

TAXI INDUSTRY'S CONCERNS WITH REGARD TO POLICY TRENDS AND GOVERNMENT'S LEGISLATIVE APPROACH TO PUBLIC TRANSPORT CHALLENGES

The purpose of this memorandum is to:

- Contextualise the dynamic nature of policy evolution and government's legislative approach to challenges prevalent in the public transport sector, in general, with the intention of understanding the impact on the taxi industry, and
- Present the taxi industry's recommendations with regard to the resolution of the prevailing challenges within the public transport sector.

1. Context and background

- 1.1. The taxi industry is one of the few commercial avenues where black economic empowerment has made a solid foundation. Although not entirely perfect, the taxi industry forms the only aspect of the economy where black entrepreneurs possess full ownership and control of operations.
- 1.2. It accounts for 65% (sixty-five percent) of the public transport market, with 20% (twenty percent) made up of buses and 15% (fifteen percent) covered by rail. Taxis are not only the most available and/or visible mode of transport, but also the most affordable to the public. They are also the most popular mode of transport in urban areas for the majority of South Africa's population.
- 1.3. The industry is currently estimated to have an annual turnover of more than R16.5-billion. Further, the industry is a viable source of job creation and is currently comprised of more than 20 000 owners and 200 000 employees.
- 1.4. Taking the above factors into consideration, it is no surprise that the taxi industry plays a significant role in the lives of many South Africans.
- 1.5. In consideration of the above, the custodians of the industry rightly believe that the taxi

industry is a significant player in any aspect of policy and legislative reform aimed transforming the public transport sector.

1.6. Notwithstanding the above, policy and legislative trends seem to suggest otherwise. The real interests of the industry have hardly been taken into consideration in formulating policy and legislation.

1.7. Consequently, the taxi industry has once again taken the liberty of consolidating all its concerns with regard to the various policy trends and the legislative approach to public transport challenges.

1.8. In this regard, this memorandum will focus on four topical aspects that have characterised policy and legislative changes for the past 20 years within the public transport sector:

1.8.1. Subsidisation of public transport

1.8.2. Development of Integrated Rapid Public Transport Networks (IRPTNs) and the Integrated Public Transport Networks (IPTNs)

1.8.3. Taxi recapitalisation, and

1.8.4. Conversion of operating licences

1.9. All the above policy issues are embedded in the following policy and legislative instruments:

1.9.1. White Paper on National Transport Policy 1996

1.9.2. Moving South Africa (MSA) Strategy 1999

1.9.3. Public Transport Strategy 2007

1.9.4. Public Transport Action Plan 2007

1.9.5. National Land Transport Act 5 of 2009 (NLTA)

- 1.9.6. Division of Revenue Acts 12 of 2009, Act 5 of 2012 and Act 10 of 2014 (DORA)
- 1.9.7. The 2012 Budget Vote 37, and
- 1.9.8. The National Land Transport Amendment Bill 2014
- 1.10. In summary, the above instruments provide for the following with specific regard to the taxi industry:
 - 1.10.1. That IRPTNs are the focal point for the ongoing public transport transformation agenda
 - 1.10.2. Participation in the IRPTNs is a pre-condition for accessing the Public Transport Operations Grant (PTOG);
 - 1.10.3. Provision of subsidies for bus services
 - 1.10.4. Creation of negotiated contracts
 - 1.10.5. Emphasis is placed on integrating the taxi industry into the IRPTNs to enable the industry to access the PTOG, either on the basis of negotiated or tendered contracts
 - 1.10.6. Taxi recapitalisation
 - 1.10.7. The involvement of the taxi industry in the IRPTNs will be determined on a case-by-case basis and this will be guided by the particular transport needs of each Planning Authority
 - 1.10.8. Conversion of operating licences, and
 - 1.10.9. Provision for a 20% target for the empowering of taxi operators and small bus operators on the basis of the industry development model
- 1.11. Although the above seem quite impressive on paper, this memorandum will show that

the policy and legislative positions highlighted above have never been successfully implemented, mainly as a result of poor conceptualisation and a lack of consultation with the taxi industry. The sections and paragraphs below consolidate the topical aspects contained above for ease of discussion and presentation.

Subsidisation of the public transport industry

Background

- 1.12. After 1994, the government decided to change the then existing public transport operating system in South Africa to a system based on competitive tenders for subsidised bus operators.
- 1.13. In order to facilitate the transformation, government agreed with the existing operators to enter into interim contracts that would preserve the existing jobs and operations while gradually phasing in the new tender system.
- 1.14. The new system was subsequently formalised by the enactment of the National Land Transport Transition Act of 2000 (NLTTA). Section 47 thereof addressed the issue relating to subsidised service contracts. It laid out the processes involved in administering the said contracts.
- 1.15. All the tendered and interim contracts concluded between 1996 and 2003 have expired, and from about 2006 the contractual engagements with bus operators were regulated on a month-to-month basis. From 2009 there were annual extensions of contracts, and in April 2015, these contracts were extended for a three-year period.
- 1.16. Until 2009, funds were transferred on the basis of an annual agreement signed between the DOT and provinces. Since 2009, the funds are allocated directly to provinces through DORA.
- 1.17. All subsidy claims received from current operators are settled by the provinces from the funds received from DOT. On an annual basis, the provinces used to conclude a subsidy agreement with the DOT in terms of which the DOT committed itself to transfer

funds to the provinces to meet the subsidy obligations emanating from the aforementioned contracts. None of the provinces to date are within their own budgets and able to allocate funds to settle subsidy claims received.

- 1.18. The nature of the above subsidy arrangements has on several occasions led to a number of problems. Provinces have faced enormous challenges regarding shortfalls in the subsidy transfers from the DOT, which have led to a multiplicity of legal suits initiated by the subsidised bus operators against the government.
- 1.19. From as far back as the 2005/6 and 2006/7 financial years, the funds that the DOT was transferring to the provinces have never been sufficient to settle all the claims received from the bus operators. Technically, this has created a continuous cycle of shortfalls that provinces may never keep pace with.
- 1.20. As a result of the shortfalls, the contracts are periodically redesigned to accommodate dynamic settlement and travel patterns and to extend services to new areas not served by original designs.
- 1.21. New settlement patterns and population growth have resulted in the level of overcrowding in subsidised bus operations reaching untold and very dangerous proportions, creating unbearable travelling conditions for commuters and workers alike. Passengers are forced to travel on dilapidated, overcrowded buses and drivers are exposed to driving unsafe buses.
- 1.22. This state of events continues to beg for the involvement of another mass mover into the subsidised services regime. It is trite that passenger rail is currently subsidised. What is therefore outstanding is the robust involvement of the taxi industry in the subsidised services regime to relieve the existing pressure on the bus operations.
- 1.23. Despite constant calls for action in this regard, the taxi industry is yet to see any movement from government in both policy and implementation. The industry remains prepared to partake in the subsidised services regime and has also set in motion plans to establish a bus commuter service transport system.

- 1.24. We believe that this move is long overdue and that the sustenance of this status quo is a direct act of discrimination against the industry, its participants and the commuters who would be the direct beneficiaries of the services.
- 1.25. Although the taxi industry reserves its right to challenge the government, we remain hopeful that the government will realise the need to ensure that the taxi industry is smoothly integrated into the mainstream subsidies regime.
- 1.26. We are aware that there is sufficient policy and legislative foundation upon which government may be compelled to act. Hence we are ready to engage with the government to present our plans and state of readiness for partaking in the public transport subsidies regime.

The right of first refusal (ROFR)

- 1.27. The interim/tendered contracts referred to above contained a right of first refusal to the effect that, when the services went out on tender, the operators would be awarded the new contract subject to certain requirements being satisfied.
- 1.28. The rationale behind the inclusion of the right of first refusal was that the bus operators required a form of security that the provision of services on their respective routes would continue, given the capital investment and financial commitments required.
- 1.29. In practice, it has become almost impossible to circumvent the right and provide access for other players into the subsidised bus services regime. The current bus operators have jealously guarded this right by threatening legal action every time the government has attempted to circumvent it.
- 1.30. Under these circumstances, the taxi industry has been left with no option but to challenge the validity of the ROFR in court.
- 1.31. It is the taxi industry's position that in the event that the right of first refusal is subjected to constitutional interpretation, it will be found to inherently violate the principles enshrined in section 217 of the Constitution, which provides, *inter alia*, that when an

organ of state contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

- 1.32. We submit that the right of first refusal violates all the principles stated therein. The right cannot lead to a fair, competitive and equitable process because it places the operator in a different bargaining position to the other tenderers. This in effect creates an uneven playing field since the operator(s) come(s) into the process with an unfair advantage.
- 1.33. Furthermore, the right of first refusal is contrary to current procurement policies and by upholding such right, the government will be fettering its discretion. Accordingly, the taxi industry is advised to seek a constitutional declaratory order declaring the right of first refusal to be invalid as it: contravenes section 217 of the Constitution; conflicts with the provisions of the relevant procurement legislative framework; and results in the government fettering its discretion despite changes in public policy, which is detrimental to the welfare of the state.
- 1.34. In summary, we are of the view that the right of first refusal clearly conflicts with current legislation and policy and should therefore be declared invalid.
- 1.35. We also believe that there is sufficient scope for the minister to act in this regard. In consideration of the fact that the right of first refusal is contained in a tripartite agreement between government, bus operators and labour, as the representative of government in charge of transport-related matters, the minister may exercise her contractual powers to vary the terms of the tripartite agreement for public interest. Since the right is purely a contractual right, the parties can and should revisit the relevance of its existence in the current political and socio-economic dispensation.

Empowerment

- 1.36. It has always been the government's objective to ensure that all previously disadvantaged individuals (PDIs) are economically empowered. As stated earlier, the taxi industry supports a significant number of livelihoods in the country that inform PDIs. Recognising that the bus services' operations are to date dominated by the advantaged

minority, the taxi industry herein calls upon the government to roll out plans for the design of a public transport empowerment charter.

- 1.37. In the interim, we request that any contracts concluded between the government and the bus operators must require inclusion of emerging operators, the taxi industry and PDIs. We caution that there is sufficient ground within the current procurement legislative framework that supports the taxi industry's involvement. Hence we advise that the government cannot ignore the current procurement legal framework and should therefore comply accordingly.
- 1.38. Arguing that the negotiated contracts' regime legislated in the NLTA is fashioned for this cause does not, in our view, address the underlying challenges. We have, on several occasions, witnessed "contracting authorities" misinterpret this provision to further the interests of monopolies and divide the taxi industry. These aspects of uncertainty in application of legislation and policy always end up prejudicing the rights of the taxi operators.
- 1.39. It is against this background that key among the issues that we are tabling for attention is the empowerment of the taxi operators as emerging bus operators. It is envisioned that a particular portion of the commuter services must be provided by this (at least 70% on each route). This will significantly transform the commuter bus services and empower the taxi operators. We reiterate that we are ready to participate in this scope if and when given a decent opportunity.

IRPTNs and IPTNs

- 1.40. The National Treasury has been consistent in indicating that the subsidy funding base will not increase substantially primarily because the existing public transport (bus) contracts are based on old operation designs.
- 1.41. Without necessarily getting into the operational details of the IRPTNs and IPTNs, the taxi industry has previously raised substantive and procedural concerns regarding the implementation of the IRPTNs.

- 1.42. In the majority of the cities where aspects of the IRPTNs are being rolled out, the substantive and procedural legal requirements that should have been met in the planning, design and implementation were violated by those cities.
- 1.43. It is therefore further argued that by proceeding with the implementation, the government will be condoning a process substantively and procedurally tainted with irregularity, one that has been executed in total disregard of the law.
- 1.44. In the majority of cases that our members have been involved in, the following are some of the concerns raised:
- 1.44.1. Lack of consultation – Stakeholder consultation processes are provided for in terms of the Municipal Systems Act, 2000 (Act No 32 of 2000) (MSA), which clearly stipulates, without alternatives, that a municipality must establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality. In the majority of cases just a few of the taxi associations affected by the IRPTNs have been consulted, and even in such cases, those consultations do not meet the basic tenets of adequate consultation, specifically in as far as such consultations are rarely made in good faith. It so happens that our members are not provided with an opportunity to engage skilled representatives to act on their behalf in the “consultation”. The level of disclosure with regard to the impact of the IRPTNs on their operations and the options available to them is also inadequate. This state of affairs has substantially prejudiced the taxi industry to the extent that our members are unable to sufficiently plan for the future of their businesses in the absence of adequate information regarding the plans of IRPTNs and capacitation to partake in any consultation.
- 1.44.2. Abuse of procurement framework – In some instances, we have had reason to believe that the cities concerned may have violated procurement processes by exclusively propelling the business interests of the selected

associations and entrenched bus operators for IRPTN-related contracts.
This has been done under the guise of implementing negotiated contracts.

1.45. In consideration of the fact that IRPTNs have been identified as the taxi industry's opportunity for entry into the subsidies regime, our view is that such opportunity is unattainable in light of the following:

1.45.1. The inadequacy of the nature of consultation undertaken by the cities, as described above

1.45.2. The impediments created by the right of first refusal as stipulated in the preceding section

1.45.3. Government's inability to capacitate the taxi industry to enable it to fully partake in the programme, and

1.45.4. The time it has taken for cities to develop IRPTNs. It is on record that almost five years since the conception of the IRPTN process, no city has to date completed an IRPTN. The taxi industry is aware of the fact that given the dynamic nature of travel demands, the finalisation of IRPTNs may never be achieved

1.46. In light of the above, the taxi industry is left with no option but to seek legal redress in the form an order compelling government to ensure that the taxi industry is included in the subsidy regime without subjecting it to the IRPTN process.

1.47. We have reason to believe that the IRPTNs are meant to delay our involvement in the subsidy regime.

Conversions

1.48. Prior to 1994, taxi operations were based on radius-based permits. These permits had no expiry date and operators enjoyed uninterrupted tenure in business operations. In

effect, the operators enjoyed business continuity and were more or less guaranteed presence in the industry. These permits created a legitimate expectation that business operations would proceed unfettered.

- 1.49. In 1994, a new seven-year regime was introduced. In other words, permits would only be valid for seven years. However, this was never implemented as a result of administrative challenges.
- 1.50. In 2000, the National Land Transition Act 22 of 2000 (NLTTA) dealt with the conversion of the licence from radius based to route based as an avenue for improving the regulatory framework relating to transport in general. However, operating licences would now be valid for only seven years.
- 1.51. It was also further stipulated that “no one has a right to be issued an operating licence”. Gradually the landscape kept changing without any consultation with the taxi industry. Again, for administrative reasons, none of these provisions were enforced.
- 1.52. Government, through the NLTA, then decided to further legislate for the administrative failures that arose from the NLTTA, albeit with minor modifications. For instance: the NLTA refers to rationalisation as opposed to conversion and it also reduces the validity period of the operating licence from seven years in terms of the NLTTA, to five years.
- 1.53. Section 47 provides that all permits for a definite period remain valid but lapse when that period expires, provided that if such a permit is still valid on a date calculated as seven years from the date of commencement of the Act, it will lapse on that date. Further that all permits issued for an indefinite period remain valid, but shall lapse seven years after the commencement of the Act.
- 1.54. The cumulative impact of the above legislative and policy trends is that pre-existing unfettered business interests are now being subjected to **an arbitrary expropriation without adequate compensation**. As earlier mentioned, the taxi operators have previously conducted their businesses with the legitimate interest that their business will continue regardless of any changes in policy. It is this kind of certainty that enables

them to invest in their operations and plan accordingly.

- 1.55. Any attempt by the government to subject the operating licences to a renewal process without guaranteed extension is therefore perceived by the taxi industry to constitute an expropriation inconsistent with the provisions of section 25 of the Constitution. We therefore caution that we reserve our legal rights to challenge any attempt to expropriate our business interests without compensation.
- 1.56. We remind the government that when similar actions were considered for the bus services sector, the right of first refusal was pencilled in to cushion the bus operators' interests. However, we find it derisive that no consultation and/or engagement was made prior to introducing these changes.
- 1.57. Notwithstanding the above, we remain committed to devising a solution in this regard. Nonetheless, we caution that any engagement on this matter should at the minimum consider guaranteeing the taxi industry a smooth "across the counter" extension process that protects their section 25 rights.
- 1.58. This will also ensure that there is less disruption in the daily operations of the taxi operators, who will inevitably be prejudiced by the administrative backlogs and delays associated with fresh applications.

Taxi recapitalisation programme

- 1.59. The scrapping process, which involves the physical scrapping of old taxi vehicles (OTVs) by the Taxi Scrapping Administrator (TSA), was launched in October 2006. The intention was to implement the process in two phases:
 - 1.59.1. The first phase covered the scrapping of OTVs belonging to operations that voluntarily wished to exit the industry, and
 - 1.59.2. The second phase of the rollout strategy included the scrapping of OTVs and the voluntary replacement with new taxi vehicles (NTVs) once the scrapping allowance had been paid out

- 1.60. The TSA (besides scrapping OTVs) also facilitates the acquisition of the NTVs as desired by the operator.
- 1.61. This voluntary exercise would be followed by the third phase in which vehicles on the National Traffic Information System that are regarded as the oldest would be required to be recapitalised in the earlier period while newer taxi vehicles would be scrapped later.
- 1.62. As part of the implementation of the TRP, mandatory distinguishing markers for new NTVs entering the market as part of the TRP were introduced through regulations in the *Government Gazette* in January 2007.
- 1.63. NTVs that comply with the mandatory safety requirements as certified by the South African Bureau of Standards (SABS) continue to enter the market. To date, at least 13 types of NTVs that comply with the safety requirements have been certified by the SABS.

1.64. The target for scrapping vehicles per year from 2006 to 2013 was as follows:

1.64.1.	2006/7:	5 000
1.64.2.	2007/8:	20 000
1.64.3.	2008/9:	30 000
1.64.4.	2009/10:	20 000
1.64.5.	2010/11:	15 000
1.64.6.	2011/12:	5 000
1.64.7.	2012/13:	5 000

1.65. It is unfortunate that prior to the implementation of this programme there was inadequate consultation with the taxi industry to understand the taxi business model.

The taxi business is a long-term business where, under normal circumstances, the return on investment (ROI) commences beyond the fifth year. This is usually the period it would take one to pay off a vehicle instalment.

- 1.66. It follows that throughout this period, the operator expends all his/her revenue on meeting instalment obligations and maintenance needs. To this end, the business aspect of the vehicle is non-existent until the vehicle is six years old.
- 1.67. The recap programme, however, inherently ignores this fact by issuing a scrapping allowance equivalent to the value of the vehicle at year five. This, to a large extent, does not represent the actual value of the vehicle to the operator. It is our view that the vehicle beyond year five represents the most valuable asset to the operator, since this period constitutes the operator's business side.
- 1.68. To this end, we believe that the true scrapping allowance should be valued at the cost of obtaining a new vehicle as opposed to the value of a five-year-old vehicle. We believe that a figure closer to R350 000, which is the price for a Toyota Quantum, would be more appropriate under circumstances. We are ready to assist the government in developing a model upon which a better scrapping allowance may be determined, on the basis of industrial practice.

2. Concluding remarks

- 2.1. In summary, the taxi industry is of the view that the policy and legislative trends have not in any way considered its interests. We have continuously participated in forums that have sought our views on matters incidental to our business. However, many of our concerns remain unresolved. Besides the continuous letters and correspondence that we have addressed to the minister, the DOT, provinces and municipalities are yet to receive any substantive response.
- 2.2. To this end, the taxi industry is left with no choice but to seek legal redress on all matters highlighted herein.

2.3. Nevertheless, in the course of executing our legal rights, we shall remain committed to participating in any process that is initiated to address our concerns. Accordingly, we recently submitted substantive comments to the National Land Transport Amendment Bill 2014.