

NSW Taxi Council Submission: National Review Model Occupational Health and Safety

Laws

1. Introduction

- 1.1 This submission is made behalf of the NSW Taxi Council on behalf of taxi owners (including networks) who own and operate taxis in New South Wales.
- 1.2 Generally, our submission will fundamentally involve recognition of the special relationship of bailor and bailee which exists between taxi owners and taxi drivers.
- 1.3 This submission in general terms proposes that any new occupational health and safety laws (“OHS laws”) take into account the unique nature of the taxi industry and in particular the bailment relationship between owners and drivers.
- 1.4 New OHS laws need to be structured to take into account the NSW Passenger Transport Act 1990, the NSW Passenger Transport Regulations 2007 and other laws that regulate the NSW taxi industry..
- 1.5 Any occupational health and safety (“OHS”) model should seek to maintain the intent of the Robens Inquiry, where OHS laws were first and foremost for the prevention of workplace injury. Although, a compensatory element may exist, prevention of injury should be the prime factor behind such changes and any responsibility in this respect must factor in the level of control that bailors/owners have in respect of taxis.

2. Owner/Operator and Driver Relationships – A relationship of bailment

- 2.1 There is a long line of authority which establishes that the relationship between taxi owners/operators and taxi drivers is one of bailor and bailee. Most recently the issue was considered by Hill J in the case *De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd and ORS v Commissioner of Taxation* [1997] FCA 840.
- 2.2 Hill J concluded that the relationship between operators and drivers is characterised as a relationship of bailment, and not as relationship of employment or independent contractor.
- 2.3 The relationship of bailment focuses upon a relationship primarily revolving around private property rather than concerning the contract for service or contract of service.
- 2.4 The relationship of bailment arises from an owner/operator of a taxi bailing taxi to the taxi driver for the purpose of gaining reward. The taxi driver pays the owner a fee for the use of the taxi during the bailment.
- 2.5 In the relationship of bailment, the drivers carry on their own business as they are given sufficient scope and freedom to find ‘work’ if they so choose and during the bailment they have complete control over the taxi.
- 2.6 OHS laws also need to take into account other unusual aspects of the operation of taxis including the involvement of taxi networks in the installation of equipment in taxis such as meters, communication equipment and alarms, the operation of which is outside their control.

3. Occupational Health and Safety and the Taxi Industry

- 3.1 The NSW taxi industry is currently subject to laws which may be regarded as normally being within the jurisdiction of OHS laws including Passenger Transport Act 1997, Passenger Transport Regulation 2007; Occupational Health and Safety Act 2000; The

Workers Compensation Act 1987 and The Workplace Injuries and Workers Compensation Act 2000.

- 3.2 These laws impose obligations and duties on taxi networks, taxi owners/operators and taxi drivers.
- 3.3 The Occupational Health and Safety Act broadly affects the Taxi Industry. However, this Act does not currently address or provide exceptions for or deal specifically with the relationship of bailment.
- 3.4 In our submission any proposed changes to national OHS regulations would need to consider issues relating to the relationship of bailment in the taxi industry.
- 3.5 The taxi industry is also concerned regarding potential overlap between model Occupational Health and Safety laws and the NSW Passenger Transport Act and Regulation. Currently, the taxi industry in NSW is subject to two sets of laws which each prescribe different levels of OHS compliance. This creates difficulties in assessing the standard of OHS compliance necessary and should not be imported into any new OHS laws.

4. Regulatory Structure

- 4.1 The Regulatory approach which should be taken in the model OHS Act should provide an appropriate balance between general duties, prescription, performance and process based standards.
- 4.2 However, it is our view that the new model should, where appropriate, rely upon other prescriptive regulation where such regulations cover OHS matters specifically related to the industry. This will enable the responsible person to more easily assess whether they comply with the Act. Regulations would to consider the implications of the Passenger Transport Act and Regulations and recognise aspects of operation where adequate controls already exist.
- 4.3 The rationale is that such an approach achieve the appropriate health and safety outcomes but at the same time avoid duplicating laws and take into account the existing regulation of the taxi industry.

5. Title, Objects and Principles

The NSW Taxi Council believes the model OHS Act should specify its objectives and include a set of principles of health and safety protection including for the taxi industry. This will allow for a definitive and clear framework for the model to be administered within the industry.

6. Scope and Application

The NSW Taxi Council submits that the status quo of industry specific legislation should be maintained. The model OHS Act should be sufficiently detailed to encompass subordinate legislation regarding the taxi industry and the current codes of practice already in place in this industry. Specifically this relates to the Passenger Transport Act and Passenger Transport Regulation 2007.

7. Workplaces and Non-workplaces

- 7.1 Specific to the industry, a bailor being an owner/operator will normally confer the use of a taxi upon a bailee (driver), and for the purposes of this regulation, this taxi would constitute a place of work.
- 7.2 We submit that certain aspects of the operation of taxi cabs which might well fall within the ambit of new OHS Laws are well and sufficiently regulated by current laws and regulations. These aspects include:
- (a) hirings by members of the public;
 - (b) interaction with the public;
 - (c) the safety equipment, roadworthiness and operation of taxi cabs; and
 - (d) traffic and criminal laws.

8. Responding to Change

- 8.1 The existing OHS Act legislates in relation primarily to traditional employment relationships namely contracts for service and contracts of service. The scope and application of the model OHS Act needs to recognise the relationship of bailment by specifying provisions for this relationship and providing exceptions from legislative provisions focusing on traditional employer relations.
- 8.2 Within the taxi industry, numerous risks and hazards exist including but not limited to vehicle defects, lifting heavy luggage, vehicle breakdown, traffic accidents and assaults of drivers by members of the public. In our submission it would be unworkable for any potential OHS Act to include the risks and hazards of operating taxis in list of potential hazards and risks for all industries. Instead, the legislation should apply a reasonable approach in determining what would constitute a specific risk and hazard in relation to this industry.

9. Control

- 9.1 The NSW Taxi Council affirms the need for a definition of ‘control’ with respect to OHS regulation in order to ascertain exactly who owes duties in the workplace and to whom.
- 9.2 A definition of control is needed which incorporates the relationship of bailment, and specifically addresses situations where owners are significantly detached from the workplace (taxi) for lengthy periods of time and are unable to exercise sufficient control. More consultation is required to establish further details regarding specific situations and where the duty of care lies.

10. Concept of ‘Reasonably Practicable’

- 10.1 The new model OHS Act should include a ‘reasonably practicable’ test. This test should be prescriptive in regards to the likelihood of the risk occurring, the degree of harm that would result should it occur, the state of knowledge that exists regarding the risk, the availability and sustainability of ways to eliminate the risk, and the costs of eliminating the risk.
- 10.2 The nature of the bailment relationship in the taxi industry is such that it is important for owner/operators especially, to have clearly defined what measures are reasonable for them to undertake with regards to safety and checks.

11. Risk Management

- 11.1 The NSW Taxi Council believes the terms ‘hazard’ and ‘risk’ should be prescriptively defined. The definitions of these should rest upon the ‘reasonably practicable’ standard.
- 11.2 Risk management principles and processes should be prescriptive in relation to general duties.

12. Consultation, Participation and Representation

- 12.1 The relationship of bailment should be taken into consideration when prescribing levels of consultations needed within different working relationships.
- 12.2 The nature of the taxi industry means that high levels of consultations between taxi owner/operators and taxi drivers are impractical. For example, as bailee drivers are not paid by operators, a bailor operator cannot compel a bailee driver to attend or participate in consultation. Hence the ability to consult may be beyond operators’ control.
- 12.3 The model OHS Act needs to clearly define circumstances where the duty to consult is necessary, and also those circumstances where this duty is merely impractical. These circumstances need to be tailored to the bailment relationship.

13. Dispute Resolution

- 13.1 Since the taxi industry is reliant upon the relationship of bailment, the NSW Taxi Council believes that the most appropriate form of dispute resolution would involve initially the communication between the bailor and bailee. In New South Wales, a specific protocol to be used in resolving OHS issues has been developed for the taxi industry in consultation with the New South Wales Taxi Council, the WorkCover Authority and the Transport Workers Union. This provides a good example of how industry-specific responses are useful in dealing with the unique nature of the taxi industry.
- 13.2 The taxi industry is subject to specific penalties for breaches of state and federal laws. The NSW Taxi Council believes that it should remain under the scope of these laws in regard to penalties where breaches occur. There should be no duplication in this respect.