

RESPONSE BY UBER

ihail Pty Ltd application for authorisation [A91501] – further amendments to the ihail arrangements and invitation to provide a submission

1 Overview

Uber has made a number of previous submissions in this matter. Uber refers the ACCC to its comments in those submissions. It makes the following further submissions in respect of the new information contained in ihail's 4 February 2016 submission, information request response, and economist report.

Uber is strongly of the view that the new amendment that ihail proposes to make to its service in its 4 February 2016 submission (**Proposed Amendment**) does not address the fundamental public detriments raised by the ACCC in the draft determination published on 12 October 2015 (**Draft Determination**). That is, allowing drivers to notionally 'opt-in' to the ihail network does not change the fact that by virtue of its corporate relationships, from launch, ihail will have access to by far the largest driver network of any point-to-point transport application in Australia.

The ACCC rightly identifies in the Draft Determination that access to this network of drivers will have nothing to do with the level of service or benefits that ihail offers to consumers, including taxi drivers. Even with the proposed opt-in, ihail still gains this network as a direct result of the corporate relationship with its shareholder taxi companies.

These points are addressed further under the headings below.

2 Network effects are key

As Uber has set out in its previous submissions,¹ it understands that network effects are the ACCC's fundamental concern with ihail. The ACCC noted in the Draft Determination that:

"ihail will likely have access to the largest taxi network in each region in which it operates by virtue of its ownership structure. Network effects could result in ihail becoming the dominant taxi app in these areas, which (similarly to taxi networks' own apps) could limit the ability of third party taxi booking apps to compete due to their smaller taxi network and corresponding consumer base. This could also raise barriers to entry, as new entrants seeking to provide taxi booking services may find it difficult to grow quickly without the network of taxis and customers that ihail would have. Over the long term, this could increase the likelihood of ihail raising charges, reducing service, or failing to continually innovate, which would lead to consumer detriment."

Uber continues to share the ACCC's concern that public detriment will flow from ihail's privileged access to the driver networks controlled by its shareholder taxi companies. Privileged access to this network will result in ihail gaining a position of dominance in the Australian point-to-point transport industry – with the associated long term impact of stalling emerging competition to traditional taxi operators from a range of third party point-to-point transport booking applications.

¹ Dated: 12 October 2015, 30 October 2015 and 17 December 2015

3 ihail's changes still do nothing to address network effects

3.1 ihail will acquire its drivers by leveraging a privileged position

In its most recent submission ihail proposes a further change to its business model. This change is in addition to the changes ihail has already made since lodging the initial application - and on which Uber made a number of previous submissions.²

ihail's latest amendment is to require its affiliated taxi networks, including its shareholder taxi networks, to administer a system of encouraging drivers to sign up to the ihail network. The new 'encouraged-in' process has the same ultimate effect as the originally proposed practice of automatically signing up all drivers affiliated with a particular network to ihail once that network signs onto the ihail service.

ihail will still gain its network by leveraging privileged existing relationships between it, taxi networks, and taxi drivers. ihail will not gain its driver network through legitimate competition with other competing third-party point-to-point transport applications.

ihail refers to the new system as an 'opt-in' – although the use of the term 'opt' is misplaced. The ACCC well knows that at the point a driver joins a network and/or is 'encouraged' to join ihail:

- faced with pressure from taxi networks and a suite of boxes to check, the driver's choice as to whether to join ihail will be rendered completely meaningless; and
- other third party point-to-point transport applications will not have the benefits of affiliation with their competing networks similarly promoted to drivers. This is because:
 - ihail uses existing taxi network infrastructure to secure jobs for drivers and affirms the traditional role of the regional taxi network at the heart of taxi operations. A job dispatched through third party point-to-point transport applications, however, cuts out revenue from taxi networks. Accordingly, taxi networks have little incentive to promote third party point-to-point transport applications to their drivers; and
 - in the case of shareholder taxi networks, they benefit directly from the success and promotion of ihail over other competing applications.

The impact described in this section is exacerbated by the fact that if a driver is not part of a taxi network that participates in ihail, they are unable to use the ihail app as a driver. In those circumstances, drivers who wish to use the app would pressure their networks to participate. With a view to facilitating booking opportunities for its drivers (which is in the driver's and the network's interest), networks would need to participate in ihail and for each network that participates the pool of drivers who are 'encouraged' to join ihail would significantly increase.

4 Building a driver network without competing for it is against the public interest

4.1 Overview

As set out above, ihail will quickly leverage existing relationships to build a large network of drivers. Consumers will follow that network and ihail will establish a dominant position in the industry. This is against the public interest.

ihail maintains that a shareholder is not required to participate in ihail and such participation is completely at the discretion of the network. This is not a tenable or realistic choice given that it is clearly in each shareholder's interest to join both for financial reasons (a larger ihail fleet

² Dated: 30 October 2015 and 17 December 2015

contributes to a more successful ihail service) and in order to, and be seen to, support its own service.

Through its commissioned economist report and associated submission, ihail puts the view that there would be no net public detriment from its app because, even if it did build a substantial network of drivers through leveraging its corporate arrangements, it would not establish a monopoly market position. Uber submits that the ACCC should not accept this position because:

- Consumers will necessarily follow ihail's large driver network;
- Consumers will in the long run have few legitimate alternative options if (or, rather, when) ihail's service levels drop or do not improve (see clause 4.3 for an example); and
- ihail is likely to become dominant and the businesses associated with ihail have a demonstrated poor prior history of involvement with dominant businesses.

Further detail on these points is set out below.

4.2 Point-to-point transport consumers will follow ihail's network

Consumers will follow ihail's driver network. The ACCC is right to make this assumption in its Draft Determination. Consumers of point-to-point transport services value highly the ability to quickly secure a ride – and are incentivised by other factors to a lesser degree.³ Network density is the key determinant of waiting times for point-to-point transport service users. Density relates directly to the number of drivers affiliated with a particular transport service.

The overall value that the public places on waiting times is clear from:

- the performance standards for taxis, which in all relevant jurisdictions weight heavily towards measuring booking speed.⁴ For example in NSW the performance standards:

'were designed to measure performance from a customer's point of view, for example, how long is reasonable for a customer to wait for a taxi to arrive after a booking has been made';⁵
- the rank and hail business model for taxis, which at its core relies for its competitive advantage upon the speed with which a customer can acquire point-to-point transport services; and
- the significant media interest placed on point-to-point transport waiting times.⁶

In these circumstances, the only possible way that consumers would not rapidly adopt an app like ihail that developed a strong driver network is if, like the Australia Wide Taxi's app, ihail was not promoted. However, every indication from ihail is that its app will be strongly promoted by both its shareholders and taxi networks (of course in most cases these two will be one and the same).

Building a driver-side network is therefore very likely if not certain to draw consumers to the platform and result in significant uptake.

³ As Uber explained in prior submissions, it is for this reasons that changes to ihail's app to allow users to choose and rate their taxi operators are unlikely to have any material positive effect on the competitive behaviour of taxis affiliated with ihail.

⁴ See for example the NSW taxi KPI definitions: <http://www.transport.nsw.gov.au/sites/default/files/b2b/taxi/taxi-performance-data-definitions-standard-taxis.pdf>

⁵ <http://www.transport.nsw.gov.au/operators/taxis/taxi-network-performance/taxi-performance-data>

⁶ For example: Uber's ride-sharing service delivers \$81m in consumer benefits, company-commissioned report says, Jan 31, 2016, www.abc.net.au; Uber driving dramatic growth in journeys undertaken, Jan 31, 2016, www.theaustralian.com.au; Uber delivers \$80m in consumer benefits, Jan 31, 2016, www.news.com.au; Taxis versus Uber: which do you prefer? Sep 10, 2015, www.theage.com.au; The real reason you can't get a taxi, June 5 2015, www.news.com.au

4.3 The competitive pressure from competing platforms will lessen if ihail is approved

In the Draft Determination the ACCC rightly focussed upon the long term position of the point-to-point transport industry. The long term position is that, as users follow the network, ihail will gradually squeeze out established and nascent competitors and competition. Fewer consumers and drivers will turn to other apps or platforms to secure rides. This cycle will perpetuate. ihail will continue to consolidate its position.

In these circumstances, arguments about consumer propensity to 'multi-home' miss the point. There needs to be a viable alternate 'home' to begin with.

Over time fewer legitimate options will be available as consumers, drivers and taxi networks cluster around ihail's network and establish a substantial barrier for new and emerging firms. Of course, because of its privileged access to drivers ihail will experience no such barrier upon its own entry and will be uniquely positioned to exploit network gains to its advantage.

By way of example, the prospectus for the float of Australian technology company 'Freelancer' discussed the difficulty that firms have in two sided technology-driven markets competing and establishing themselves against a competitor with a large network. Investors place significant value on the presence of a network - much of this value derives from the barrier to competition that it can create. In this respect, the Freelancer prospectus noted:

'Due to strong network effects, online marketplaces tend towards 'winner-takes-all'. It is difficult for a late mover in the space to create network value when an established market has already been created. This creates the competitive environment of lock-out for new entrants and lock-in for existing users. Put simply, the buyers want to go where there are the most sellers, and the sellers want to go where there are the most buyers. ...'⁷

'Freelancer is the world's largest freelancing, outsourced services and crowdsourcing marketplace by users and number of projects posted. This creates a strong competitive advantage in terms of network effects. Simply put, online marketplaces generally tend towards 'winner takes all' because the buyers want to go where the most sellers are, and the sellers want to go to where the most buyers are. ...'⁸

'There are relatively high barriers to entry in Freelancer's market including marketplace network effects, lock-in, early mover advantage, competitor lock-out and proprietary intellectual property and algorithms. ...'⁹

In the case of ihail the above effects are likely to be even more pronounced. This is because ihail has not had to incur the same costs as its rivals to establish its network. It will not have to incur these costs to maintain its network either. Such costs include having to advertise, market, and improve their product to attract and retain drivers. Instead, it is able to exploit a privileged relationship with taxi networks (as noted in the sections above).

4.4 Nascent competitors are still growing networks and are sensitive to abuse of dominance

Uber and other providers of point-to-point transport services are still establishing their presence in Australia. For the first time Australian consumers are benefitting from emerging competition in this industry. The strength of this competition will be enhanced with the addition of new driver partners to these networks in cities across Australia. At present these point-to-point transport businesses, including Uber, have focussed their operations on large capital cities. There is much consumer surplus to be generated with further roll-out both within capital cities and regional communities.

⁷ <http://www.asx.com.au/asxpdf/20131024/pdf/42k92mwrqthbmr.pdf>, Page 44

⁸ <http://www.asx.com.au/asxpdf/20131024/pdf/42k92mwrqthbmr.pdf>, Page 62

⁹ <http://www.asx.com.au/asxpdf/20131024/pdf/42k92mwrqthbmr.pdf>, Page 13

To show that consumers already receive most of the expected benefits from Uber and goCatch's networks, ihail in its economist report aggregates the total numbers of reported drivers on Uber and goCatch networks, without providing analysis as to where those drivers operate. These aggregated figures provide no indication as to the current competitive dynamic in any particular location where ihail will establish its network. Uber is confident that in all locations across Australia, consumers would benefit from increased numbers of Uber driver partners. Asserting, as ihail does, the mere fact that waiting time reductions per additional driver added to a network steadily decrease after a set point of driver density in a particular location tells the ACCC nothing about whether existing competitors have or can grow to a scale to capture those benefits if ihail is approved.

Uber is concerned that its growth and associated consumer benefits from reduced waiting times will be hampered by having to compete with a provider that incurs little to no costs to build and retain its network.

4.5 Companies affiliated with ihail should not operate a dominant business

The ACCC should be just as concerned about the public detriment flowing from its approval of ihail in circumstances where ihail tends towards a dominant market position as it would be if ihail tended towards becoming a monopoly. ihail's economist report establishes a straw man position of assessing the likelihood that ihail will become a monopoly, without full consideration of the likely effects, when that service becomes dominant.

When ihail becomes dominant, Uber is concerned that it will continue the anti-competitive tactics used by the taxi industry for decades to retain its dominance – of course, at the expense of consumers. This result seems likely, given that ihail's shareholders include Cabcharge, the New South Wales Taxi Council (**Council**) and Australia's largest taxi companies. These businesses have a consistent history of resisting competition and stifling new entrants.

For instance:

- the Council recently implemented ongoing advertising campaigns regarding ridesharing, which included statements such as “Know the potential danger [of ridesharing]” and “If you’re thinking about ridesharing, think again.”¹⁰ Uber has challenged these advertisements as being misleading and anti-competitive. Such advertisements were not designed to promote taxi services and benefits, but instead focussed on unfairly damaging the reputation of ridesharing providers using misleading information and inferences; and
- in 2010 Cabcharge Australia received substantial penalties for misusing its market power. Cabcharge had refused to deal with competing suppliers to allow payments to be processed through rival taxi payment terminals.¹¹ Cabcharge has also previously entered into exclusive arrangements with taxi companies regarding use of its merchant facility whereby it provided taxi companies a 'kick-back' of 2.5% of taxi fares processed using Cabcharge's merchant facility.¹² Moreover, only last year Cabcharge accepted an ACCC enforceable undertaking, which forces it to allow rival payment processors to process Cabcharge cards on their own taxi payment terminals.¹³

¹⁰ The second such advertising campaign, 'Ridesharing. Know the facts', commenced in 2015 and was implemented across print, billboard and radio media. See example of an advertisement that formed part of this campaign at <http://www.nswtaxi.org.au/meter>

¹¹ ACCC v Cabcharge Australia Ltd [2010] FCA 731; ACCC v Cabcharge Australia Ltd (No 2) [2010] FCA 837.

¹² Reference Australian Competition and Consumer Commission v Black & White Cabs Pty Ltd [2010] FCA 1399

¹³ <http://www.smh.com.au/business/banking-and-finance/accc-confirms-cabcharge-agrees-terms-for-rivals-access-20150629-gi0jed.html>

Additionally, taxi networks operate within an industry which is already dominated by a small number of major license owners, although historically this fact has largely been obfuscated.¹⁴ This existing non-transparent and centralised ownership structure compounds the concerns of ihail securing a dominant market position.

Against this background even the risk that ihail will become dominant (as opposed to a monopoly) should give the ACCC significant pause - especially in circumstances where that dominance would be the direct result of an arrangement approved by the ACCC.

5 ihail's examples are not useful case studies

5.1 Australia

(a) Australia Wide Taxis

The plight of the Australia Wide Taxis app gives no indication as to what will happen in the case of ihail, which as the ACCC is aware, will be promoted heavily by its affiliated taxi network shareholders.

ihail asks the ACCC to compare the future position of ihail to the position of a service that (despite asserting in a previous submission to the contrary), ihail now acknowledges it has not 'actively marketed'. The term 'active' is an interesting qualifier. Uber can find little evidence that the application was marketed at all. This has nothing to do with lack of investment from shareholders – as ihail puts in its latest submission. If the app was intended to succeed, the free options of creating a Facebook or Twitter page, or at least tweeting the app's existence were readily available. Of course, these options were not used.

(b) goCatch

ihail notes that goCatch has publicly announced its number of affiliated taxi drivers now exceeds 35,000. ihail makes the argument that if goCatch is not dominant, then by it having 42,000 affiliated drivers it too will not be dominant. This is an oversimplified argument that ignores at least the following relevant points:

- goCatch is a third party application and does not have the network affiliations and marketing tools that ihail will have;
- ihail shareholders already have strong marketing campaigns that can easily be used to direct consumers to ihail. The ihail shareholders will also be able to publicise ihail to their existing app users and their existing customer base, a privilege that GoCatch does not have; and
- ihail will incur far fewer costs to acquire drivers than Uber understands is the case with goCatch. ihail can use its taxi network connections to directly market to existing taxi drivers.

As is clear from the above, goCatch cannot be used as a case study on the likely impact of ihail on the point-to-point transport industry.

5.2 Overseas

ihail provides overseas examples, particularly from Canada, that purport to show that after the launch of apps like ihail (such as Curb and E-Cab), taxi networks continue to maintain their own white label apps. These examples are not useful case studies because Uber's understanding is

¹⁴ See example of Taxi Industry ownership structure in Victoria here: <http://www.theage.com.au/victoria/secret-world-of-our-taxi-titans-20130104-2c91y.html>

that these aggregator apps do not include affiliated taxi networks as shareholders. The incentives are therefore very different.

However, even assuming that some useful comparison can be made against the Canadian experience, it is unclear to Uber how such comparison advances the position of ihail. While the four main taxi companies in Canada (being, Black Top and Checker Cabs, MacLures Cabs, Vancouver Taxi and Yellow Cab), continue to operate their white label apps they have not continued to invest and improve these apps since the introduction of e-Cab in September 2015. This is despite in recent months those apps receiving poor user reviews, which in the ordinary course of a competitive market, would prompt further development and product improvement.

Poor user reviews and very limited download history have plagued these applications since their inception. An expected competitive response in these circumstances might be to abandon the existing provider of third party white label software and instead take up the services of a competing wholesale provider. Nothing has been done on this front by these taxi companies.

The conclusion that Uber draws from the inattention that the Canadian apps have received from their associated taxi companies is that, with the prospect of e-Cab launching on the horizon, and with e-Cab now having launched, the taxi networks in Canada do not feel that they need to invest in maintaining and improving the consumer experience provided by their affiliated applications.

If indeed any like-for-like comparison can be drawn from the Canadian experience to inform the likely outcome if ihail is approved, it is that white label apps will receive less attention, fewer updates, limited management focus and provide an ongoing overall poor consumer experience.