

Professor Allan Fels AO

Taxi Industry Inquiry
Locked Bag 20046
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10 July 2012

By email: taxiindustryinquiry@transport.vic.gov.au

Response to Customers first: service, safety, choice

Dear Professor Fels

Thank you for inviting comments on the Taxi Industry Inquiry's draft report, *Customers first: service, safety, choice*.

I attach a copy of our new report, *In the driver's seat: achieving justice for taxi drivers in Victoria*. This report outlines the work of the Taxi Driver Legal Clinic, a joint project of the Federation of Community Legal Centres and Footscray Community Legal Centre. It discusses the causes of taxi drivers' legal problems and makes seven recommendations aimed at creating a fairer and safer working environment for taxi drivers in Victoria.¹ The report also contains numerous case studies, based closely on the experiences of our clients at the Taxi Driver Legal Clinic.

We would be delighted if you could attend the formal launch of *In the driver's seat*, the details of which will be confirmed shortly. In the meantime, we hope that the report will be of some assistance to the Inquiry.

We would like to comment briefly on some specific recommendations put forward in *Customers first* (indicated in bold text in brackets).

1 Licences, working conditions and structural reform of the industry

We strongly endorse the Inquiry's recommendation that the Government remove restrictions on taxi licences, making it easier for drivers to hold their own licences (**1.1 to 1.6**). Many of taxi drivers' legal problems arise from their anomalous status as bailees, with few rights and little bargaining power in the workplace. While it is vital to improve the working conditions of non-owner drivers, in the long term it would be much better for these drivers to lease their own licences. With more control over their working conditions, drivers would be able to avoid many legal problems, particularly those resulting from inadequate insurance.

More generally, we agree that the current licensing system concentrates power in

¹ Federation of Community Legal Centres and Footscray Community Legal Centre, *In the driver's seat: achieving justice for taxi drivers in Victoria* (2012), p 7.

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the hands of investors and large industry players, at the expense of bailee drivers. This situation also disadvantages government licence holders and operators leasing private licences ('smaller operators'). By diluting the influence of investors and large operators, the proposed new licensing regime would make it easier to implement structural changes in the industry, to make driving a more secure and attractive occupation. This would serve the interests of social justice and would raise standards in the industry by reducing the turnover of drivers.

2 Bailment and the proposed new Driver Agreement

We strongly support the Inquiry's proposals to improve drivers' pay and conditions with a new Driver Agreement (**6.12** to **6.24**). As set out in Chapter Six of our report,² we believe that the current Model Bailment Agreement is deeply unfair, conferring disproportionate power on owners and operators. We are particularly concerned that the current Bailment Agreement seeks to restrict the legal relationship between owners and drivers, by stipulating that it 'does not create... a relationship of agency, employment, partnership, lease, franchise or independent contractors.'³ As we explained in our previous submission to this Inquiry, we believe this has the potential to mislead taxi drivers as to their common law rights.⁴ For this reason, we strongly endorse the Inquiry's view that the new Driver Agreement 'should not contain any clauses that have the effect of limiting or constraining the nature of the relationship between the operator and the driver.'⁵

We support the proposal that the new Taxi Services Commission (TSC) should review the Driver Agreement, five years after its implementation, with a view of introducing a compulsory written employment contract (**6.22**). While we accept that gradual reform may be necessary to sustain the viability of the industry, we believe that the new Driver Agreement will not in itself be sufficient to address drivers' low pay and lack of basic workplace rights.

In the meantime, we support the proposals that the new Driver Agreement should entitle drivers to 60 per cent of fare revenue (**6.14**) and four weeks' annual unpaid leave (**6.15**). We also support the Inquiry's proposal to introduce a minimum hourly rate for peak and non-peak periods of work, as a 'safety net' (**6.16**). While these measures will not, in themselves, be sufficient to address drivers' inadequate pay and working conditions, they are all important steps towards this goal.

As set out in Chapter Eight of our report, we believe that many drivers are unaware of their rights to workers' compensation and victims of crime compensation.⁶ We therefore strongly support the Inquiry's recommendations that WorkSafe and the TSC implement strategies to enforce drivers' right to workers' compensation (**6.17**).

² Ibid pp 24-25.

³ Victorian Taxi Directorate, Model Taxi Bailment Agreement, accessible at http://www.transport.vic.gov.au/_data/assets/pdf_file/0013/31423/4392-F93-Bailment-Agreement-webb.pdf (accessed 10 July 2012), clause 15.

⁴ Federation of Community Legal Centres submission to the Taxi Industry Inquiry, 24 June 2011, http://www.taxiindustryinquiry.vic.gov.au/_data/assets/pdf_file/0006/58083/SS105-FederationofLegalCentresVictorialnc-Submission-Redacted-PDF.PDF (accessed 10 July 2012), pp 5-6.

⁵ Taxi Industry Inquiry, *Customers first: service, safety, choice*, http://www.taxiindustryinquiry.vic.gov.au/_data/assets/pdf_file/0004/67864/TII-Customers-First-Book-20120626.pdf (accessed 10 July 2012), p 298.

⁶ *In the driver's seat*, pp 29-30.

We also agree that the Victorian Government should amend the *Occupational Health and Safety Act 2004* to make it clear that taxi drivers are owed a duty of care by taxi owners and operators (6.18). We suggest that, in addition, the TSC should be mandated to advise taxi drivers of their potential right to compensation under the *Victims of Crime Assistance Act 1996*.

We strongly support the Inquiry's emphasis on dispute resolution mechanisms and in particular its proposal to confer jurisdiction on the Victorian Civil and Administrative Tribunal (VCAT) to consider disputes between taxi drivers and owners (6.20).

We note that the current Victorian Taxi Directorate appears to take little interest in the welfare and legal rights of drivers. As such, we believe it is necessary to state explicitly that the TSC bears responsibility for monitoring drivers' welfare and upholding their legal rights.

Recommendation 1:

The Inquiry should recommend that the new Taxi Services Commission implement strategies to raise taxi drivers' awareness of Victoria's victims of crime compensation scheme.

Recommendation 2:

The new Taxi Services Commission should be explicitly required to monitor the welfare of drivers and uphold their legal rights.

3 Insurance

We support the Inquiry's recommendation that permit holders should be required to maintain third party property insurance policies and that the new Driver Agreement should indemnify drivers for vehicle damage (6.15). This would do much to reduce the significant debts and legal problems that drivers and smaller operators currently face, as a result of chronic underinsurance in the Victorian taxi industry.

We are concerned, however, that in its current form, Recommendation 6.15 may be interpreted as proposing an indemnity only for *third party* property damage. If interpreted in this way, the recommendation may expose drivers to liability for damage to the taxis they drive. We believe that the recommendation should state explicitly that drivers must be indemnified for *all* property damage, whether to third party vehicles or to the taxis they drive.

We are also concerned that Recommendation 6.15 allows taxi owners to recover excess payments from drivers when they are at fault. We believe strongly that drivers should not be required to pay an excess, whether or not they are legally at fault. Being on the road for 12 hours every day, six days a week, drivers face a very high risk of accidents. Occasional, minor accidents are an inherent and almost unavoidable risk, even for the most careful and experienced drivers. Any excess payments resulting from an accident should be regarded as an operating cost to be borne by owners and operators. Some stakeholders may claim that charging an excess is necessary, in order to encourage drivers to drive carefully. We believe, however, that there are other incentives sufficient to deter drivers from driving carelessly. Chief among these is the loss of income that follows an accident, when

a taxi is off the road undergoing repairs. Repeated accidents would also put a driver at risk of losing his or her job.

If the Inquiry decides to allow excess payments to be recovered from drivers, we believe that it must set a strict limit on the amount that can be recovered. If there is no limit on the excess for which a driver can be liable, owners and operators may take out policies with an excess of several thousand dollars. In effect, this would do nothing to protect drivers from catastrophic accident-related debt.

Even the current industry practice of charging drivers an excess of between \$1,000 and \$2,000 is unfair and vastly disproportionate to drivers' earning capacity. If the Inquiry is correct in stating that drivers earn, on average, less than \$40,000 per year,⁷ an excess of \$1,500 represents at least two weeks' gross earnings for the average driver. Until drivers see a significant increase in their earnings, we believe that the maximum excess payable should be capped at a much lower figure. Even an excess of \$500 would represent nearly two thirds of the average driver's gross weekly earnings.

A cap on excess payments would also discourage taxi owners from overstating the cost of repairs. We often see drivers who have been charged between \$1,000 and \$2,000 for minor repairs to a taxi's lights or bumper bar, most of which are carried out in taxi clubs at very little cost to the taxi's owner. At present, drivers in this situation have no way of challenging the owner's estimate of repair costs. The new Driver Agreement should state that drivers must not be charged more than the reasonable cost of repairing damage to the taxi. Drivers should be entitled to obtain their own quotes for repairs, if an owner's estimate is excessive. Disputes over excess payments should be determined by the Victorian Small Business Commissioner and the VCAT.

Recommendation 3:

Recommendation 6.15 should be amended, to state explicitly that drivers should be indemnified for damage to any third party vehicles *and* the taxis they drive.

Recommendation 4:

Recommendation 6.15 should be amended to state that drivers cannot be charged an excess in the event of an accident.

Recommendation 5:

If drivers are to be liable for excess payments, in at-fault accidents, this excess should be capped at \$500. Drivers must not be charged more than the reasonable cost of repairing damage to the taxi. Drivers should be entitled to obtain their own quotes for repairs, if an owner's estimate is excessive. Disputes over excess payments should be determined by the Victorian Small Business Commissioner and the Victorian Civil and Administrative Tribunal.

4 Training

While we agree that training is not the most critical factor in increasing driver

⁷ *Customers first*, p 93. If a driver earned \$40,000 per year, his or her average gross weekly earnings would be \$769.23.

quality,⁸ we believe that drivers require more training, particularly those drivers whose first language is not English and drivers who have recently migrated to Australia. We discuss this in some detail in Chapter Nine of our report.⁹

Recommendation 6:

The Inquiry should give further consideration to the specific training needs of drivers whose first language is not English and drivers who have recently migrated to Australia.

5 The disciplinary system

We strongly endorse the Inquiry's recommendation that the TSC should operate 'a transparent and accessible internal... appeals process in relation to driver accreditation... and disciplinary matters' (**11.14**). The current system for accrediting and disciplining drivers is slow and unnecessarily complex. It is virtually impenetrable to those drivers whose first language is not English. We discuss the disciplinary system and the need for reform in Chapter Five of our report.¹⁰

In most disciplinary matters, drivers' livelihoods are at stake. The outcome can have very significant consequences for drivers and their dependants. It is important that drivers have an opportunity to respond to allegations against them, to outline any extenuating circumstances and, if appropriate, to express remorse. In order to do this, many drivers need the assistance of lawyers and interpreters.¹¹

Recommendation 7:

The Inquiry should recommend that the Victorian Government establish ongoing funding for a Victorian community legal centre to provide legal assistance and advocacy to taxi drivers who face disciplinary action.

6 Taxi clubs

We believe that all taxis should be insured by reputable insurers governed by the *Insurance Act 1973* (Cth).¹² We do not believe that taxi clubs are an appropriate means of insuring the taxi industry, but as long as they continue to play a role in the industry, they should be much more effectively regulated. We strongly agree that Consumer Affairs should do more to ensure that taxi clubs comply with the provisions of the *Associations Incorporation Act 1981* (**6.19**).¹³

7 Interim measures to assist low-income drivers

On the whole we strongly endorse the Inquiry's proposals to improve drivers' pay and working conditions, to improve regulation of the industry and to reduce the power and influence of large-scale operators and investors. Nevertheless, we are conscious that the Government will take some time to consider the Inquiry's proposals and to introduce new legislation to implement them.

In the meantime, many low-income drivers are still facing serious legal problems, as

⁸ Ibid p 527.

⁹ *In the driver's seat*, pp 34-35.

¹⁰ Ibid 21-22.

¹¹ Ibid 35-36.

¹² Ibid 32-33.

¹³ Ibid 14-15, 33.

a result of the current unfair and ambiguous bailment agreement, chronic underinsurance in the industry, an opaque and inflexible disciplinary system and many other factors. These drivers need access to free legal advice and interpreting services.

Our funding to operate the Taxi Driver Legal Clinic ended in December 2011. Since then, the Clinic has operated in a much more limited capacity under the auspices of Footscray Community Legal Centre's regular night service. Due to our limited resources, we are unable to provide legal advice to every driver who contacts our service. Under these circumstances, we are also reluctant to advertise more widely as this would only increase the unmet demand for our service. This leaves many low-income drivers in urgent need of legal assistance.

Similarly, many low-income drivers will continue to face significant debts as a result of taxi clubs failing to indemnify them, until the Government acts on the Inquiry's recommendation and makes third party property insurance compulsory. Many drivers in these circumstances risk bankruptcy, or losing any significant assets they possess, such as a house or a car. They face this situation because the current system does nothing to protect them from the risk posed by inefficient, sometimes unscrupulous taxi clubs.

The Inquiry should recommend that, pending the introduction of compulsory third party property insurance, the Government should take action to assist drivers in these circumstances. The Government should liaise with Australia's major insurance companies and ask that they refrain from pursuing individual low-income drivers who have contributed money to taxi clubs, until the new legislation is in place.

Recommendation 8:

In addition to its ongoing funding for legal advice on disciplinary matters, the Government should provide special interim funding to a community legal centre, to assist drivers with legal problems relating to taxi clubs, car accidents and damages claims. This should be an interim measure, until the Government has implemented the Inquiry's proposals to make third party property insurance compulsory and to entitle all drivers to an indemnity for property damage.

Recommendation 9:


The Inquiry should recommend that, pending the introduction of compulsory third party property insurance, the Government should liaise with Australia's major insurance companies on behalf of individual low-income drivers. The Government should ask Australia's major insurance companies to refrain from pursuing individual low-income drivers who have contributed money to taxi clubs, until the new legislation is in place.

Thank you again for inviting our comments on the draft report, *Customers first*. We hope that our comments and our report, *In the driver's seat*, will assist the Inquiry in drawing up its final recommendations.

We would very much like to make further submissions, in person, at a public forum later in the year.

If you would like to discuss any aspect of this submission, please do not hesitate to contact me on (03) 9652 1501 or via email at lucinda.obrien@fclc.org.au.

Sincerely

A handwritten signature in black ink, appearing to read 'Lucinda O'Brien', with a long horizontal flourish extending to the right.

Lucinda O'Brien
Policy Officer

Attachments: 1

Summary of recommendations

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Recommendation 2:

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Recommendation 6:

The Inquiry should give further consideration to the specific training needs of drivers whose first language is not English and drivers who have recently migrated to Australia.

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