

AUSTRALIAN TAXI INDUSTRY ASSOCIATION

Submissions Regarding Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper dated September 2011

Australian Taxi Industry Association

1. The Australian Taxi Industry Association (**ATIA**) is the peak representative body in Australia for the taxi industry. We primarily represent the interests of taxi owners, taxi operators and taxi networks.
2. The members of the ATIA are as follows:
 - (a) NSW Taxi Council;
 - (b) Victoria Taxi Association;
 - (c) Taxi Council of Queensland;
 - (d) Taxi Council of Western Australia;
 - (e) Taxi Council of South Australia;
 - (f) Canberra Taxi Industry Association; and
 - (g) The Taxi Council of the Northern Territory.

Background

3. The ATIA believes that certain proposals in the Discussion Paper dated 21 September 2011 (**Discussion Paper**), if introduced, will create significant hardship for the taxi industry.
4. The taxi industry is comprised of a myriad of different businesses.
5. In each State and Territory there are accredited or authorised taxi networks or equivalent organisations (**Networks**) which provide a two - way radio booking service (that is, a call centre) for taking and dispatching bookings for taxi cabs. Some Networks outsource this facility however the legislation of each State and Territory regulates how this may occur. Networks that operate their own call centres employ individuals to work in those call centres.
6. Networks may also operate a fleet of taxis cabs although this is becoming far less common.
7. The vast majority of operators and owners of taxis are individual small businesses. These businesses (**Operators**) are in the majority of cases required by law to be members of a Network to increase passenger and driver safety and provide the benefit of the use of a Network's call centre for radio bookings of taxi cabs. Aside

from membership of the Network, Operators are completely independent from the Network and operate as separate businesses.

8. Operators may drive their cabs themselves or bail their cabs to bailee drivers. Bailee drivers are not employees of the Operator nor are they employees of the Network.
9. The Operator of a taxi-cab typically contracts with a driver to give that driver use of the cab and the taxi licence plates for a shift in consideration for a fee.
10. In many respects, excluding the industrial regulation of the taxi industry in Sydney, bailor Operators run their taxis as small businesses in which the bailee driver participates in a type of joint venture arrangement in respect of the driving of their taxi cabs. It should be noted however that Operators have no control over the actions of their drivers during a shift.
11. In each State and Territory, separate taxi licences are available to operate wheelchair accessible taxis services. Various State governments have encouraged Operators to purchase and use these licences by ensuring that the cost of the licence is kept low. At different times, a range of incentives have also been offered to drivers and Operators to encourage wheelchair accessible taxis services. In NSW, and in other States incentives are offered to drivers for some trips. In different states other initiatives have been introduced such as assistance with the fit out of a taxi cab to make it wheel chair accessible. In this regard, it is noted that the cost of purchasing and converting a vehicle to make it wheel-chair accessible is several times higher than the cost of purchasing a non-accessible vehicle.
12. However, despite the initiatives, the number of wheelchair accessible taxis operating in Australia remains a small but increasing proportion of the fleet. The number of passengers requiring these services is also very small proportion of the total demand for taxi services.
13. Further, in the case of wheelchair accessible taxis, not all taxis can accommodate all possible types or ranges of wheel-chairs. For example, very few taxis are equipped to accommodate very large motorised wheelchairs and shopping carts used by some disabled passengers. Mobility scooters also pose a range of serious safety and other issues for the providers of wheelchair accessible taxi services. Part of the difficulty arises because the standards covering public transport pursuant to section 31 of the *Disability Discrimination Act 1992* (**Disability Standards**) do not include clear definitions or standards for mobility devices that are required to be accommodated in those standards.
14. There are practical consequences which flow from the difference between the numbers of non-accessible taxis when compared to the limited number of wheel chair accessible taxis in Australia. The most obvious consequence is that when a passenger makes a telephone booking for a taxi, it is far more likely that a non-accessible taxi will be in the vicinity when compared to a wheel-chair accessible taxi. Accordingly, it is also likely that the response times for non-accessible taxis will be shorter (that is, the taxi will arrive sooner) when compared to a wheel-chair accessible taxi. This problem is compounded when a passenger's mobility device is not suitable for use in taxis with an allocated space that meets the minimum standard only. There is a very small pool of vehicles that exceed the minimum standard.
15. The number of wheel chair accessible taxis depends on the number of individuals who choose to become taxi owners and also elect to purchase a wheel-chair accessible taxi licence as opposed to a standard licence.

16. The Networks do not control (or have any capacity to control) the decision of these individual Operators as to the type of taxi and taxi licence they hold, or which Network they choose to affiliate with.
17. Operators have no control over the conduct of their drivers and no ability to regulate their conduct. As stated above, drivers are neither employees nor contractors of the Operator rather they are bailees.
18. At this point in time, the cost of rapidly increasing the proportion of wheelchair accessible taxis in the fleet has proven prohibitive. Whilst the proportion of the fleet continues to grow, this growth remains gradual.
19. Insofar as the Disability Standards introduced a requirement for parity between response times for accessible and non-accessible taxis services, the obligation has been imposed on the Networks. Yet for the reasons outlined above, the Networks do not control the number of wheel-chair accessible taxis available to passengers nor can they compel a driver or Operator to make their taxi available at a particular time or take a radio booking at a particular time.
20. This example is given because it highlights the difficulty for the taxi industry in particular in accommodating changes to standards and legislation if such standards and legislation do not take account of the lack of control exercised by Networks over their member Operators and drivers.
21. Against this background, the ATIA submits that any proposal to amend existing anti-discrimination law must have regard to the practical difficulties that the taxi industry will face. An obligation imposed on Networks (or the suppliers of a regulated public booking service) must have regard to the fact that Networks generally do not operate taxi cabs and have no control over the number or type of accessible taxis using their booking service or available at any time in any geographical area. Lack of similar obligations placed on competing service providers such as hire car services or unregulated booking service providers (often called "trunk networks") affects the competitive position of regulated taxi networks.

Discussion Paper

22. We have provided comments and submissions on relevant numbered questions contained in the Discussion Paper below.

Burden of proof to establish direct discrimination (Question 2)

23. The ATIA submits that the difference between direct and indirect discrimination provides the most compelling reason for different obligations to apply in respect to the burden of proof.
24. If a complainant alleges that an act was discriminatory on its face then it is not unreasonable to require that the complainant prove this allegation. It may be more onerous to prove all the elements of indirect discrimination and so shifting the burden of proof in respect to this type of complaint may be more easily justified.

25. The ATIA has had regard to submissions already lodged and notes that there seems to be some concern that commencing and prosecuting claims for direct discrimination is prohibitively expensive because of the obligations imposed on the complainant.
26. In our experience, many claims are commenced without a clear basis at law. Even in such circumstances, it often proves cheaper for our members and their associates to settle such claims rather than contest them.
27. It is assumed that the settlement of claims in some way validates the claim being commenced in the first instance. It is also often assumed that business can afford to manage claims of this type. Both of these assumptions are incorrect.
28. The requirement that the complainant establish the case of direct discrimination to be met by the respondent does not seem excessive. It provides a (limited) safeguard against frivolous claims.

Duty to make reasonable adjustments (Question 4)

29. There is already an express duty to make “reasonable adjustments” to address disadvantage experienced by persons with certain attributes in the *Disability Discrimination Act*.
30. Any amendment to the existing duty (including an extension of that duty to cover other forms of discrimination) should be approached cautiously because it may well impose significant additional obligations on businesses.

Vicarious Liability (Question 19)

31. The Discussion Paper includes a proposal to introduce a unified approach to vicarious liability with a new requirement that the employer, principal or company establish that it took “all reasonable steps” to prevent the employee, contractor or other party under its control, from engaging in discriminatory behaviour.
32. For the reasons outlined above, the ability of Networks to control Operators or drivers is, in reality, very limited.
33. Notwithstanding the significant role that the taxi industry plays in the provision of wheel chair accessible public transport services, it is comprised of independent businesses working as joint-venturers and not as principal and agent or employer and employee.
34. The ATIA is concerned that any obligation which extends vicarious liability of employers, principals or companies is not drafted so broadly as to create vicarious liability for Networks in respect of their member Operators or drivers.
35. Similarly, as drivers are bailees (and not employees or contractors), any provisions dealing with vicarious liability should not be so broadly drafted as to make Operators vicariously liable for the actions of bailee drivers.
36. As stated above, Networks do not exercise the requisite level of control over the operations and activities of Operators and drivers. Similarly, Operators do not

exercise the requisite level of control over bailee drivers. Accordingly, it is unreasonable to hold Networks or Operators vicariously liable for the actions of these independent parties.

37. In addition, the ATIA submits that the proper test is that the employer, principal or company party took “reasonable steps” to prevent the relevant conduct.
38. The new test proposed in the Discussion Party effectively requires that the party do all that it is reasonably able to do to avoid their employees, contractors or others from taking discriminatory action. The ATIA submits that the proposed new test is unnecessarily onerous on employers, principals and companies. While steps can be taken to prevent discriminatory conduct, it is very difficult to predict the behaviour of employees and agents. Difficulties are likely to be encountered in determining the ambit of *all* that may be done to prevent such discriminatory behaviour.

Temporary exceptions (Question 23)

39. There is a suggestion in the Discussion Paper that the power of the Commission to grant temporary exemptions from certain provisions of the discrimination legislation be limited to circumstances where the exemptions give effect to the objects of the relevant act.
40. This approach, on its own, will not allow the Commission to exercise discretion to accommodate any unique circumstances applicable to the application for an exemption.
41. It also assumes that the objects of the relevant acts were drafted as an exhaustive list of considerations relevant to the granting of exemptions.
42. The ATIA submits that the Commission’s power to grant temporary exemptions should not be limited only to a consideration of the objects of the relevant act, which generally can be brief and non-exhaustive.

Other mechanisms (Question 24)

43. The Discussion Paper refers to the introduction of the Disability Standards as an example of a positive mechanism to provide additional certainty and guidance.
44. The Disability Standard has resulted in the imposition of new and wide-reaching obligations for regulated public transport providers.
45. The ATIA submits that the introduction of such significant obligations should only occur after widespread consultation with individuals and service providers impacted by the changes. Such consultation should also include an opportunity to review and comment on the drafting of the relevant standard because any change to the disability regime has the potential to have tremendous impact on individuals and businesses.
46. The ATIA considers that the use of standards should be very limited and not used as a means of expanding anti-discrimination legislation.

47. Changes to disability rights and obligations are more properly to the subject of carefully crafted legislation subject to parliamentary review.

Other

48. The ATIA is grateful for the opportunity to make these submissions and would be pleased to provide additional information should it be deemed necessary.

Peter Ramshaw

Company Secretary ATIA

Dated: 1 Feb 2012