

Update

Transport



Fatigue Management in the Road Transport Industry

The issue of fatigue in the workplace is a growing issue across all industries but it is especially topical for transport operators.

Importantly, fatigue management is not just an industrial issue, to be negotiated between operators and drivers, it is an occupational health & safety issue, a commercial issue and a public safety issue. Australia's occupational health & safety laws place an obligation upon operators to ensure that their drivers are aware of all potential workplace hazards (such as fatigue), and take steps to prevent workplace accidents, injuries and illnesses that may arise from these hazards.

In a recent Victorian decision (*R V Allbulk Landscape Supplies Pty Ltd 2006 VCC*) a transport company was prosecuted and fined \$130,000 following a fatal road accident involving one of its employees. The operator was prosecuted after one of its employees was involved in a fatal accident in October 2001. Thirteen vehicles were stopped at road works on a highway when the employee's truck drove into

the last of them, killing three occupants of that car and another person in the car in front.

Judge Shelton heard that prior to the accident, the employee had driven about 1,195 kilometres in 24 hours, during which time he had changed a tyre and spent five hours waiting in line to load his truck. He had no sleep in that time despite the *Victorian Road Safety (Drivers) Regulations 1999* requiring a minimum of 10 hours rest, including one continuous period of 6 hours. Judge Shelton noted that the driver had been provided with a driver manual which referred to the need to rest when fatigued, "however, no steps were taken to enforce or stress this".

WorkSafe Victoria said the sentence would be reviewed with the possibility of asking the Director of Public Prosecutions to consider an appeal. WorkSafe said that the case should send a clear message to the transport

Disclaimer

The information contained in this newsletter is for general information only and should not be construed as legal advice. Formal legal advice relating to the particular circumstances should be sought in all situations.

industry that driving hours and maintenance should be a high priority.

In addition to occupational health and safety regulations, operators could now be held responsible for breaches of road laws committed by a driver. New chain of responsibility regulations have been passed in each state with the effect that you will share the responsibility for ensuring breaches of road laws do not occur.

Importantly for operators if one of your drivers is found to have breached a road transport law and it occurs due to your action, inaction or demands, you may be legally accountable.

These new chain of responsibility laws mean that operators should have a clear and transparent system of rostering and scheduling of drivers so that they do not exceed the regulated hours of driving and work, nor exceed speed limits, and that they have been provided with sufficient opportunity for proper rest and sleep to avoid fatigue.

Operators should ensure that all drivers have the necessary training, supervision and instruction to enable them to comply with all relevant laws.

Driver fatigue is an issue that looks to become an even bigger issue for transport operators in the future. Operators should take immediate steps to address fatigue management. Employers must assure they have a safety management system that, as far as is reasonably practicable, not only reduces risks to the health and safety of drivers and the general public, but is effective on an ongoing basis and is enforced correctly by the operator.

RISK MANAGEMENT - EFFECTIVE CONTRACTUAL LIMITATIONS

In 2004 the High Court found that where there is a signed document that altered a person's legal rights, the courts would not (unless there was fraud, duress or

misrepresentation) consider whether the person had actually read the document. A NSW boat operator recently relied upon this principle to enforce a contractual clause that required customers to notify the operator of any matter within 28 days of leaving the boat and to institute proceedings within 12 months. This clause was upheld notwithstanding that there were statutory provisions which provided for longer periods in which persons could institute proceedings. The operator used the provision to have a group claim struck out on the basis that it was issued more than 12 months after the claim arose.

Therefore, whenever it is possible, transport operators (especially those involving publicly available services) should look to put in place systems that draw customers' attention to contractual conditions that vary ordinary legal rights. There is no doubt that this can be a very effective risk management strategy provided that it is done carefully and the clauses in question are legally enforceable.

DUE DILIGENCE INCLUDES HEALTH AND SAFETY

A recent prosecution of a specialist logistics company (Kerry Logistics (Australia) Pty Ltd) has highlighted that it is important to cover hazard identification and risk assessment of plant, equipment and work practices when conducting a due diligence.

Following a workplace injury, Kerry Logistics were prosecuted for poor work practices. One of their defences was that the previous owner of the business had been responsible for the particular practice. This argument was rejected by the Federal Magistrate. The Magistrate observed that an analysis of hazards and a full health and safety risk assessment was an essential element of any due diligence.

WORKCHOICES - HOW IT CAN AFFECT FLIGHT TIME LIMITATIONS

Anyone who runs an aviation business knows of the difficulties caused to rostering and proper allocation of staff by flight and duty time limitations. Whilst flight and duty time limitations aim at ensuring that pilot fatigue does not endanger flight safety, the safety of passengers, crews and the general public underneath flight paths, they add another layer of regulation to an aviators business.

On top of this government regulation, the aviation industry is also regulated by the pilots (*General Aviation*) Award 1998 and various other agreements with employees that further regulate periods of duty, reserve time and flying hours. The net result for aviators continues to cause rostering headaches that are generally alleviated through the provision of annual leave. In the past, employers have been able to use annual leave as an effective tool for standing down employees who have exceeded their requisite flight time limitations and/or duty hours.

The Federal Government recently enacted a number of changes to the *Workplace Relations Act* through its Workchoices legislation.

One of the more significant changes was the Federal Government's capture of regulation of annual leave moving it within the auspices of the Australian Fair Pay and Conditions Standard ("the Standard").

The Standard now forms the legislated five minimum working conditions.

Although the (*General Aviation*) Award 1988 or employment agreement may contain annual leave provisions that may be considered greater than those in the Standard, the Standard now provides for greater regulation of annual leave.

Under the changes the cashing out

of annual leave, or the request by an employer for an employee to take annual leave now form part of

the standard and must be complied with by all employers across Australia.

If employers use annual leave in this fashion they must now ensure they have regard to the Standard and to ensure that their own particular methods of operation comply with the Standard.

CHANGES IN TRANSPORT LEGISLATION

A. Driver Accreditation

Changes to the *Transport Act* 1983 (Vic) (TA) will impact upon operators of a 'private bus service' and 'commercial passenger vehicles'. For operators of private bus services the changes will add to the accreditation obligations that already exist under the *Public Transport Competition Act* 1995 (Vic). These changes will take effect from 1 July 2007.

The main points to note are as follows.

- A new driver accreditation scheme is inserted into the TA. Applications for accreditation of drivers will be assessed against the new public care objective.
- Applicants will have to demonstrate basic competencies in order to be accredited, including familiarity with streets, locations and the English language.
- Persons convicted of some serious criminal offences will be only be able to achieve an accreditation by making and application to the Victorian Civil and Administrative Tribunal. Where a person has a conviction for a so-called 'category 2' offence there is an administrative discretion in relation to whether or not the application should be granted.

For further information



Simon French
Senior Lawyer

Tel (03) 5273 5246
Fax (03) 5273 5274
sfrench@coulterroache.com.au



Martin Reid
Workplace Relations Lawyer

Tel (03) 5273 5236
Fax (03) 5273 5274
mreid@coulterroache.com.au

disqualify a person from making a further application for a period of up to 5 years

- The Director may take disciplinary action against accredited drivers who are convicted of certain offences.

The following definitions apply and are reasonably self-explanatory:

- **"private bus service"** means a service consisting of the carriage of passengers by a bus for or in connection with the activities of a religious, philanthropic, educational, sporting or social body but does not include a road transport passenger service.
- **"commercial passenger vehicle"** means any motor vehicle (together with any trailer fore-car side-car or other vehicle or device, if any, attached thereto) which is used or intended to be used for carrying passengers for hire or reward.

B. Authorised Officer Management Systems and Accreditation

For those businesses who employ or engage their own authorised officers it will be necessary for them to administer authorised officer management systems in a way which will promote the new objective. There are certain matters that must be included within an authorised officer management system such as education, training and reporting protocols. The essential points of these changes are as follows.

- Persons are prohibited from employing or engaging an authorised officer without being accredited (300 penalty units).
- The key component in a decision about whether to accredit is the authorised officer management system.
- There are obligations upon accredited persons to notify the Director where certain matters occur - it is very important to be absolutely clear about when this obligation arises.
- The types of books and records that must be kept is expanded.

IN THE NEWS

- PBS trucks are hitting the road in States throughout Australia. See reports on the National Transport Commission's website - www.ntc.gov.au
- The NSW government have introduced a bill that will make the introduction of higher mass limits contingent on the use of Intelligent Access Programs, *Road Transport (General) Amendment (Intelligent Access Programs) Bill 2006* - www.parliament.nsw.gov.au
- Proposals to increase steer axle mass limits for heavy vehicles featuring latest safety equipment and Euro 4 engine technology are being considered - www.ntc.gov.au
- An additional train station has been announced for Ballarat. This will also mean a need for more connecting bus services. For further information see www.doi.vic.gov.au
- Plans for a new Port of Melbourne freight hub have been announced by the Transport Minister www.doi.vic.gov.au
- The *Rail Safety (General) Regulations 2006 (Vic)* came into force on 1 August 2006 and give life to the *Rail Safety Act 2006 (Vic)*. The Regulations address various matters such as requirements for necessary accreditation; content of emergency plans; content of safety management plans; alcohol and drug controls; and reporting obligations - www.dms.dpc.vic.gov.au
- From 31 July 2006 the *Transport (Ticketing) Regulations 2006 (Vic)* came into effect. The Regulations clarify and consolidate the laws surrounding ticketing on public transport. The Regulations build on the principles set out in *Mainsey v Lafayette (2002)* - www.dms.dps.vic.gov.au

For further information on the matters covered in these articles or you wish to unsubscribe, please contact Simon French or Martin Reid.