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# Extending Unfair Contract Term Protections to Small Businesses

Footscray Community Legal Centre

## Submission to the Australian Treasury

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## **1 Introduction**

Thank you for the opportunity to make a submission to the Treasury on extending unfair contract terms to small businesses. Footscray Community Legal Centre Inc (FCLC) has established a specialist advisory service to assist taxi drivers and / or owner drivers with legal advice and advocacy. Our clients are defined as small businesses for the purposes of the Australian Consumer Law.

## **2 About FCLC**

FCLC provides free legal services to the communities of people who live, work or study in the City of Maribyrnong. FCLC has established a strong foothold in assisting these communities. The communities are culturally diverse, with a large proportion of our clients speaking a foreign language as their first language. To meet the needs of the culturally evolving community, FCLC has successfully implemented community education programs and specialist advice services tailored to meet specific legal and socio- economic problems. Examples include initiatives to meet the needs in areas such as employment, tenancy, infringements, debts and utilities associated issues.

In addition, FCLC provides outreach services to organisations focused on assisting new arrived communities and settling disputes around the broader Western regions of Melbourne. Such outreach services include Spectrum Migrant Resource Centre in Sunshine; Wyndham Community and Education Centre in Werribee; and operating duty lawyer services at Sunshine Magistrates' Courts and VCAT in Werribee.

## **3 The Taxi Driver Legal Clinic**

FCLC established a specialised legal service in February 2011 dedicated to disadvantaged, low income taxi drivers. Through this service we have identified key problem areas that have surfaced and apply consistently to taxi drivers and owner drivers. These disputes have often required lengthy and complex negotiation and dispute settlement assistance and if unsuccessful, strategising appropriate litigation options as a final resort.

For the purposes of this submission the key words and phrases are as follows:

- **Driver** – a bailee (not an employee) who contracts to drive a taxi but does not own or lease the taxi licence or vehicle;
- **Owner Driver** – A small businessman who owns or leases both the taxi licence and vehicle and drives the taxi;
- **Taxi Operator** – A business that owns or leases multiple licences and vehicles but does not drive the taxi;
- **Network operator** – A business that provides radio network and electronic payment services for taxis;
- **Taxi Clubs** – Usually established as cooperatives or incorporated associations to provide unregulated insurance services for motor vehicle accidents to taxi owners and operators.

### **3.1 Client profile**

Our typical client was born outside Australia, speaks a language other than English at home, suffers significant financial hardship and falls into the category of either a driver or an owner driver. A driver drives the taxi cab for an owner driver or an owner operator who owns or leases both the taxi and the taxi licence.

Frequently, drivers suffer financial hardship due to the uneconomic and restrictive work conditions resulting from operating as bailees, effectively independent business contractors, which requires that they forgo the benefits most employees have such as a minimum wage, sick leave, annual leave, superannuation, occupational health and safety training and protection against unfair dismissal.

Owner drivers are often similarly impecunious due to the large debts and payments incurred to own or lease the taxi licence and the taxi cab. The lease of taxi licences to single owner drivers has been expensive and at times unconscionable in recent years due to the closed and uncompetitive structure of the industry. The Victorian taxi industry is currently undergoing significant change designed to reduce the cost of taxi licences but many owner drivers will continue to suffer financial hardship for some years to come.

### **3.2 Drivers as independent business operators**

Drivers are defined as ‘bailees’ which is a term denoting the driver of the taxi cab in a bailment. A bailment is the voluntary delivery to a person (the bailee) by its owner (the bailor) of a thing, (in this case, a taxi cab).<sup>1</sup> As bailees, drivers operate as independent business contractors rendering them into the category of small businesses for the purposes of the unfair contract term legislation.

### **3.3 Casework**

#### **3.3.1 Motor vehicle accidents**

The taxi clinic casework falls into four main categories: infringements; disciplinary matters; motor vehicle collisions and licence repayment issues. From a concerning proportion of our casework, there has surfaced a pattern of complaints that surround a dispute where there exists the reliance upon unfair terms. In considering the way in which unfair contract term law applies to these cases, our motor vehicle accident matters highlight a significant power imbalance between on the one hand drivers and owner drivers and on the other, the taxi clubs, as evidenced by the restrictive liability clauses contained in the taxi club agreements.

As background, drivers cannot insure a vehicle they do not own and are therefore dependent on the owner/operator to insure the taxi cab and the taxi club to pay legitimate claims.

In the circumstances where a collision has occurred, the claim amount for the damage is often passed on to a taxi club with whom the owner/operator of the taxi cab has contracted for insurance. These agreements contain numerous unfair terms that protect the taxi club from liability such as, most commonly, stipulating the taxi club may pay at their own discretion and where the club ought

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<sup>1</sup> Victorian Taxi Association Inc, *Taxi Cab Bailment Agreement* (Dec 2012) Victorian Taxi Association <<http://www.victaxi.com.au/media/28699/bailment%20guide.pdf>>

to pay, there are broad exception clauses excluding liability. In our experience many taxi clubs routinely refuse to pay legitimate claims.

### **3.3.2 Taxi Clubs**

Taxi Clubs play the role of a quasi insurer to the owner and driver of a taxi cab. Taxi Clubs charge contribution fees and premiums to its owner driver members, and excesses on claims to both drivers and owner drivers in return for the taxi club indemnifying the member for repairs and / or damage in the event of a collision.

In practice, provision of indemnity is at the sole discretion of the taxi club in accordance with taxi club indemnity agreements that limit their obligation of payment in the event of collision. Typically, the context in which clients approach our service are circumstances where, chronologically:

- a) The taxi club fails to pay a claim amount,
- b) The other party sues our client for payment of repairs and
- c) Judgment is entered against our client for payment of repairs including costs and interest.

## **4 Unfair contract terms in taxi club agreements**

The parties to an indemnity agreement of a taxi club are the club and its member, the owner driver, who pays contributions prescribed by the taxi club. There are three main types of contract terms within these agreements that render them unconscionable and unfair. These are:

- 1) Terms providing a wide discretion to compensate a member;
- 2) Terms relieving the taxi club of liability; and
- 3) Terms placing onerous obligations on its members and drivers.

### **4.1 Case examples**

#### **I. Taxi Club example 1- Metropolitan Taxi Club Inc**

In *ABC v Metropolitan Taxi Club Inc* (“MTC”),<sup>2</sup> the VCAT Deputy President Ian Lulham found that the Rules of MTC that had been signed by the member, ABC, served the purpose of a contract between MTC and the member under which MTC supplied services and that within those Rules contained exemption clauses that rendered the contract unconscionable.

Examples of exemption clauses given by Mr Lulham as those that MTC have drafted in such a way to avoid having a liability to the members with whom it contracts were:

- 1) All accidents need be reported to the club within 24 hours after the accident.  
This poses the problem where the club is not open on weekends and a collision occurs between 5.01pm on Friday and 8.59am on Monday.<sup>3</sup>
- 2) A member is responsible to provide all the details of the accident required by the club to make an informed decision. A claim is at fault where a vehicle is forced off the road and the

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<sup>2</sup> [2013] VCAT 1332.

<sup>3</sup> Ibid [11].

member fails to provide witnesses and registration number or description of the offending vehicle.<sup>4</sup>

- 3) A decision to accept or refuse to assist the member shall be binding upon the member.<sup>5</sup>
- 4) Where MTC has an assessor inspect the vehicle the club shall review the report of the vehicle assessor and decide whether to assist the member and to what extent.<sup>6</sup>

## **II. Taxi Club example 2**

In Victoria, a taxi club located in Melbourne has engaged an indemnity agreement that contains similarly drafted exemption clauses aimed at relinquishing total liability of the taxi club. These include:

### *Providing a wide discretion to compensate a member*

- Clause 1 gives the club sole discretion to determine to indemnify a member against loss or damage to a vehicle;
- Clause 3 provides the terms of indemnity are at the sole discretion of the Club;
- Clause 5 stipulates the club reserves the sole and complete discretion of determining whether the member was in the right or were at fault in the event of a collision.

### *Placing onerous obligations on its members*

The following clauses are based on the provisions of the *Insurance Contracts Act 1984* (Cth) even though the contract is not regulated by that Act and the protections for the insured in that Act do not apply to this taxi club contract. In that context, the clauses impose vague descriptions of duties imposed upon members where if not met, the taxi club's obligation to that member is relinquished:

- Clause 2 imposes a duty to disclose all matters that are relevant to the acceptance of the indemnity agreement by the club.
- Clause 2 explains the duty to disclose imposes on the member what a reasonable person in like circumstances would be expected to know to be relevant matters.
- Clause 2 states that in the circumstances where a member fails to disclose a material matter or where the club would not have accepted that member as a member of the club, the club can avoid or reduce its obligations under the indemnity agreement.
- Clause 8 provides that a claim is in the wrong where a vehicle is forced off the road and there is a failure by a member to prove by way of witness, registration number and description of the offending vehicle.

It should also be noted that a number of these clauses are based on sections of the *Insurance Contracts Act 1984* (Cth) that has subsequently been amended to provide a more reasonable balance between the rights of insurer and insured. Section 21 of the *Insurance Contracts Act 1984* (Cth) requires insurers to specify what information is required to be disclosed and removes the

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<sup>4</sup> *Ibid* [10].

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid*.

requirement of an insured to guess or be the reasonable man and know what information is required by the insurer.

*Termination clauses*

- Clause 7 provides that where a vehicle is considered a total loss in the event of a claim, the indemnity agreement is automatically terminated without refund of member fees.

This means that whilst the taxi club will insure against damage to the taxi cab it will not provide cover in the event that the taxi cab is so badly damaged that it cannot be repaired and is therefore a write off. The clause raises the issue of a business model that lacks consideration or *quid pro quo* by the taxi club for the payment of member fees. That is, the indemnity agreements and / or taxi club rules that govern the member rights with the club contain evidence of a clear intention by the club to avoid liability.

As stated by Mr Lulham in *ABC v MTC*,<sup>7</sup> a different taxi club, the taxi club has:

‘received membership fees from ABC in return for precisely nothing and ABC is entitled to a refund of all of those fees.’<sup>8</sup>

### III. **Taxi Club example 3**

Another widely used Victorian taxi club agreement contains clauses binding the taxi plate holder as a party to the agreement between the taxi plate holder and the taxi club as a provider of taxi club services.

- Clause 6.5 empowers the taxi club to direct a plate holder to remove a person employed as a driver in operation of the taxi if the taxi club considers that person to be undesirable in any way. Upon such finding, the clause stipulates the plate holder to subsequently remove that person (the driver) within a time frame directed by the taxi club.
- Clause 16.1 places an onerous obligation on the plate holder through a confidentiality information clause contained in the agreement prohibiting the plate holder from disclosing or making public any information obtained by them in connection with the services or the contract. The term continues to state that the obligation continues to bind the plate holder after termination of the contract without a specified end date.
- Clause 18 creates a financial product, namely, a put option that may be exercised at the discretion of the taxi club. In exercising the put option the taxi club is empowered to force the plate holder to purchase the taxi and any taxi equipment in accordance with the terms stipulated in the put option schedule provided in the agreement.

### IV. **Network Operator – a case example**

The use of a network operator user manual engaged by one of Western Australia’s largest taxi dispatch services illustrates the type of terms users of the service are bound by. The manual contains disciplinary procedures and rules that govern drivers and owner operators as users of the dispatch service. The standard form network operator contract contained within the manual

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<sup>7</sup> [2013] VCAT 1332.

<sup>8</sup> *Ibid* [12].

imposes the manual and the rules therein as a condition of the provision of network services to the operator. Provided below, are three examples of oppressive clauses restraining the legal rights that an owner operator or owner driver, as members of the network operator service, might have intended to rely upon:

- 1) Clause 3.8.1 states that in the event a dispute is referred to the Network Operator's Tribunal and the member is required to show cause, that member will have no right to legal representation. The only exception to this clause is where the Disciplinary Tribunal exercises its absolute discretion to allow legal representations as it considers appropriate in circumstances that are considered by the tribunal to be exceptional.
- 2) Term 4 of the Network Operator *Log On Terms and Conditions* purports to bind the user to agree that the permission to operate on the network operating service is wholly at the discretion of the Directors of the network operator and that they may, at any time and without prior notice or reason withdraw that permission.
- 3) Term 5 contained in the Network Operator *Log On Terms and Conditions*, stipulates the driver to indemnify the network operator against any claims whatsoever which may be made against it as a result of the act, omission or default of the driver whilst operating a taxi. Interestingly there is no contract between a network operator and the driver and this clause is enforced by a threat to withhold radio access to the driver.

#### **V. The Victorian Taxi Association**

The Victorian Taxi Association *Taxi Cab Bailment Agreement* ("VTA agreement") is a legal document outlining the rights, responsibilities and obligations of bailees and bailors. Most relevant to the liability of the bailee in the event of a collision is that the VTA agreement mitigates liability to the bailee. In particular, it provides that the bailor indemnifies the bailee in respect of liability for property damage.<sup>9</sup> That is, the owner driver or owner operator must indemnify the driver in the event of a motor vehicle accident.

An exception to the indemnity clause operates to exclude the indemnity from applying in the event that the bailee is negligent or to the extent that the bailee's negligence, wilful misconduct or wilful breach caused the damage.<sup>10</sup> The extent of this exemption clause in relinquishing the indemnity offered by the agreement in the event of a collision is significant due to the highly subjective nature of the interpretation of negligence and that motor vehicle collisions frequently occur due to driver negligence.

#### **5. Consequences**

The rules imposed upon drivers and owner drivers by taxi clubs and network operators create significant and long lasting concerns arising from significant power imbalances within the Australian taxi industry. The application of unfair contract terms, particularly in insurance or indemnity contracts, has been devastating for many our clients. We have had to defend clients in Magistrates'

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<sup>9</sup> *Taxi Cab Bailment Agreement*, above n 1, 8.12.

<sup>10</sup> *Ibid.*

and Federal Court proceedings, including bankruptcy applications. We have had to assist with credit reference disputes in relation to credit refused for home finance and taxi upgrades. We have had clients threatened with the loss of their taxis, their livelihood and their homes.

## **6. Conclusion**

It is widely recognised that contractual arrangements within the taxi service industry are subject to unfair contract terms and in some cases, have extended to render the entire contract unconscionable. Taxi clubs and network operators contract with drivers and owners that are considered small business operators under the law in the absence of the protection against unfair contract terms afforded by the Australian Consumer Law.

Drivers and owners are subject to a range of highly complex and unusual contractual arrangements for indemnity and network services. The constraints arising from the socio- economic backgrounds are that they are rarely in the position to nor able to afford legal advice to scrutinise the contractual rights and obligations that arise from these agreements.