that it is not in the public interest. For the first 12 months of the new process it is proposed the 14 day period may be increased to 28 days. It will be up to the ACCC to show that immunity is not acceptable, rather than for the applicant to show that immunity is acceptable, as is the case under the current process.

Once the bill is passed by Parliament, the ACCC will be releasing public guidelines to further assist small business with this new process and we will also be conducting information and education sessions for interested parties.

GOING FORWARD

Compliance with the TPA is beneficial to all parties. The protection available to owners and drivers promote fair dealing, encouraging competition, participation and further investment in the sector. Knowledge by consumers that they will enjoy fair dealing from the taxi industry promotes confidence and encourages the public to "catch a cab" more often.

My participation in your conference today is an important part of the ACCC's effort to work with businesses to achieve compliance with the TPA. It is also an opportunity for your industry to raise any concerns about trade practices law and regulation.

I thank you for the invitation to speak and am happy to respond to any questions or comments.