

# **Appendix 10**

## **Determination of Core Passenger Services**

## Determination of a Core Passenger Service

The *Passenger Transport Act 1997* gives the Transport Commission the power to determine which regular passenger transport services need to be provided in Tasmania in order to meet the essential travel needs of the community.

The circumstances in which the Commission may exercise this power have been developed by DIER through the establishment of the Access Principles (Appendix 15 and the Commercial Framing Principles. (Appendix 18) These two documents seek to further describe the circumstances in which a core passenger service may be declared, and the apportionment of responsibility for ensuring the viability of a declared core passenger service.

The Commission only has power to institute a new service through a tender process. This power operates where the whole or any part of a core passenger service is not currently being provided.

In determining whether the whole or any part of a core passenger service is being provided, it is necessary to consider the implications of section 17 of the Act.

Section 17 provides that a determination about the delivery of a core service is to be made in relation to an area, route, corridor or between 2 or more places. That is, the determination of a core passenger service is by reference to the area, corridor or route traversed and not by the person providing a bus service within that space, or the frequency with which that service is provided.

It may be assumed, therefore, that the reference to ‘service or part of a service’ in section 18 is in fact a reference to the spatial description of the route, not to the perceived adequacy of the services provided along all or part of that route.

These sections have significant implications for potential operators of regular passenger transport services in Tasmania:

- Only the Commission has the power to decide what is and is not a core passenger service;
- The right to operate core services can only be awarded through a tender process (where the service or part of a service does not already exist);
- A core service is defined by the description of the area over which the service is to be provided; and
- The adequacy or inadequacy of the timetable is irrelevant in determining whether the whole or any part of a service is being provided and therefore the Commission does not have power to then seek to tender additional services on a route where a ‘core’ service is already being provided.

## Core services – What does it mean?

The discussion above is presented because where a service has been declared core, it is important to understand what that declaration actually means.

With the declaration of a service as a core service an operator is provided with a contract to operate an agreed set of services over a route, between two places or within an area. Although section 18(4) enables the Commission to confer an exclusive right to provide the whole or any part of a service, no existing contracts confer such a right. In many instances, multiple operators provide core passenger services over the same route, or sections of route.

## **Advantages to an operator**

A number of advantages are provided to the operator of a core passenger service, even in the absence of a guaranteed monopoly over a route.

### **Guaranteed offer of a new service contract**

Where the Commission makes an offer of a new service contract consequent on the outcome of an independent review, the offer is to be made to the transport operator or transport operators providing the reviewed core passenger service.

Existing operators of core passenger services have a guaranteed right to the offer of a contract for a period of five years, with the options of a second term of five years provided the operator meets the relevant performance standards stated in the contract.

Under the *Passenger Transport (Transitional) Regulations 2000*, the Commission does not have the option of putting existing routes to tender to benchmark fares, subsidies or service levels. It must work with the current provider or providers of the relevant service, if that service is to continue to be supported as a core passenger service.

Where more than one operator is providing sections of a core passenger service, the Review has been restricted by the Regulations in its ability to make recommendations for the rationalisation of services. As the core service is described geographically, and not by purpose, there is no capacity under the regulations to recommend a hierarchy of services to determine whether fare paying services should be preferred over free to user school bus services or vice versa.

### **Subsidy**

Only operators of core passenger services have access to subsidy funding under the Act. The manner in which funding is provided varies between services, with gross funded, net funded and fares reimbursement models all operating in Tasmania.

Subsidies will be part of the negotiation of the new service contracts.

Subsidies for operators of free to user school bus services have already been fixed based on the Bus Cost Model.

Both the Metro and MerseyLink urban service contract operate on a net funding model, with a fixed subsidy being provided in return for an agreed level of service.

For all remaining operators, the subsidy is currently based on the payment of an agreed percentage of the base fare for every concession passenger carried. The non-concession adult fare is also related to the base fare, and cannot be more than 115% of the base fare. Calculation of the base fare is therefore critical to the cost of service provision for Government, and the operator's capacity to provide services under the contract.

The method of subsidy payment and the proportion of gross revenue those payments provide are critical determinants of the level of influence Government can expect to have over the provision of the service.

In the case of gross funded school bus contracts, the timetable, bus size and route are all determined by Government. In the case of non-urban general access services, the restriction of subsidy payments to concession top-up funding gives the Government limited scope to require an operator to make changes to services, or to maintain services the operator considers to be unviable.

The type and value of the subsidy payment also affects the sensitivity of the service provider to competition in the market place.

### **Protection from competition**

Section 20 of the *Passenger Transport Act* regulates the assessment of applications for regular passenger transport services.

Any person is entitled to seek to operate a regular passenger transport service. However, the Commission must first consider:

- is there a core passenger service already being provided whose commercial viability may be affected by the proposed service;
- is it likely or unlikely that the proposed service will adversely affect the commercial viability of that core passenger service?

The Commission must approve an application for a regular passenger transport service if it is satisfied that the proposed service is unlikely to adversely affect the commercial viability of a core passenger service that is already being provided under government contract.

It is notable that the Act refers only to 'a' core passenger service. It does not limit consideration to services that operate over the same route, or between the same points. This has important implications when it is considered in the context of core passenger services that are provided in conjunction with non-core service elements, such as day tours for tourists. The meaning of 'commercial viability' is not expanded upon in the Act, and there is some doubt as to whether this is in fact a subjective or objective test of financial loss.

Even if the proposed bus service is considered likely to adversely affect the commercial viability of a core passenger service, that proposed service may be approved if the Commission considers that it is in the public interest and the interests of the person providing the core passenger service are capable of, and will be, addressed contractually.

Addressing the interests of the core service provider is problematic. While the interests of the core service provider should always be capable of being addressed either through a commercial arrangement between operators or compensation, there is no way for the Commission to know whether in fact the interests of the core service provider will be addressed. What the 'interests' to be addressed actually are is also not made clear in the Act.

No direction is provided as to the terms or limits of negotiation of a contractual outcome. It is unlikely that there would be any particular advantage to the core service provider reaching a contractual outcome. It could delay an agreement indefinitely by simply declining any terms offered by the Commission or other operator. The Commission is effectively required under the legislation to make a determination based on events over which it ultimately has no control. This creates a potentially open ended process to try and satisfy the incumbent operator.

### ***Impact of section 20 in different regulatory environments***

The effective result of section 20 is a regulatory structure that inhibits the development of any service that may have a commercial impact on a core passenger service.

Section 20 of the *Passenger Transport Act* is designed to operate in an environment in which contracts for the delivery of core passenger services are awarded through a tender process. In a situation where the Commission has had the opportunity to assess fares, subsidies and services in an open market environment, it is a reasonable expectation that the successful bidder for the service will be given the opportunity to develop the service in accordance with their tender bid and based on the market conditions at the time the tender process was undertaken. To allow the Commission to authorise additional operators to provide services, in those circumstances, without first providing contractual redress to the operator of the core passenger service would be a poor public policy and contractual outcome.

However, the operators who will be offered new service contracts following completion of the Review will not have secured those contracts through a competitive bidding process. The fares, subsidies and service levels will be the result of a negotiation process with the existing service providers

The operator of the core passenger service has guaranteed access to funding support for concession passengers. It has a marketing advantage in respect of that segment of the market. It is also assured of providing services over a route for a period of up to ten years. These are significant commercial opportunities, which will not be available to any other operator.

In this context, the protection given to the incumbent operator under section 20 takes on far greater significance than perhaps was originally expected in an operating environment premised by competitive tendering for services. The new service contracts are therefore the critical tool to ensure that the:

- level of service provided is commensurate with funding and demand;
- operator has the appropriate incentives and responsibilities to further develop services;
- Commission is provided with sufficient information about the steps taken by the operator to develop their services; and
- Commission has the appropriate tools to address problems with service delivery.

## **Applications for regular passenger transport services**

There are two very different scenarios in which section 20 will be relevant:

- an application for a regular passenger transport service that will impact on the ‘core service’ market by providing a service to meet essential travel needs; and
- an application for a regular passenger transport service that will impact on the viability of a core passenger service because it will provide competition in a non-core sector such as for tourism business.

### **Competition for core needs**

Where the proposed service is designed to meet a core need, this suggests a gap or failing in the existing core service contract or in the delivery of that contract. If the proposed service is designed to provide a level of service greater than the level deemed necessary under the core service contract, and the proponent can identify sufficient demand for that service, the question must be whether it is appropriate for that service to be delivered as a core or non-core service.

In entering into a new service contract, the incumbent operator needs to establish with the Commission the timetable for that service; to identify the timetable slots they wish to operate in, and the demand these services are designed to meet. This requires a clearer definition of the intended market of each timetabled service. Where an application for a new service is aimed at a market not identified by the core operator, it may be assumed that the service will not have an impact on the commercial viability of the core operator.

### **Competition in non-core markets**

Where a proposed service seeks to operate in a ‘non-core’ environment such as providing a tourist oriented service to major attractions or sites, there should be no need for consideration of impact on a ‘core operator’. The development of tourism transport infrastructure, and the funding support for services meeting essential travel needs, are two very different tasks. Yet, on some services in Tasmania, the

overlap between tourist oriented services and core passenger services is obvious. The commercial contracts under which non-urban core services are provided create the opportunity for operators to develop other revenue streams using the same vehicle and service. To extrapolate the core from the non-core elements is an impossible task for the Transport Commission. Again, this points to an issue in the contracting framework, and funding model, rather than the legislation.

Section 20 does allow for this situation by giving the Commission the discretion to approve a service that is in the public interest, if the interests of the incumbent operator can and will be addressed contractually. This is primarily a question of being able to determine what the public interest actually is in the relevant circumstances, and also a question of funding.

## Conclusions

Both operators and the Commission would benefit from clarification of section 20 in respect of the operation of the three critical tests:

- commercial viability;
- public interest;
- core service operator's interests can and will be addressed contractually.

The current test places a far greater emphasis on the commercial viability of the core service provider than the public vehicle licensing system it replaced. The funding liability that may arise from authorising a service that is likely to impact on the commercial viability of a core passenger service serves as an inhibitor to the Commission from considering an application from the perspective of public interest and need.

There is a significant question as to which party should carry the burden of demonstrating where the public interest lies- in competition or the exclusion of competition. The section 20 test is unusual in providing a presumption in favour of excluding competition, but this may be argued to be a realistic reflection of the Tasmanian public transport market.

The focus of Government must clearly be on supporting the sustainable delivery of services to meet essential travel needs of the community.

If an existing contracted service is failing to achieve this, then it is either:

- a failure of the contract:
- the contracting process; or
- the regulatory framework.

In the first instance, it is suggested that clarifying both the core service provider's contractual obligations, and the Government's expectations with respect to service delivery and the role of cross-subsidisation between core and non-core service elements will provide a contractual platform with which to move forward.

The Commission's recourse in the event of poor performance should be through the contract, culminating in termination of the contract and re-tendering of the service where necessary. It should not be to seek additional operators to provide a non-core service in competition.

However, where a third party operator seeks to provide a non-core service, it is reasonable to expect that the operator of a contracted service should have the opportunity to seek variation to their contractual obligations to reflect any change in operating conditions that results from the commencement of new regular passenger transport services. This may be changes to the route, timetable, fare structure or funding model. But if the public interest is best served by the introduction of those additional services, the core passenger service operator should not be given an open ended opportunity to frustrate the development of those services.