

Essential Services Commission
Level 37
2 Lonsdale Street
MELBOURNE VIC 3000 (Attention Jonathan Roberts)

Dear Jonathan,

RE: Draft Determination on Taxi Non-Cash Surcharges Dated 11 November 2019

National Billing Group (T/A CabFare) has analysed in detail the Draft Determination on Taxi Non-Cash Surcharging issued in November 2019 by the ESC and have a series of issues we believe need to be addressed by the ESC prior to reaching its Final Determination. This letter constitutes National Billing Group Pty Ltd and CabFare's formal response to the Draft Determination and it may be posted on the ESC's Website.

1. In the ESC's benchmarking analysis provided in the "Taxi non-cash payment surcharge review 2019 draft decision - Benchmarking Spreadsheet.xls, worksheet "Terminal offers" the 'Merchant Service Fees', which are classified as reasonable cost, demonstrates an inverse relationship with transaction volumes. The 'Merchant Service Fees' is not a single universal fee and different providers have different Merchant Service Fees, the quantum of which the taxi payments processors have no control over. Therefore, taxi payments processors with the highest market share and the largest volumes enjoy the lowest Merchant Service Fees. However, the ESC caps the surcharge to recover reasonable costs yet the ESC cannot regulate the 'Merchant Service Fees' individual payment service providers face in a market.

Question 1:

Given the above, how does a one size fits all regulated Non Cash Surcharge ensure that the ESC meet its obligations under the following sections of the Essential Services Commission Act 2001, namely:

s. 8A (1) Matters the Commission must have regard to

In seeking to achieve the objective specified in section 8, the Commission must have regard to the following matters to the extent that they are relevant in any particular case—

- a. *efficiency in the industry and incentives for long term investment;*
- b. *the financial viability of the industry;*
- c. *the degree of, and scope for, competition within the industry, including countervailing market power and information asymmetries.*

Question 1A:

Further how does the ESC's methodology accommodate MSF which is not a single universal fee level common across all providers and align this with the provisions of Section 122 of the Commercial Passenger Vehicle Act 2017?

2. In the ESC's November 2019 draft determination document "DDP - Further Draft - Taxi Non-Cash Payment Surcharge Review 2019 - PUBLIC - 20191111_0.pdf" page 17, the ESC quoted a bottom-up cost assessments that "Live eftpos" has a cost base of 3% and the ESC used this as an example of a provider that can operate in a 4% (inc GST) surcharge price cap.

Question 2:

- a. **Is this 3% a cost based solely on transactions from non-cash payment transactions in taxis or is this cost based from Live eftpos' wider market footprint in many industries which increases the total volume of transactions and may lower the cost base?**
- b. **Can the ESC confirm that the ESC benchmarking and/or bottom-up cost assessment supports or does not support the contention that 'Merchant Service Fees' are;**
 - i. **different in each industry?**
 - ii. **higher in the taxi industry?**
- c. If the ESC quoted "Live eftpos" bottom-up cost assessment of a 3% is based on Live eftpos' wider market footprint in many industries which may artificially lower Live eftpos' 'Merchant Service Fees', **can the ESC explain if and how it isolated only the Live eftpos taxi industry transactions in its benchmarking and bottom up analysis?**

3. In the ESC's November 2019 draft determination document "DDP - Further Draft - Taxi Non-Cash Payment Surcharge Review 2019 - PUBLIC - 20191111_0.pdf" page 24, (Consumer Action Law Centre (CALC) submitted that 'the better approach would be to say that it is reasonable to only recover efficient costs' as 'it does not align with community expectations for reasonable costs to be applied in a way that incorporates existing cost inefficiencies'. This unsubstantiated and undocumented assertion is given undue weight by the ESC in its Draft Determination, when the ESC "amended" its approach in the November 2019 draft determination so that the maximum surcharge now reflects the average actual costs of taxi payment processors instead of the highest actual cost.
- Question 3

- a. **Can the ESC please outline where in the Essential Services Commission Act 2001 and/or the Commercial Passenger Vehicle Industry Act 2017 such an 'amended approach' can be accommodated?**
- b. **If the ESC determines the maximum surcharge using the average actual costs of taxi payment processors instead of the highest actual cost, can the ESC explain how competition in the industry is not decreased when the taxi payment processors with costs above the average cannot operate profitably?**
- c. If the ESC accepts the principle that "average costs" should be used then it follows that at the next regulatory reset those providers remaining in the market after the current determination but with costs above the new average at the time of the reset will exit and thus over time the ESC will create a single supplier market. **Can the ESC explain how its use of average costs will not lessen competition over time?**
- d. **Can the ESC explain where in the legislative provision of Sect 122 of the Commercial Passenger Vehicle Industry Act 2017 that "community expectations" are to be a factor to be incorporated in determining Reasonable Costs of a Payment Processor, being the legislative charter for the ESC in this industry; as Section 121(2) specifically directs that the ESC is to place the requirements of the Commercial Passenger Vehicle Industry Act 2017 in determining the Surcharge level over the requirements of the Essential Services Act? (i.e. The requirements of the provider of non cash payment services in taxis are to be given greater weight in the ESC's determination than those of a consumer under the Essential Services Act)**

4. In the 'DDP - Further Draft - Taxi Non-Cash Payment Surcharge Review 2019 - PUBLIC - 20191111_0.pdf' Page 33, "A2B Australia's competitors cannot accept Cabcharge or process MPTP subsidies. Cabcharge is a major form of payment for business and government travellers and, under state government regulation, taxis are required to have a terminal that can process MPTP subsidies." Further the ESC is aware that Cabcharge is still the only processor of the Cabcharge payment instrument since their voluntary undertaking given to the Reserve Bank of Australia back in 2015.

Question 4A:

Does the ESC agree that A2B is the only taxi payments processor that is a full service provider to taxi drivers, operators and networks in the State of Victoria?

Question 4B

- a. **If the ESC does not agree, please outline which other taxi payment processor competes with Cabcharge on an equal full service offering to taxi drivers, operators and networks?**
- b. **If the ESC does agree, then how does the ESC's determination meet its obligations under the Essential Services Commission Act 2001, s. 8A (1).** Matters the Commission must have regard to:

"In seeking to achieve the objective specified in section 8, the Commission must have regard to the following matters to the extent that they are relevant in any particular case—

- i. efficiency in the industry and incentives for long term investment;
- ii. the financial viability of the industry;
- iii. the degree of, and scope for, competition within the industry, including countervailing market power and information asymmetries;"

6. The ESC has made a Draft Determination that assesses the Surcharge on Cabcharge Payment Instruments can be set up to 6%. It argues that this is because A2B incurs additional costs as a card issuer in addition to the costs of providing a non cash payment facility. This premium seems excessively high as A2B does NOT face any Merchant Service Fees on this instrument as it is both the issuer and the acquirer.

Question 6

Can the ESC advise what benchmarking has been undertaken to justify a surcharge premium of 2% when A2B is a Card Issuer of its own payment instruments when it does not incur any Merchant Service Fees costs on this instrument?

7. The ESC has argued that setting multiple surcharges will lead to confusion in the market however in the November 2019 Draft determination it has set multiple surcharges. The main reason for the Cabcharge specific surcharge cap was due to higher regulated costs.

Question 7A:

Can the ESC please explain why the same logic cannot be applied to high Merchant Service Fee cards such as 'Credit Commercial and Premium', International, AMEX and Diners, as these cards, like the Cabcharge product, are used by "employees of corporations and government agencies which have corporate accounts"?

Question 7B

Based on the ESC's own arguments relating to the differential surcharging of Cabcharge products, can the ESC please explain why the higher surcharge is not applied to all cards used by "employees of corporations and government agencies which have corporate accounts"?

8. The ESC has accepted the principle of multiple surcharges by card type and believe that it will NOT be confusing to Consumers as that consumer is a business. The CPV Act does not exclude the determination for a Payment Service Provider specific surcharge, and arguably the wording of the Act anticipates this.

Question 8:

Can the ESC please explain why the ESC cannot determine separate surcharges for each Payment Service Provider, reflecting the specific reasonable and regulated costs they face and allow the market to determine viability of the Payment Service Provider, as an outcome that is entirely consistent with the provisions of Section 121 of the Commercial Passenger Vehicle Industry Act 2017?

9. Much of the ESC's Draft Determination seems to be weighted towards delivering an outcome appropriate to a regulated monopoly asset and hence its undue attention to "consumer" issues (e.g. reliance on the CALC's comments) which places it in conflict with the provisions of Section 121(2) of the Commercial Passenger Vehicle Industry Act 2017.

Question 9:

Can the ESC please explain why it has chosen to go down the path of central planning and has ignored market-based solutions as being at the heart of value creation? A central planning approach in a market appears to be inconsistent with its legislative charter and the purpose for which it was established by the Government.

Can you please address each of these matters raised in developing the ESC's Final Determination and post your responses to these important matters on the ESC website to ensure transparency of the regulatory process.

Please feel free to contact me should you require any clarification on the matters raised.

Kind Regards

David Hamilton
Chief Strategy Officer
30 January 2020