



Federation of
Community Legal Centres
VICTORIA

Professor Allan Fels

Taxi Industry Inquiry
GPO Box 2797
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By email: taxiindustryinquiry@transport.vic.gov.au

24 June 2011

Background paper: *Setting the scene*

Dear Professor Fels

Thank you for inviting submissions to the Taxi Industry Inquiry ('the Inquiry'), further to the release of the initial discussion paper, *Setting the scene*.

Our submission addresses four issues:

- Anti-competitive practices and price gouging in the taxi industry;
- Taxi clubs and the problem of underinsurance;
- The inadequacy of 'bailment' as a framework for regulating drivers' employment conditions; and
- The need for much greater transparency and accountability on the part of the taxi industry and the regulator.

We recommend:

- The investigation of anti-competitive practices and price gouging in the industry;
- The investigation of 'rogue' taxi clubs and the implementation of a strict regulatory regime for taxi clubs in Victoria;
- The recognition of a principal-agent relationship between drivers and owners (as distinct from the current terminology of bailment); and
- The creation of an efficient, transparent, accountable and even-handed regulatory body.

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1 About us

Community legal centres (CLCs) are independent community organisations. They draw on the work of volunteers to provide free legal services to the public. CLCs provide advice, information and representation to more than 100,000 Victorians each year. The Federation of Community Legal Centres (Vic) is the peak body for over fifty CLCs across Victoria.

In conjunction with the Federation, and with the financial support of the Legal Services Board, the Footscray Community Legal Centre (FCLC) is currently operating a Taxi Driver Legal Clinic. Lawyers at the Clinic provide specialist advice to taxi drivers every Wednesday evening, in the offices of the FCLC. The Clinic advises on a range of matters including driver accreditation and disciplinary issues, speeding and other traffic infringements.

The Clinic also advises drivers with civil law problems, most of which arise from motor vehicle accidents and inadequate insurance. Through our case work, we are assessing the need for stricter regulation of taxi clubs, to protect drivers from potentially ruinous accident-related debt.

Terminology: 'bailee' drivers and taxi 'owners'

The Clinic was initially set up to assist 'bailee' drivers. We use this term as it is commonly used in the industry, to refer to drivers who do not own the taxis that they drive. As discussed below, the Federation does not believe that bailment is an appropriate way to characterise the relationship between owners and non-owner drivers.

In practice, however, Clinic lawyers advise many drivers who could be described as taxi 'owners.' These 'owners' sometimes manage several taxis and may have business relationships with a number of 'bailee' drivers. These 'owners' rent their licences (or technically speaking, pay 'assignment fees' to licence owners). They are often heavily indebted, having borrowed significant sums in order to purchase their taxis.

In this context, the term 'owner' is something of a misnomer, as the individuals in question do not own any significant assets. For the purposes of this submission, however, we use the term 'owner' to describe any person who owns a taxi, pays for its license and takes primary responsibility for ensuring that the taxi remains on the road (either by driving the taxi or 'bailing' it to another driver or group of drivers).

2 Anti-competitive practices and price gouging in the taxi industry

Do the roles of key industry players, and the relationships between them, encourage best practice service delivery? (p 18)

Many owners of Victorian taxi licences appear to have little involvement in the day to day operation of the industry. These licence owners make money by 'assigning' their licences to drivers. They may also have interests in other taxi-related activities.

Based on our cases at the Clinic, we believe that there are strong synergies between licence owners, network owners, taxi club operators and the used car dealers who sell taxis and arrange the necessary loans. This is due to the high proportion of very recent migrants who present at our Clinic, having bought a taxi, arranged finance (often borrowing very large amounts of money) and rented a licence under an 'assignment' arrangement.

Many of these taxi 'owners' pay inflated prices for their taxis, and as a result, carry large debts when they enter the industry. The combination of high loan repayments, licence assignment fees, network fees and taxi club membership makes it very difficult for these 'owners' to make a living.

We find it difficult to believe that very recent migrants to Australia would enter into these complex financial arrangements on their own initiative. We believe that in some cases, large industry players collude with each other, in order to encourage recent migrants to enter the industry as 'owners.'

Many of these 'owners' belong to self-insuring co-operatives or taxi clubs. As discussed below, these taxi clubs purport to offer a kind of insurance for motor vehicle damage. The clubs are intended to cover the cost of repairs to a taxi, in the event of a motor vehicle accident. Unfortunately, however, many such clubs fail to pay for the necessary repairs and almost always fail to cover third party claims. Despite this, many 'owners' continue to pay significant membership fees to these clubs. This suggests to us that membership of a taxi club may be part of a larger agreement or package of obligations, including finance, assignment of a licence and access to a taxi network. In some cases, we suspect that access to licences and networks may be contingent on membership of a taxi club.

We believe that this points to anti-competitive practices on the part of large players in the taxi industry. These practices have the effect of price gouging, in at least two respects: they cause taxi 'owners' to pay inflated prices for taxis, and they induce these 'owners' to pay large sums of money for taxi club memberships, despite the fact that many taxi clubs provide little or no service to their members.

We would be happy to provide case studies from our Clinic files to illustrate this point further.

Recommendation 1:

We urge the Inquiry to investigate anti-competitive practices on the part of larger industry players, such as taxi clubs, which have the effect of price gouging and which prevent individual 'owners' from making a viable living in the industry.

3 Taxi clubs and underinsurance

What insurance arrangements do drivers typically operate under? Is this appropriate? (p 18)

Community legal centres (CLC) regularly assist 'bailee' drivers with legal problems arising out of motor vehicle accidents. These legal problems arise because most 'bailee' drivers are not covered by a comprehensive insurance policy.¹ Of course, drivers cannot take out insurance policies on taxis they don't own. In many cases, however, they make regular payments to the taxi's owner, ostensibly for 'insurance'. These sums are in fact paid to taxi clubs.

In the event of an accident, a driver often pays 'excess' of up to \$1,500 to the owner of the taxi, or the taxi club.² The driver is led to believe that if he pays this 'excess', the taxi club will pay any debts that arise from the accident. Despite these assurances, taxi clubs often fail to settle third party claims for property damage. Months or even years later, the insurer of a third party may issue legal proceedings against the driver, for a sum as high as \$20,000. Taxi clubs and owners often refuse to assist drivers in these circumstances. As reported in *The Age* in April last year, many of these drivers ultimately go bankrupt.³

While some taxi clubs appear to operate well,⁴ we believe that many smaller 'rogue' clubs deliberately mislead taxi drivers as to their rights and entitlements. Specifically, we believe that these clubs lead the drivers to believe that their third party claims will be covered, in order to induce them to hand over large 'excess' payments. Such clubs often take significant sums of money from drivers without issuing receipts, or else issue receipts that bear no business name, contact details or legible signature.

In several recent CLC matters, the Melbourne Taxi Club (MTC) has behaved in a manner we regard as deliberately misleading and deceptive. The MTC has written a number of letters to third parties' solicitors and insurers, admitting liability and attaching a cheque, apparently in part payment of the claim. These cheques are unsigned and in one case undated, meaning that they are invalid. In each case, the MTC has sent a copy of its letter and unsigned cheque to the driver. We attach copies of three such letters, obtained by Broadmeadows Community Legal Service and the Taxi Driver Legal Clinic.⁵

We believe that the MTC sends copies of these letters and cheques to drivers in

¹ Peter Munro, 'Thousands of taxis uninsured,' *The Age*, 15 May 2011, available at <http://www.theage.com.au/victoria/thousands-of-taxis-uninsured-20110514-1enjp.html> (last accessed 20 June 2011).

² This practice is not limited to Victoria: see Transport Workers' Union of New South Wales, Submission to the Select Committee on the New South Wales Taxi Industry, 22 January 2010, available at <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/CB3EE83049C34E2ECA2576B9001E092C> (last accessed 14 June 2011), 2.

³ Clay Lucas, 'Cabbies driven to bankruptcy,' *The Age*, 7 April 2010, available at <http://www.theage.com.au/victoria/cabbies-driven-to-bankruptcy-20100406-rpet.html> (last accessed 14 June 2011).

⁴ Eg Taxicare, a New South Wales-based club that holds an Australian Financial Services licence and is a member of the Financial Ombudsman Service: see <http://www.taxicare.com.au/> (last accessed 14 June 2011).

⁵ In the interests of confidentiality, we have removed the client reference details from these letters.

order to convince them that the third party claims have been addressed and that they, the drivers, do not need to take any further action. This increases the likelihood that drivers will not seek legal advice and will not defend a summons issued by the third party.

Most non-owner taxi drivers are extremely vulnerable to misleading and deceptive conduct of this nature. Many are recent immigrants, with limited English and few other job prospects. Others are international students. In general, these drivers do not understand insurance products or financial instruments such as cheques. Moreover, they are often reluctant to challenge unfair treatment by taxi operators and taxi clubs, as to do so would be to risk losing their only source of income.

ASIC has advised us that taxi clubs are subject to State fair trading legislation, but to date the Victorian Government has shown little interest in regulating the clubs' activities. This absence of regulation is causing untold distress and hardship to low-income 'bailee' taxi drivers.

Recommendation 2:

We urge the Inquiry to investigate the conduct of 'rogue' Victorian taxi clubs, such as the Melbourne Taxi Club, and to recommend a strict regulatory regime for taxi clubs in Victoria. This regime might require, at a minimum, that all taxi clubs obtain Australian Financial Services licenses and join the Financial Ombudsman Service.

4 Bailment

Are 'bailments' a suitable employment arrangement for drivers? (p 17)

Australian taxi drivers have been categorised as bailees since at least 1941 (*Dillon v Gange* (1941) 64 CLR 253), however the law of bailment dates back much further, to the medieval period.⁶ It has been described by a recent Australian commentator as an 'amorphous hybrid' of voluntary and involuntary obligations.⁷

This vague and anachronistic legal concept is totally inadequate as a framework for regulating employment in the Victorian taxi industry, in the twenty-first century.

While the working conditions of taxi drivers are severely deficient in numerous respects, we focus here on the inadequacy of 'bailment' in the context of motor vehicle accidents.

a The current Model Taxi Bailment Agreement

The Victorian Taxi Directorate's Model Taxi Bailment Agreement ('Bailment Agreement'), released in December 2009, attempts to characterise drivers as mere bailees.⁸ In this respect, the Bailment Agreement seeks to curtail drivers' well-established common law right to indemnity from taxi owners, in the event of a costly

⁶ See Samuel Stoljar, 'The early history of bailment' (1957) 1 *American Journal of Legal History* 5.

⁷ Simon Fisher, *Commercial and Personal Property Law* (1997) 152, cited in Kate Lewins, 'Sub-bailment on terms and the Australian consumer' (2002) *Murdoch University Electronic Journal of Law* 9.3, [1], available at <http://www.murdoch.edu.au/elaw/issues/v9n3/lewins93.html> (accessed 14 June 2011).

⁸ Victorian Taxi Directorate website, <http://www.taxi.vic.gov.au/DOI/Internet/vehicles.nsf/AllDocs/9924795569E6DBA1CA2575060019B8E9?OpenDocument> (last accessed 14 June 2011).

motor vehicle accident.

The Supreme Court of Victoria has repeatedly held that a non-owner taxi driver is not a mere bailee, but also an agent of the taxi owner. On this basis, the Court has held that owners are liable for damage that results from drivers' negligence.⁹

Clause 15 of the Bailment Agreement states that the document 'does not create between [the driver and the owner] a relationship of agency, employment, partnership, lease, franchise or independent contractors.' Read in conjunction with its heading ('No other relationship'), clause 15 seems intended to suggest that there is no agency relationship between owners and drivers.

Clause 7 is similarly ambiguous. It provides that a taxi owner must 'indemnify... the driver of the taxi in the event of an accident, through insurance or some other means.' Yet Clause 12 of the Agreement provides that if either party 'suffers a loss because of the other,' due to breach, negligence or misconduct, the party responsible for the loss must reimburse the other. Read together, clauses 7 and 12 seek to hold 'bailee' drivers liable for damage to third party vehicles.

In light of consistent Supreme Court authority, which states that drivers are agents, entitled to indemnity for third party property damage, we believe that the Bailment Agreement has the potential to mislead drivers as to their legal rights.

b Counsel's advice on the Bailment Agreement

In February 2010, the Public Interest Law Clearing House briefed Mr McEachern of counsel to advise on the relationship between the common law and the Bailment Agreement.

In an advice dated 26 February 2010, Mr McEachern observed that 'the Courts are generally leaning towards the proposition that the owner is the principal of the driver' (at p 4). Mr McEachern wrote that 'Courts these days tend to look unfavourably upon the taxi owner trying to evade his "moral" responsibility' to compensate innocent third parties (p 3).

By contrast, Mr McEachern wrote, the Bailment Agreement 'favour[s] the taxi owner/operator' and may prevent an 'impecunious taxi driver' from claiming indemnity in the event of an accident. By drafting the Agreement in this way, Mr McEachern observed, the VTD 'would appear to be entering into the debate on the side of the taxi owners' (pp 5-6).

c View of the Australian Taxi Industry Association

At the 2010 Australian Taxi Industry Association conference, a legal adviser to the taxi industry confirmed that the term 'bailment' favours owners at the expense of drivers.

⁹ See especially *Elfah Pty Ltd v Sabbadini* (1994) 19 MVR 81 and *Emjay Motors Pty Ltd v Armstrong*, unreported judgment of Hedigan J, Supreme Court of Victoria (24 August 1995). See also *Mauro Taxi Services Pty Ltd v Israport (Sales) Pty Ltd* (1990) 12 MVR 147.

Mr Owen Ratner, a solicitor at Pigott Stinson Lawyers, discussed the ‘advantages of taxi drivers being bailees.’ He pointed out that under a bailment arrangement:

- ‘1. The taxi driver is responsible for his or her own tax. The owner is not required to deduct PAYE tax nor pay superannuation.
2. The taxi driver is not generally entitled to the benefits that usually apply for the benefit of employees under laws such as Fair Work Act or under awards such as annual leave, long service leave and personal leave. However under certain laws in various states the drivers are entitled to Worker’s Compensation coverage and in Sydney where there is a contract determination under the Industrial Relations Act taxi drivers are entitled to annual leave, long service leave and sick leave.
3. *There is no vicarious liability imposed by the common law on taxi owners for the acts of taxi drivers. In other words a taxi owner is not responsible for the actions of a taxi driver who drives his or her taxi in the way that he or she would be if the taxi driver were an employee.*¹⁰

Mr Ratner went on to discuss the importance of ‘protecting the bailment agreement,’ in the face of increasingly ‘vocal’ and ‘perhaps disruptive’ advocacy on the part of the Transport Workers Union, the Victorian Taxi Drivers Association and other driver representatives.

As this presentation demonstrates, the taxi industry is well aware of the disadvantages that drivers suffer as a result of being characterised as bailees – especially in relation to liability for property damage.

We believe that Victorian taxi drivers are entitled to fair and impartial treatment by policymakers and regulators. By characterising the owner-driver relationship as one of bailment, the Victorian Government seems to be protecting the interests of owners, without regard to the interests or legal rights of drivers.

Recommendation 3:

The Victorian Government should no longer use the term ‘bailment’ to describe the relationship between owners and drivers. Instead it should acknowledge the principal-agent relationship that exists between owners and drivers, and uphold the rights that flow to drivers as a result. The Government should replace the Bailment Agreement with a new model document that explicitly recognises drivers’ right to an indemnity from owners, in the event of a motor vehicle accident.

¹⁰ Owen Ratner, ‘Taxis – protecting the bailment arrangement,’ paper delivered to the Australian Taxi Industry Association Conference, Darwin, on 8 June 2010, available at <http://www.pigott.com.au/news/taxis-protecting-the-bailment-arrangement/> (last accessed 14 June 2011), emphasis added.

5 Need for transparent and accountable regulation

Does the Victorian Tax Directorate deliver a service that meets community needs and expectations? (p 13)

We have tried unsuccessfully to raise our concerns with the Victorian Tax Directorate (VTD) on a number of occasions. We first met with the VTD on 17 December 2009. We raised several concerns, including:

- The provisions of the Bailment Agreement regarding indemnity and negligence, and their inconsistency with several recent Supreme Court cases;
- The misleading and deceptive conduct of certain taxi clubs and the effect of this conduct on low-income drivers; and
- The need for greater transparency regarding taxi ownership (since at present, the VTD refuses to reveal the owner of a particular taxi, on privacy grounds, even when this information is requested by a lawyer for the purposes of joining the taxi owner as co-defendant to a legal action).

The VTD agreed to investigate these matters.

Further to the meeting, we rang and emailed the VTD several times, but never received any response, either orally or in writing.

We met with the VTD again on 12 July 2010, at the request of Brian Tee, then Parliamentary Secretary for Public Transport. This meeting was attended by Garry Ellis, a senior bureaucrat within the VTD. We reiterated our concerns about the Bailment Agreement and taxi clubs. Mr Ellis said he was not aware of the problem of underinsurance as it had not been raised at the VTD's Driver Advisory Group. We asked if we could attend a meeting of this group and we were told we could not.

To date we have not received any correspondence from the VTD, either acknowledging our concerns, responding to our queries or undertaking to investigate any of the issues that we have raised.

In May this year, an *Age* journalist contacted the VTD to enquire about the practices of taxi clubs. According to *The Age*, the VTD's general manager, Peter Corcoran, 'refused to say whether he had any concerns with taxi club practices and referred questions to the Australian Prudential Regulation Authority.'¹¹ This suggests that our concerns were not communicated to senior personnel within the VTD, or alternatively, that the VTD considered our concerns and elected to take no action.

¹¹ Munro, above n 1.

We believe that this falls well short of community needs and expectations. The community has a right to expect that an industry regulator will act in the interests of all participants in the industry, in a conscientious and even-handed manner. In its letters to taxi drivers, the VTD frequently states that according to the 'public care objective' set out in the *Transport Act 1983* (Vic), it must ensure that drivers provide services 'in a manner that is not fraudulent or dishonest' (s 169F(c)). It seems, however, that VTD has little desire to address fraudulent or dishonest conduct on the part of certain taxi owners, depots, taxi clubs and other powerful players in the industry.

Recommendation 4:

The new Taxi Services Commission must be an efficient, transparent and accountable regulatory body, with an explicit duty to act in the interests of all participants in the taxi industry, including 'bailee' drivers.

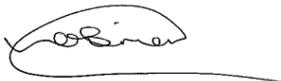
6 Further material

We would be grateful for the opportunity to provide case studies and other documents obtained through our work at the Clinic, to illustrate the issues we outline in this submission.

If we can assist the Inquiry in any other way, please do not hesitate to contact me on the number below or via email at lucinda.obrien@fclc.org.au.

Thank you very much again for giving us the opportunity to make this preliminary submission.

Sincerely

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

Lucinda O'Brien

Policy Officer

Direct line (03) 9652 1512

Attachments: 3

Summary of recommendations

Recommendation 1:

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