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Issue No. 1 April 2011

IN TRANSIT

Rigby Cooke Transport & Logistics Bulletin

Introduction

Welcome to the first of Rigby Cooke's quarterly "In Transit" transport and logistics bulletins.

The firm's Transport and Logistics Industry Group consists of experienced lawyers across the firm's various practice group areas including commercial, commercial litigation, employment and industrial relations, and property. It is headed up by partner, Elizabeth Guerra-Stolfa, who has over 10 years' experience advising and representing in this sector. Elizabeth is a member of the Victorian Transport Association and the Supply Chain & Logistics Association of Australia, and is an Executive Committee member of Women in Supply Chain.

In this bulletin and future ones, we canvass topics of particular interest to the industry and highlight recent cases of note, legislative developments and useful tips.

Chain of Responsibility

Recent Decisions

The Chain of Responsibility of Provisions (**COR**) which have been in place since 2005 (Fatigue since September 2008) are now starting to sting some transport and logistics operators. An example is a case involving the bulk carrier AG Spread fined $95,000, for multiple fatigue management breaches in late 2010:

- Failing to ensure 7 hour continuous breaks in a 24 hour period.
- Basic fatigue management 84 hour work rule which mandates a 24 hour continuous rest after 84 hours of work.
- Exceeding 14 hours work in a 24 hour period.

Apart from defending COR prosecutions (which are on the rise), we are receiving more and more instructions regarding:

- COR audits and conducting or supervising same.
- Formulating or fine tuning COR assurance programs.
- Assessing COR provisions in existing and new contracts.
- Conducting COR training.

Rigby Cooke has also been engaged by a leading industry association in the primary sector to assist in bringing COR awareness and compliance to the forefront of the minds of all participants in that industry sector. There will be more to report about this in later bulletins.

We are currently looking at developing a relationship with a key service provider in this area, for the provision of an end to end guide for our clients and their supply claim participants to manage their COR responsibilities.

Our Team

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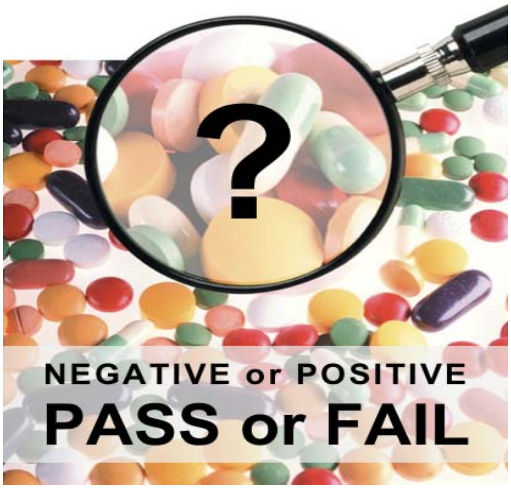
Employment Law and OHS Developments

Drug and Alcohol Policy steps up a Notch

A decision of the New South Wales Industrial Relations Commission Decision handed down on 23 December 2010 upheld a drug and alcohol testing regime allowing a company's contract drivers to be subjected to urine testing for drugs. The Transport Workers Union challenged the urine testing proposing oral testing using saliva swabs as a less intrusive and more convenient method to detect drug use. The Commissioner said that:

> "*Whilst in time oral testing might become a more appropriate convenient and accurate method to adopt than urine testing, the evidence before me suggested that on balance a more conservative approach would be more appropriate supporting a regime of urine testing as the safest method to adopt in the circumstances of that case.*"

This issue received recent press in Melbourne on 3 April 2011.



Pregnant Worker Unfairly Dismissed By National Transport Company

A national transport company recently lost an unfair dismissal hearing after a manager told a pregnant employee her pay would be cut after she worked a period on light duties prior to taking maternity leave. The employee was asked to accept an $18,000 reduction of her original salary, which she refused. She claimed that such a significant 'demotion' forced her to resign. She filed an unfair dismissal claim in Fair Work Australia.

The Commissioner confirmed that an employee can be 'dismissed' if they are forced to resign due to their employer's conduct. The conduct of the employer in this case of varying the employee's contract without her consent effectively brought the contract to an end. The Commissioner found that the employee had been a "conscientious, hard-working" member of staff who had been treated unfairly by a relatively large organisation that had not applied "reasonable human resources practices". The Commissioner considered that the company had treated the employee "very poorly", "particularly in the context of the impending birth of her child and the agreed maternity leave" and ruled the dismissal was harsh, unjust and unreasonable.

The company was ordered to pay $25,821 in compensation. (*Owens v Allied Express Transport Pty Ltd* [2011], FWA1058).

Dismissal of truck driver for using mobile phone while driving fuel tanker was fair

A transport company dismissed a truck driver after he was observed by three eyewitnesses talking on his handheld mobile phone while driving a fuel tanker through a small town in NSW. The driver had been reprimanded previously for talking on his phone or texting while driving and had assured the employer on two occasions that he would not do it again.

Fair Work Australia found the dismissal was not unfair because the employee's explanation for his conduct (that he was cradling his head in his right hand in a way that made it appear like he was using a mobile phone) were "implausible and ridiculous". The employee breached both the employer's mobile phone policy and driving laws, and his actions constituted "gross and willful misconduct".

The Commissioner said that the employee's misconduct "not only put his own safety in peril, but that of the road-travelling public and the general community. It is perhaps more good luck than good management that this conduct, seemingly over a long period of time, has not resulted in a disastrous outcome". Accordingly, the dismissal was for a valid reason and the employee's application was dismissed.

(*Ben Starkey v Cootes Transport Group Pty Ltd* [2011] FWA 228).

Ports and Containers

Kwai Tsing Terminals Hong Kong

Elizabeth Guerra-Stolfa attended the Hong Kong Forum in Hong Kong in recent months and was fortunate to attend a tour of the Cosco-HIT Terminal forming part of the Kwai Tsing Container Terminal in Hong Kong. Apart from being truly amazed by the sheer scale and activity of the Terminal, here are some interesting facts:

- there are 9 terminals including Cosco-Hit, DP World, Modern Terminals, HIT and ACT.
- it has 24 berths (total approximately 8.5 kms)
- 322 vessels arrive at the port per week (almost 50 per day) (compared to 3157 vessels into the Port of Melbourne for the 2009/2010 financial year)
- it has 98 quay gantry and 301 yard cranes
- it is the third largest port in the world (behind Singapore (1) and Shanghai (2))

Container Detention

The legality or otherwise of container detention or demurrage charges and the exercise of liens by shipping companies over cargo is still in limbo despite the recent decision of the New South Wales Supreme Court in *DV Kelly*.

Prior to this decision, the New South Wales Consumer Trader and Tenancy Tribunal (**Tribunal**) found that detention fees imposed by a shipping company were unenforceable because they were in the nature of a "penalty" rather than a measure of damages actually sustained by the shipping company as a result of the late return of the containers. However, rather than finding whether the fees were in the nature of a penalty or not, the Court overturned the Tribunal's decision on the basis that the Tribunal did not have jurisdiction to make the decision in the first place. The Court did not assess the soundness or otherwise of the Tribunal's findings and reasoning. This will have to be litigated in the appropriate forum on another occasion.

Removal of the existence of the decision is a positive step for those wishing to charge detention fees but disappointing for those who are trying to avoid them.

Pallets

Our clients have been more active than ever in the area of pallet recovery. Whereas previously pallets would often disappear and/or exchanges did not occur, clients are seeking our advice to intervene on their behalves and make pallet claims which otherwise would not have been made. Increased vigilance and assertiveness in this area has been producing real results for some clients.

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Reflection

Looking back on 2010

The Transport and Logistics sector faced a number of challenges in 2010 including the hangover effect of the Global Financial Crisis and the credit squeeze that followed; increasing oil prices; shortage of suitably qualified drivers; employment law changes and uncertainty; interest rate increases; ongoing issues with pallets; ever increasing Chain of Responsibly regulation and prosecution; and in recent months the crippling effects of floods in Victoria and Queensland, resulting in blockages in the supply chain, the immobility of freight and extensive damage to infrastructure.

That said, the sector has performed as well as can be expected with job security and safety for workers and road users a priority.

The future?

The impending carbon levies, increased registration charges, reduced rebates and the ever increasing demands of consumers to get goods to market on or before time, will continue to be pressures at the forefront of each transport and logistics operator in the country.

For more information about any of the articles contained in this Bulletin or on issues generally within the transport and logistics area, please contact Elizabeth Guerra-Stolfa, Partner, on eguerra@rigbycooke.com.au, (03) 9321 7864 or 0418 149 444.

An interesting read

Attached with this newsletter is a copy of Paxton Bridge's April Snapshot which talks about oil pricing and its economic impact which you might find interesting.

Paxton Bridge has kindly allowed us to include this Snapshot in our newsletter.

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