



Confidential communication

24 June 2019

To Jonathan Roberts
Transport Division
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000
By email: transport@esc.vic.gov.au

Dear Jonathan

A2B's submission responding to the Essential Services Commission's First Determination

A2B Australia Limited (**A2B**) appreciates the opportunity to provide a submission in respect of the Essential Services Commission's (the **Commission**) first determination (**First Determination**) in relation to its "Taxi Non-Cash Payment Surcharge Review" (**Review**).

The Draft Decision of the Commission dated 30 May 2019 is referred to as the "**Draft Decision**" and the final decision to be made by the Commission upon completion of the Review is referred to as the "**Final Decision**".

The Draft Decision provides as follows:¹

"The release of this draft decision is intended to give stakeholders an opportunity to share their views on our proposed decision on the maximum surcharge. It also gives stakeholders the opportunity to comment on our proposed approach to our first determination, to keep the maximum surcharge at five per cent while we complete this review.

Submissions on the draft decision are due by 22 July 2019".

A2B supports the Commission's First Determination to keep the maximum service fee at 5% (including GST) while the Commission completes the Review.

However, A2B submits that the Commission's request for submissions on the Draft Decision by 22 July 2019 will not give stakeholders a reasonable opportunity to respond to, or address, the significant issues and concerns arising from the Draft Decision.

For the reasons set out in the remainder of this submission, A2B submits that the Commission should give effect to each of the following:

- Extend the deadline for submissions on the Draft Decision from 22 July 2019 until after the Victorian Government's response to the Legislative Council's report on the legislated reforms affecting Commercial Passenger Vehicle Industry can be considered so that submissions can:
 - give full and proper consideration to matters relating to the Draft Decision; and

¹ Draft Decision at page 4

- o be informed by the Victorian Government's views and the Legislative Council's report on the findings from its inquiry.

Such an extension would not prejudice the interests of any participant in the industry or discharge by the Commission of its statutory duties in respect of the Review; and

- Extend the date for the release of the Final Decision until after the Commission has conducted appropriate consultation and allowed interested parties to factor into their submissions and engagement the recommendations and observations of the report of the Victorian Legislative Council's inquiry and the Victorian Government's response to the report.

These reasons are discussed in further detail below.

1. Inquiry into the Commercial Passenger Vehicle Industry Act 2017 Reforms

On 20 February 2019, the Victorian Government's Legislative Council agreed to review the Commercial Passenger Vehicle Industry Act 2017 reforms (**CPV Reforms**). The Legislative Council will report on the operation of the CPV Reforms and investigate what further reforms they believe are required to ensure Victorians benefit from the best functioning industry possible (**Inquiry**). The Victorian Government is required to respond to the report within 6 months of the report being tabled.

In all of its communications with the Commission, A2B has explained how rapidly the personal paid transport sector is changing and the magnitude of those changes arising from the CPV Reforms. A2B has further explained that the consequences of these changes have not been fully realised or understood. The Inquiry provides an opportunity for the Commission and participants in the industry to better understand these and other relevant matters and considerations.

The CPV Reforms abolished the licence system for Taxis and hire cars that had existed for many years. The system was replaced with permits issued to operators who wish to operate commercial passenger vehicles; namely, Taxis, hire cars or vehicles used to provide ridesharing services. The annual permit fee – payable to the State Government of Victoria – is currently \$53.80. This is a substantially lower amount than the one-off licence fee of up to \$500,000 that was previously paid to the State Government of Victoria for the right to hold a Taxi plate.

One of the consequences of the introduction of low cost permits is that the number of licensed Taxis has increased significantly. According to the Commission, the number of licensed Taxis in the Victorian metropolitan zone has increased by 94% – from 4,625 in September 2017 to 8,970 in June 2018.² At the end of FY2017/18, the total number of Taxi licences in Victoria was 10,480, an increase of approximately 127% since September 2017. That is, the deregulation of the Taxi licensing system in Victoria has virtually doubled the number of Taxis in Victoria.

As A2B provides in-Taxi terminals to facilitate non-cash payments, the number of terminals it deploys has increased directly in line with the increase in the number of Taxis. However, fewer transactions are being facilitated by each of A2B's terminals, substantially increasing the cost of providing in-Taxi non-cash payment services in Victoria.

A2B expects that this is an industry-wide trend and is a shared experience for other in-Taxi payment processors.

It follows that one of the key effects of the CPV Reforms on the personal transport industry has been to increase substantially the costs to in-Taxi payment processors like A2B for accepting and processing non-cash payments. All of these additional costs must be

² Essential Services Commission, Final Decision, Unbooked Commercial Passenger Vehicle Fare Review, 2018

included as "reasonable costs" of accepting and processing non-cash payment transactions.

As the Commission has a statutory obligation to ensure persons facilitating the making of non-cash payment transactions are able to recover the reasonable cost of accepting and processing such transactions,³ the Inquiry's findings on the impacts of the CPV Reforms will be highly relevant to its assessment.

For this reason, A2B considers the Commission's plan to release its Final Decision and make a new price determination by September 2019 to be premature. The determination would be made based on incomplete and inaccurate information that will be missing critically relevant facts and informed insights, including the Inquiry's findings and submissions to the Commission that have had the opportunity to take full account of the Inquiry's findings.

A Final Decision by the Commission that does not consider both the findings from the Inquiry and the Victorian Government's response would have unintended and undesirable impacts on, and create distortions in, the competitive landscape.

Further, A2B submits that if the Commission were to proceed without the benefit of the findings from the Inquiry, it would be demonstrating a failure to have regard to, and give proper weight to, its overarching statutory objective to protect the long term interests of Victorian consumers with regard to the price, quality and reliability of essential services, and assign proper weight to its other statutory objectives,⁴ including:

- the financial viability of the industry;
- the efficiency in the industry and incentives for long term investments;
- the degree of and scope for competition;
- the benefits and costs of regulation for consumers and users of products or services (including low income and vulnerable consumers); and
- the consistency in regulation between States and on a national basis.

A2B submits that the First Determination should remain in place until the Commission can clearly understand the current state of regulatory and competitive landscape and the effect of a new price determination that involves a reduction in the maximum service fee as expressed as the Commission's "initial view" in the Draft Decision.

Therefore, the Commission's indicative timetable for the Review should be revised to take these important factors into account by allowing submissions to its Draft Decision to be framed with full knowledge of, and by reference to, the Inquiry's findings and the Government's response to the report on those findings. This will allow the Commission as well as all participants in the industry to have had sufficient opportunity to assess the impact of the Inquiry on the CPV reforms.

2. The date for implementation of the proposed change to the maximum service fee does not allow sufficient time to minimise industry disruption

In the event that the Commission makes a Final Decision to reduce the maximum service fee from 5% (including GST) to 4.5% (including GST), as proposed in its Draft Decision, the Commission has proposed deferring implementation of any such reduction until 1 January 2020. The Commission states that the objective is to minimise the inevitable industry disruption associated with the change.

³ Section 122(2) of the *Commercial Passenger Vehicle Industry Act 2017*

⁴ When exercising its power to meet its particular statutory objectives described above, the ESC must give proper weight to each of its overarching or fundamental statutory objectives in sections 8, 8A and 33 of the *Essential Services Commission Act 2001*.

A2B agrees that if the Draft Decision is ultimately adopted as the Final Decision, this will result in significant disruption. Consequently, participants in the paid personal transport industry will require sufficient time to understand the practical effects of the change, identify and review options available to them, implement changes to their systems or otherwise organise themselves from an operational perspective, and finally to adapt to the implemented change.

Taking into account the observations in Sections 3 and 4 of this submission, if the Final Decision were to adopt the proposal in the Draft Decision, and reduce the maximum service fee, A2B is concerned that to defer implementation of any such reduction only until 1 January 2020 (that is, approximately 3 months from the indicative date for the release of the Final Decision) would not provide sufficient time for A2B and other participants in the industry to assess the commercial issues that would arise and, subject to the outcome of the determination of those issues, to make the necessary arrangements and adjustments to implement that lower maximum service fee. As emphasised above, A2B considers that such a compressed timeframe may, in particular, affect adversely the provision of services to vulnerable communities and especially the elderly and disabled communities.

A2B submits that if the Final Decision is to adopt the proposal in the Draft Decision, the implementation of any reduction to the maximum service fee should take effect from 1 July 2021 to allow sufficient time to make the necessary commercial decisions and achieve these necessary arrangements and adjustments. Further, this would provide support for the Commission's stated intention to minimise disruption in the industry.

3. Potential inability of A2B to continue operations in Victoria

A2B does not support, and is disappointed by, the Draft Decision to lower the maximum service fee and will provide a separate submission detailing its concerns.

As the Commission will recall, A2B provided evidence in its submission dated 1 March 2019 to the Commission demonstrating that it is unable to recover its reasonable cost of acceptance of non-cash payments in Victoria with the current maximum service fee of 5% (including GST).

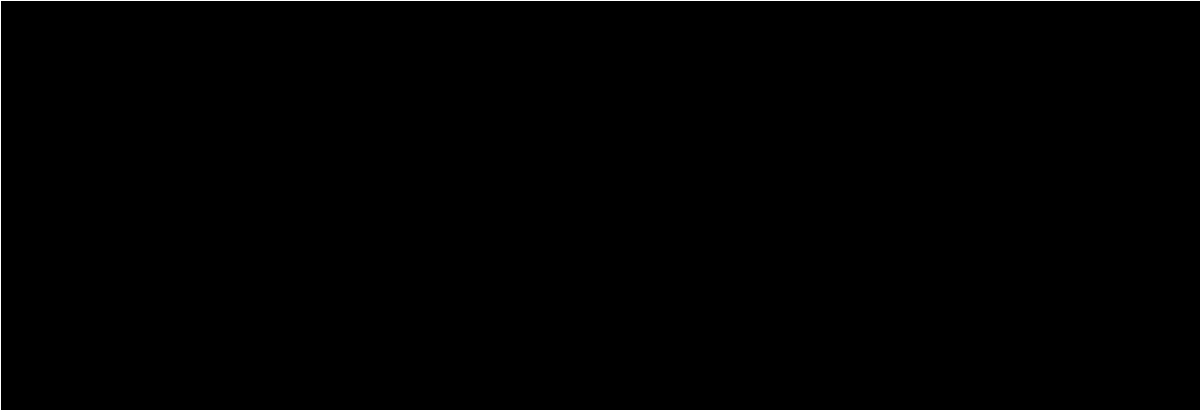
If the Commission were to make a new price determination that lowers the maximum service fee to 4.5% (or by any amount), as foreshadowed by its Draft Decision and in recent press articles, A2B will be forced to re-assess whether in-Taxi payment processing is a viable business proposition in Victoria and whether it is able to continue such operations in Victoria.

A2B requires sufficient time to consider the actions it must take to prevent further losses that would result from implementation of a Final Decision to reduce the maximum service fee and to determine how to respond commercially to a Final Decision that would substantially compromise its ability to continue to operate in Victoria.

4. Adverse effects on vulnerable and disadvantaged communities

As the Commission is aware, A2B provides services to the rural, disadvantaged and vulnerable communities of Victoria at a loss and will be unable to continue providing those services (in their current form) if the Commission were to lower the maximum service fee as it has proposed in its Draft Decision.

As A2B explained in its submission dated 1 March 2019 responding to the Commission's consultation paper for the Review, A2B provides services under a contract with the Victorian Government in respect of the Victorian Government's Multiple Purpose Tax Program (MPTP).



For this reason, an extension of the Commission's timetable as proposed by A2B above would ultimately benefit vulnerable passengers and assist to minimise the detriment caused by a Final Decision that reduces the maximum service fee.

5. Significant matters in the Draft Decision must be given a reasonable opportunity for response

The Draft Decision makes numerous statements in respect of its proposed maximum service fee of 4.5 per cent that suggest strongly that the statutory duties and objectives of the Commission have not been satisfied in the Draft Decision. In particular, the Commission has stated throughout its Draft Decision that it has made several assumptions or relied on certain benchmarks. A2B considers many of these assumptions and benchmarks are inappropriate, misinformed, incomplete or factually incorrect. For example:

- The Commission states: "Our assessment *implies* the current five per cent maximum surcharge is too high" (page 6);
- The Commission assumes that the observation that Taxi payment processors have "used surcharge revenue to provide rebates to drivers who use their systems" ... demonstrates that the surcharge exceeds the cost of providing the payment service" (page 8). No quantitative support for that assumption is made and it also assumes that any such rebate is not part of the cost of providing the payment service;
- The Commission acknowledges that it has not isolated "all costs related to non-regulated services with accuracy", indicating that it may have isolated costs that should be included as reasonable costs of processing non-cash payments (page 8); and
- The Commission's assessment of a reasonable cost "is based entirely on our bottom-up assessment" (page 13). The Commission has assumed that its "bottom-up cost assessment" and methodology is sufficient to meet the statutory standard of ensuring a reasonable cost will be recovered.

The purpose of setting out the few examples above is to merely illustrate that significant work is required and appropriate submissions (including expert submissions) are necessary to assist the Commission in discharging its statutory duties and meeting its statutory objectives when it makes and publishes the Final Decision.

Even leaving to one side the need to take into account the Victorian Government's response to the Inquiry, for the Commission to require submissions on the Draft Decision by 22 July 2019 will not give interested parties sufficient time to make the submissions (or provide the expert evidence in support), or give the Commission sufficient time to analyse and evaluate those submissions and evidence, to ensure that the Final Decision is made in accordance with the Commission's statutory duties and objectives.

6. Statutory tests for the Commission

The statutory test for the Commission is that it “must **ensure** that persons facilitating the making of non-cash payment transactions are able to recover the reasonable cost of accepting and processing such transactions”.⁵

The word “reasonable” has its natural and ordinary meaning; it must consider all relevant circumstances in the context, and consistent with the objects, of Part 6 of the Commercial Passenger Vehicle Industry Act. Further, the Commission must ensure that the outcome achieves a “reasonable cost”, considering the fact that imposing a service fee in excess of the maximum prescribed price is a criminal offence.

A further point to emphasise in this context is that the Commission's objective in relation to the non-cash payment transaction industry is “to promote efficiency”. Clearly, that efficiency must include, as a fundamental element, the economic and financial viability on a sustainable basis of the persons “facilitating the making of non-cash payment transactions”.

It can be added that as non-cash payment transactions are prescribed services, and the maximum amounts of non-cash payment service fees are prescribed services, under the Essential Services Commission Act, the Commission must ensure that in making a price determination, it adopts “an approach and methodology which the Commission considers will best meet the objectives specified in this Act and any relevant legislation”⁶ and the “particular circumstances of the regulated industry”.⁷

Conclusion

A2B does not support the Commission's proposal to reduce the maximum service fee (as proposed in the Draft Decision).

A2B considers that if the Commission decides to reduce that maximum service fee, it should defer its implementation until 1 July 2021 in order to provide sufficient time for industry participants to adjust and make the necessary arrangements. This would be consistent with the Commission's stated intention to minimise disruption in the industry including to vulnerable Victorian passengers served by the MPTP.

A2B further submits that the Commission should revise its timetable while it completes the Review to take into account the procedural right for all interested parties to make submissions relating to deficiencies in the Draft Decision and the findings from the Inquiry and the response of the Victorian Government. The Commission must ensure that it is capable of discharging its statutory duties and objectives.

In the event that the Final Decision reduces the maximum non-cash payment service fee, A2B considers that its request for a revised timetable providing for an extension to the period prior to implementation of any such reduction is a reasonable request, considering the inevitable disruption that will be experienced by the industry. Further, in A2B's view, no harm or prejudice would result to the Commission nor the industry as a result of the Commission accepting such an extension.

Claim for confidentiality

This submission is confidential and commercially sensitive to A2B and A2B would suffer a detriment if the Commission were to release the Confidential Information.

A2B is of the view that the Confidential Information contains commercially and competitively sensitive information which discloses, amongst other things, A2B's business operations, cost

⁵ Section 122(2) of the Commercial Passenger Vehicle Industry Act 2017

⁶ Section 33(2) of the Essential Services Commission Act

⁷ Section 33(3)(a) of the Essential Services Commission Act

model and financial position. The Confidential Information is not in the public domain and is presented at a level of granularity in the Submissions that is not available publicly.

Disclosure of the Confidential Information would provide A2B's competitors and key customers access to information they would not otherwise have and allow them to adjust their own competitive position in a way they would ordinarily be unable to do. In addition to causing detriment to A2B's competitive position, this will likely have the undesirable effect of dampening competition.

In accordance with section 61 of the *Essential Services Commission Act 2001 (ESC Act)* and consistent with the Commission's submissions policy⁸ and Consultation Paper,⁹ A2B asks the Commission to treat as confidential the Confidential Information.

Should the Commission decide to disclose any part of the Confidential Information, A2B asks the Commission to provide it with adequate opportunity (and not less than 10 business days) before disclosing any part of the Confidential Information to provide reasons why A2B considers the information is of a confidential or commercially sensitive nature and why the public benefit in disclosing the information does not outweigh the detriment caused to A2B.¹⁰

Yours sincerely



Adrian Lucchese
General Counsel & Company Secretary

⁸ Available at: <https://www.esc.vic.gov.au/about-us/our-policies/our-submission-policy>

⁹ Consultation Paper (p. 4), "We treat all submissions as public information unless the submitter has asked us to treat some or all of a submission as confidential or commercially sensitive."

¹⁰ A2B understands that information provided in response to the Information Request will be treated as if it is covered by section 38 of the *Essential Services Commission Act*, according to the page 4 of the Information Request.