rigbycooke lawyers

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IN TRANSIT

Rigby Cooke Transport & Logistics Bulletin

Introduction

Welcome to the July edition of Rigby Cooke's quarterly "In Transit" transport and logistics bulletin.

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.

National Heavy Vehicle Regulator

For some time now, understanding let alone enforcing the regulation of heavy vehicles has proved quite challenging. This is because there is a myriad of acts and regulations existing throughout the various Australian states.

The need for a reduction in the burdens, costs and inefficiencies that multiple regulations place upon businesses (particularly those that operate across states) has arrived. Back in 2009, the Council of Australian Governments decided to establish the National Heavy Vehicle Regulator (**NHVR**) – an independent body responsible for regulating all heavy vehicles over 4.5 tonnes Australia wide.

The NHVR is an independent body which is based in Queensland. It will have the power of statutory authority which means it will be recognised by all state and territories. The Australian Transport Council (**ATC**) has the responsibility for managing the NHRV. On 28 February 2011, the National Transport Commission released a draft bill consolidating relevant parts of acts and regulations concerning heavy motor vehicles for public comment. The period for public comment has now closed. Come 1 January 2013, it is proposed that the *National Heavy Vehicle Law Act* (**NHVL**), will commence and the NHVR will officially come into existence.

The current draft of the NHVL includes as major components: registration of heavy motor vehicles; mass and loading of heavy motor vehicles; fatigue management relating to the drivers of heavy motor vehicles; compliance and enforcement with the NHVL and its components.

In addition to these major components, the bill has attempted to resolve a few significant policy matters such as:

- **Right of review**: Any decisions by the NHVR concerning the issue of an unregistered vehicle permit, accreditation of an operator and/or the imposition of vehicle conditions in notices or permits are now subject to internal review, and if required can be appealed to an administrative tribunal.

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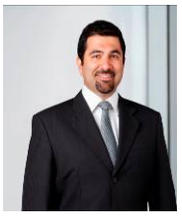

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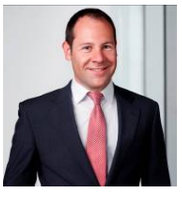

NHVR continued

- Any decision must also state reasons for any adverse decisions made. Similarly, road managers who make decisions on access conditions will be subject to internal review and again reasons must be provided.

- **Access decision making**: The NHVR has the responsibility to issue notices and permits allowing heavy vehicles to operate above general access requirements. Any notices or permits issued above the general access requirements by the NHVR will require consent from relevant road managers, such as VicRoads. If no consent is granted by a road manager, the NHVR cannot issue such notices or permits to operate general access requirements.

Although 1 January 2013 is a fair distance into the future, it could prove prudent to begin looking at the draft NHVL to see how it will affect you and your business.

Chain of Responsibility

Elizabeth Guerra- Stolfa recently took part in a Chain of Responsibility (**CoR**) workshop run by the Supply Chain & Logistics Association of Australia (**SCLAA**); alongside panellists from Freightrain, VicRoads and NSW RTA.

The panellists re-enacted a real CoR case that ended in prosecution and fines, giving participants an insight into what organisations need to do to be compliant.

VicRoads will be releasing the presentation from the event, so please check the SCLAA or VicRoads websites at www.sclaa.com.au or www.vicroads.com.au for a copy.

New Bullying Laws

Victoria has new laws (dubbed "Brodie's law" after a teenage victim of extreme workplace bullying) that make serious forms of bullying a criminal offence. The *Crimes Amendment (Bullying) Bill 2011* amends the existing offence of stalking to cover serious bullying. The new laws mean that people who engage in serious bullying, as well as cyber bullying, face criminal charges and possible jail terms.

The new laws expand the above behaviours to include:

- making threats to the victim;
- using abusive or offensive words to, or in the presence of, the victim;
- performing abusive or offensive acts in the presence of the victim;
- directing abusive or offensive acts towards the victim;
- acting in any other way that could reasonably be expected to cause a victim to engage in self-harm

An individual who commits an offence can face up to 10 years imprisonment. Companies cannot be prosecuted or held vicariously liable for an offence committed by one of its employees under these laws.

The media surrounding the new laws provides a timely opportunity for employers to consider updating harassment and bullying policies to reflect the changes, and to roll out equal opportunity training to all staff.

In our experience these issues can be rife in transport and logistics workplaces and should be monitored carefully and acted upon.

EQUAL OPPORTUNITY

A new *Equal Opportunity Act 2010 (***Act***)* was passed in Victoria in April 2010 and is expected to commence on 1 August 2011. The Act retains the existing protections against less favourable treatment on the basis of attributes such as age, race, sex, pregnancy, industrial activity etc, as well as many of the existing exceptions. However, the new Act will introduce some technical amendments to the definitions of both direct and indirect discrimination.

The Act introduces a new *proactive* obligation on Victorian employers to eliminate discrimination, sexual harassment and victimisation.

To ensure compliance with the new Act, employers should review written policies, educate managers about their obligations under discrimination laws and consider a strategy to audit discriminatory risk areas in the business.

Given the breadth of employees attracted to transport and logistics workplaces, this needs to be taken on board by HR Managers immediately.

Occupational Health & Safety and Unfair Dismissals

OCCUPATIONAL HEALTH & SAFETY

Australian governments have begun the process of 'harmonization' of occupational health and safety (**OH&S**) laws to give effect to the national model *Work Health & Safety Bill* (**Model Bill**). Laws mirroring the Model Bill are expected to commence on 1 January 2012, replacing all existing OH&S laws throughout Australia.

The national model laws will apply to a broad range of businesses and have been drafted to protect all categories of workers from workplace health and safety risks. They will do this by extending the primary duty of care owed by employers beyond the traditional employer/employee relationship that currently exists under most State OH&S laws. The Model Bill therefore provides that any person who conducts a "business or undertaking" must ensure, so far as is reasonably practicable, the health and safety of all "workers" it engages, as well as workers whose activities are "influenced or directed" by the business or undertaking. This can include subcontractors.

Other changes include significantly increased penalties for breach of the primary duty of care (e.g. fines of up to $3 million) and broader worker consultation requirements. Right of entry provisions, similar to those in the *Fair Work Act 2009*, have also been included allowing unions to enter businesses or undertakings in relation to suspected contraventions of the Model Bill.

The Model Bill will provide much needed consistency in the transport and logistics industry. Hopefully this will mean that one consistent set of OH&S laws applies across all jurisdictions in Australia, rather than different individual laws in each State. Employers are encouraged to familiarise themselves with the national model laws in the lead up to the 2012 implementation. The Model Bill can be viewed here: http://www.safeworkaustralia.gov.au/Legislation/ModelWHSAct/Pages/ModelWHSAct.aspx

UNFAIR DISMISSAL

Three recent unfair dismissal decisions of Fair Work Australia examined the conduct of transport workers. We summarise the decisions below:

Fair – driver sacked for falsifying worksheet

In the first case *Tu Noanoa v Linfox Pty Ltd* [2011] FWA 306, Linfox Pty Ltd was justified in dismissing an employee who falsified a worksheet. The employee, having exceeded the maximum allowed hours without a break under driver fatigue legislation, falsified his worksheet so that he could continue driving. The employer noticed a discrepancy between the time entered for a rest break and for unloading. A meeting was arranged with two union delegates present to investigate the discrepancy. The employee admitted to falsifying the entries. His employment was terminated for serious misconduct with immediate effect.

Fair Work Australia held that the dismissal was for a valid reason given that no acceptable justification for falsifying the worksheet had been given.

Unfair – driver sacked for urinating in public

In the second case, *Ly Eng v Goodman Fielder Ltd* [2011] FWA 317, the employer was found to have unfairly dismissed a truck diver who urinated in a storm water drain at one of the employer's loading docks. The incident was reported by a fellow worker. Following an investigation, the employee's employment was terminated for breaching the company's policies (including hygiene and OHS policies) by urinating in the storm water drain and not washing his hands afterwards.

Fair Work Australia found that while the employer's policies required hand-washing in the manufacturing area, it was not clear that the employee had breached an actual policy. However, urinating in the storm water drain was a valid reason for dismissal, given the employer's business of food manufacture and its reputation. Despite this, the Commissioner found that in all the circumstances, the dismissal was not valid in his particular case and reinstated the employee to his former position.

Fair – driver sacked for using GPS blocking device to hide from employer

In the third case, *Harry Zoumas v TNT Australia Pty* [2011] FWA 3065, a truck driver was dismissed for gross misconduct when his employer discovered that he regularly used a GPS blocking device in his truck to disguise his whereabouts, and instead returned home during working hours where he remained for lengthy periods of time. The employee would then return to the depot later in the evening and fraudulently claim overtime. The employee's claims that the blocking device was a mobile phone signal booster and that he had medical reasons for returning home were rejected by Fair Work Australia.

The Commissioner held that that the willful use of the blocking device to defraud the employer, and his unauthorized absence from duty, substantiated the dismissal.

If you require further information on Employment & Workplace relations including bullying, equal opportunity, occupational health and safety or unfair dismissal, please contact Paul O'Halloran.

Creditor's Statutory Demand – Time Waits for No-one

In today's fragile economy, many companies cannot pay their debts on time, or at all. This has driven some creditors to either write-off their invoices as bad debts or take steps to recover the unpaid invoices and engage in litigation. A statutory demand is one of the most powerful tools a creditor can use to apply pressure on a company to pay a debt (or debts). Used correctly, it is very effective and inexpensive.

A creditor who is owed $2,000 or more by a company may serve a statutory demand on that company. The demand must be in the prescribed form and be accompanied by a short affidavit (usually no more than a page) verifying the debt is *due and payable*.

Statutory demands must be served either on the company's registered office (as registered with ASIC) or personally on the company's director/company secretary.

Within **21 days** of being served with a statutory demand a company must either:

- pay the full amount;
- negotiate a settlement with the creditor; or
- apply to have the demand set aside.

The 21 days start to run on the day the demand is served. This is a *strict time frame*. The demand is almost always sent to the company's registered office. If the company's registered office is not the address where the company trades, but, for example, its accountant's office, by the time the company becomes aware of the demand, it may only have a week (or less) to act on the demand before time expires. This highlights the need for the registered office of the company to be a place where notices will be received promptly.

Applications to have demands set aside are usually made because:

- there is a 'genuine dispute' in relation to the amount claimed (e.g. Company A provides Company B with a fork-lift. The fork-lift is faulty and Company B refuses to pay the invoice);
- the company has an 'off-setting' claim (e.g. due to the faulty fork-lift, Company B had to buy another fork-lift from Company X, Company B now wants to off-set the cost it paid for the second fork-lift against Company A's outstanding invoice); or
- there is a defect with the demand.

If the amount in the demand is not paid or a compromise reached, an application **must** be made to the Court to set the demand aside within **21 days**. A Court will not hear an application after this time.

If a company does nothing within 21 days of being served with the demand, it is deemed to have committed an act of insolvency. **On day 22**, the creditor can apply to have the company wound-up.

For this reason (and others) statutory demands should not be used if the creditor knows the company has funds to meet the debt. This device should be used if the creditor has doubt over a company's ability to meet a debt (or debts), which are due and payable.

If you receive a statutory demand or require any further information regarding statutory demands, please contact Elizabeth Guerra-Stolfa or Rob Oxley.

Minimum Wage Increase

On 3 June 2011, Fair Work Australia handed down its Annual Wage Review Decision to increase minimum wages by 3.4% with effect from 1 July 2011.

Determinations updating the minimum rates in modern awards are available on the Fair Work Australia website: http://www.fwa.gov.au/index.cfm?pagename=wagereview2011&page=awrmodaward

Most modern awards contain transitional provisions that provide for the phasing in of differences between pre-modern award and modern award rates of pay. These transitional provisions need to be considered when employers calculate current base rates of pay, loadings and penalty rates.

Employers with registered agreements (such as collective agreements or AWAs) in place must ensure that the base rate of pay in any such agreement is not less than the relevant modern award rate of pay that would have applied had the employee not been on the registered agreement.

COMPLIANCE WITH WORKPLACE LAWS

Transport and logistics employers should take note that the Fair Work Ombudsman (**FWO**) has issued a warning to employers to "*regularly check that they are meeting their lawful obligations to ensure they pay employees their full entitlements*." A recent prosecution of a transport company in Wagga emphasises this point.

The FWO investigated and prosecuted Farey Transport & Trading Pty Ltd in the Industrial Magistrate's Court for contraventions that related to underpaying 34 of its employees, most of whom were truck drivers, between November 2006 and March 2009. The underpayments, amounting to almost $150,000 were rectified, but the company was still fined $30,000.

Rigby Cooke Lawyers defends employers against prosecutions by the FWO. Employers and human resource managers are urged to check compliance with current rates of pay under modern awards and agreements, as well as ensure compliance with minimum conditions in agreements and the National Employment Standards.

Personal Property Security

What is personal property securities reform?

Personal property security (**PPS**) reform introduces a national system to replace over 70 different Commonwealth, state and territory laws regarding security interests. The reforms are scheduled to commence October 2011.

What is personal property?

Generally speaking, personal property is all property except real property or land. It includes tangible and intangible property (such as trade marks), and both commercial and consumer property.

What is security interest?

A security interest is created when a person or business takes an interest in property as security for a loan or other obligation. For example, if you purchased a new vehicle on finance, the finance company may hold a security interest over the vehicle until full payment has been made.

The PPS reform will also have a major impact on retention of title and consignment arrangements, which are also considered to be a type of security interest under the *Personal Property Securities Act 2009* (Cth) (**PPSA Act**). Retention of title is when title to goods does not pass to a purchaser until the purchase price is paid.

What is the PPS register?

The PPS register is a national online register that will allow lenders and businesses to register their security interests in personal property. The Insolvency and Trustee Service Australia will be responsible for the register. The PPS register will be able to be searched by secured parties, buyers and other interested parties to determine if a security interest is registered over the personal property. The PPS register will replace a number of existing Commonwealth, state and territory personal property security registers, including:

- the Australian Securities and Investments Commission register of company charges;
- the Registers of Encumbered Vehicles in New South Wales, Queensland, Western Australia and the Australian Capital Territory;
- the Vehicle Securities Registers in South Australia and Victoria;
- the Register of Vehicle Security Interests in Tasmania; and
- the Register of Interests in Motor Vehicles and Other Goods in the Northern Territory.

Security interests which are currently registered on those registers will generally be migrated to the national PPS register. It is essential that any security interests in personal property be registered on the PPS register to ensure that your priority under that security interest can be maintained. The PPS register is scheduled to go live on 31 October 2011.

Personal Property Security continued

How will the PPS reform affect your business?

How the PPS reform affects your business will depend on how your business uses or trades in personal property, whether your business provides security for the amounts it owes to third parties, and whether it also receives security for the amounts that it is owed. Some examples of how the PPS Act could affect your business are as follows:

- If you sell personal property subject to a retention of title or consignment arrangement, you will generally need to register that arrangement on the PPS register in order to obtain priority over other secured creditors. Currently, retention of title and consignment arrangements do not need to be registered.
- If you are purchasing a motor vehicle, you will need to search the national PPS register rather than searching the register of vehicle encumbrances in the relevant State or Territory to determine whether there are any security interests affecting that vehicle.
- Fixed company charges will be replaced with security interests in non-circulating assets and floating company charges will be replaced with security interests in circulating assets.

  In our view the PPS reforms will provide an increased opportunity for business to use personal property as collateral for finance.

For more information contact Brad Ross, Partner at bross@rigbycooke.com.au, +61 3 9321 7868 or Andrea Drobnik.

The Carbon Tax

On 10 July 2011, the Gillard Government announced that a carbon pricing mechanism starting at $23 per tonne (fixed for the first 3 years) will commence on 1 July 2012.

Although transport fuels are not covered directly by this mechanism, an equivalent carbon price will be applied to fuel used in domestic air, sea and rail freight from **1 July 2012** by changes in fuel tax credits or excise. The Government also intends to apply an effective carbon price to the liquid fuel used by heavy on-road transport from **1 July 2014** through changes in fuel tax credits. Ethanol, biodiesel and renewable diesel and the fuel used by households and light commercial vehicles (4.5 tonnes or less GVM) are exempt.

If you have any queries about the impact of the carbon pricing mechanism on your cartage agreements, please contact us.

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