

# in transit

Transport & Logistics Bulletin

November 2011 Issue No 3

## Our Team



**Elizabeth Guerra-Stolfa** Partner



**Rob Oxley** Senior Associate



**Andrea Drobnik** Senior Associate



**Natalie Chapman** Associate



**Paul O'Halloran** Associate



**Timothy Stokes** Associate

## Inside

**Workplace conduct at End of Year Parties** / Page 1

**How well do you know your Customers?** / Page 2

**Electronic Work Diaries** / Page 3

**An update on the Personal Property Securities Act** / Page 3

**Clean Energy Future Incentive** / Page 4

**Update on Progress of OH&S Harmonisation** / Page 5

**New Discrimination Laws in Victoria** / Page 5

## Introduction

Welcome to the new look IN TRANSIT edition number 3. Hopefully the changed format makes for easier reading and transportability.

As usual, we cover key areas of interest to the transport and logistics industry, including our regular employment law and occupational health and safety updates.

The past three months have been very busy for our Transport & Logistics team with Chain of Responsibility advice, contracts & policy review, not to mention defences to work diary infringements where we have obtained excellent results for our clients.

We hope you enjoy the bulletin, and look forward to your feedback!

Regards,  
Elizabeth Guerra-Stolfa and the Transport & Logistics Team

## Workplace Conduct at the End of Year Christmas Party

Christmas is just around the corner. Over the next two months as end of year events are being planned in the workplace, employers should turn their minds to how to manage the conduct of employees at work related functions.

The end of year work Christmas party will usually be considered sufficiently "connected" to the workplace such that any unlawful behaviour engaged in by employees, for example fighting or sexual harassment, can be the subject of a complaint or even litigation.

Even though irresponsible or unlawful behaviour at Christmas parties usually occurs between individual employees, most workplace legislation has provisions that allow the employer to be held "vicariously liable" if the employer had not taken proactive steps to prevent the unlawful behaviour.

Below are examples of Christmas party conduct that has resulted in litigation:

- An employee was injured by a propeller after being pushed off a boat at a Christmas party. The employer was found liable for the injury caused.

*Continued on next page*

- A golf club was held liable for the conduct of its president who sexually harassed a female employee of the club at the end of year Christmas party.
- Four employees were prosecuted and fined by Worksafe for breaches of occupational health and safety laws when an employee suffered severe burns at a Christmas party when another employee unintentionally sprayed paint thinner onto his colleague's bare torso, which caught fire as a result of the flame from an already ignited spray can.
- An employee was dismissed for sexual acts in front of several other employees at a hotel booked by the employees, after the end of a Christmas party organised by the employer.
- An employee was dismissed after he urinated over the side of a balcony on to diners below at his employer's Christmas party.

Employers should consider taking the following responsible measures when preparing for and managing the company Christmas party:

- Ensure the company has in place current policies on equal opportunity, sexual harassment, bullying and occupational health and safety. Reinforce these policies, and the Code of Conduct if you have one, with staff prior to the end of the year, preferably by conducting training sessions at minimum once a year.
- Implement responsible serving of alcohol practices at the Christmas party (or ensure the venue does so on the company's behalf).
- The Christmas party should have a designated finish time. Make sure no one has to drive home. Provide a bus or cab vouchers.
- Make sure someone is monitoring occupational health and safety hazards at the Christmas party, such as wet floors, broken glass and loose electrical cables.
- Remind all staff by email or memo a day or so before the Christmas party of the standards of behaviour expected and the disciplinary consequences of failing to meet those standards, as provided in the policies.



## How well do you know your Customers?

We are sure that every business which receives this publication has rendered invoices for goods and/or services within the last month. How confident are you that the invoice was addressed to the correct company? When was the last time you checked your customer's ACN? Do you know whether your clients are solvent?

A client of Rigby Cooke recently obtained a big win in VCAT. For privacy reasons, the parties to the litigation have not been named, however the dispute related to unpaid fees for custom clearance services provided by company ABC to a third party (Company 'X').

The difficulty ABC had, was that whilst it had agreements signed by Company X's director, its invoices had been rendered to Y (which ABC believed was a trading name for Company X). Further, ABC had sent all correspondence to an email account which appeared to belong to Y, a foreign company with an Australian licensee, 'Z'.

It was unclear from ABC's internal records why Y had been invoiced. However, investigations did reveal that the ABN on the invoice did belong to Company X and that Z had a receiver appointed several years prior to ABC being engaged to provide any services.

Company X defended the claim on the basis that the services were provided to Z, as Y's licensee and that Z had made part payment of the fees, not Company X. Therefore, no fees were payable by Company X.

The Tribunal was not satisfied with the evidence produced by Company 'X' and said that whilst it was 'puzzling' that ABC had rendered invoices to Y, it was always understood that ABC's contract was with Company X.

This dispute goes to show that getting something as simple as an invoice right can help avoid pitfalls down the track.

We've listed our top 5 tips below so you can check your company is on the right path:

- Require each customer to complete an agreement at the outset of your business relationship.
- Ensure that the agreement is signed by the customer and includes the customer's full trading name, business address, point of contact and if a company, it's ACN (Australian Company Number).
- Check ASIC's website ([www.asic.gov.au](http://www.asic.gov.au)) that the ACN matches the company's name and that the company is still registered- it's free to check and takes less than a minute!
- If the customer has a registered trading name, check who owns the name online at [www.business.gov.au](http://www.business.gov.au) – again, it's free and takes less than a minute to check.
- Before rendering an invoice check that the name and address match the details set out in the agreement.
- Check the status of your client every three months.



## Operational Pilot of Electronic Work Diaries

Currently, the most popular method to record work and rest hours for drivers of heavy vehicles is in written work diaries. However, the recent introduction of electronic work diaries proposes a way forward for industry and regulators on the voluntary use of electronic work diaries to monitor fatigue and speed compliance.

On 4 August 2011, the Roads and Transport Authority NSW began an operational pilot of electronic work diaries field testing them with assistance of transport operators. It is expected that the pilot will continue field testing in this current form until the end of 2011. A larger and longer field testing process is then scheduled to commence in 2012.

While the claimed advantages of electronic work diaries are extensive, the main advantages to note include:

- **Automatic data capture:** The location, date and time of a driver's declaration in their electronic work diary is automatically generated. As a result, electronic work diaries will increase the integrity of operators' compliance with the fatigue regulations and will ultimately prevent drivers who routinely flout current laws from dishonest recording.
- **Recording of time:** The current method of time recording of rounding work periods up and rounding break periods down to the nearest 15 minutes will now be accurate to 1 minute intervals or less.
- **Reduction in paperwork:** An electronic work diary will decrease the amount of paperwork used, which will improve internal business systems and practices.

Despite the advantages of electronic work diaries, there are disadvantages that the operational pilot aims to manage, which includes:

- **Authentication:** Written work diaries are authenticated by signature of the driver. Query how an electronic work diary will be authenticated?
- **Roadside enforcement:** Road authorities and police will require either specific technology to view electronic work diaries or require a paper record of the electronic work diary to be produced to ascertain any breach of traffic laws. These issues may impact on the overall system by inflating costs, reliability and acceptance of electronic work diaries by operators.

To date, it has been found that operators using electronic work diaries believe they are saving time for their drivers, while at the same time improving safety and compliance with the heavy vehicle driver fatigue laws in place in each State and Territory in Australia, which in Victoria is the Road Safety Act 1986 (Vic).

Specifically, it has been said that the operational pilot provides an opportunity to enhance the current fatigue and speeding regulations, as well as educate operators on the changes to be contained in the proposed *National Heavy Vehicle Law Act (NHVL)*, contained in the draft bill released on 28 February 2011:

- providing technical advantages for the approval of electronic systems;
- aiding the enforcement of fatigue regulations; and
- results that may potentially reduce occurrences of heavy vehicle fatigue incidents.

The results from the operational pilot will be used to make recommendations and amendments to the proposed NHVL Act, with the aim of Australia becoming a leader in this area. It is envisaged that this should, hopefully, have a positive effect in decreasing the amount of heavy vehicle fatigue incidents and improving business efficiency for transport operators.



## An Update on the Commencement of the PPS Act and the Registration of Motor Vehicles

The Personal Property Securities Act 2009 (PPS) Act was scheduled to commence on 31 October 2011. However commencement has now been re-scheduled to 30 January 2012.

Prior to the commencement of the PPS, it is proposed that all existing security interests over motor vehicles that are registered on State and Territory based registers will automatically migrate over to the Personal Property Securities Register (PPS Register).

Subsequent to the commencement of the PPS, any new security interests over motor vehicles will need to be registered on the PPS Register.

The PPS and the regulations provide comprehensive definitions as to what constitutes a 'motor vehicle', which are as follows:

1. Personal property that:
  - a. is built to be propelled, wholly on land, by a motor that forms part of the property; and

*Continued on next page*

- b. either is capable of a speed of at least 10 km per hour or has 1 or more motors that have a total power greater than 200 W; and
  - c. has a vehicle identification number (**VIN**), a chassis number or the manufacturer's number; and
  - d. does not run on rails, tram lines or other fixed path.
2. Personal property that:
- a. is capable, when being towed by, or attached to, a motor vehicle, of travelling at a speed greater than 10 km per hour; and
  - b. is:
    - i. without motive power and designed for attachment to a motor vehicle; or
    - ii. a piece of machinery or equipment that is equipped with wheels and designed to be towed behind a motor vehicle; and
  - c. has a VIN, a chassis number or the manufacturer's number.

Failure to register the correct serial number of a motor vehicle on the PPS Register will result in the buyer or lessee taking the motor vehicle free of any security interest. As a result, it is important to ensure all information registered on the PPS Register is correct.

Interested parties will be able to search the PPS Register to determine whether there is a registered debt or other security interest over a motor vehicle in any State or Territory in Australia. This search will be performed via the vehicle's VIN or chassis number and not by the plate or engine number.

By searching motor vehicles on the PPS Register, interested parties will also obtain vehicle information from the National Exchange of Vehicle and Driver Information System. This may include written off and stolen status information, as well as the make, model, colour and other information relating to the motor vehicle.

## Transport and Logistics Sector and the Implications of the Clean Energy Future Incentive

On 28 July 2011, the Australian Government released the Clean Energy Legislative Package, which is a collection of 13 draft bills which aim to give effect to the Government's climate change plan released in early July 2011.

The Fuel Tax Legislation Amendment (Clean Energy) Bill 2011 was introduced into the House of Representatives on 13 September 2011 and referred to the Joint Selection Committee on 14 September 2011.

**Proposed Adjustment of Fuel Tax Credits** Currently, businesses are able offset fuel taxes with fuel tax credits.

Although transport fuels are expressly excluded from the carbon emission mechanism, an equivalent 'carbon price' will be applied through changes in the fuel tax credit system. The changes will see a reduction in the fuel tax credits equivalent to the value of the carbon price.

This means that transporters will essentially be paying a carbon price on their fuel consumption. Such cost will not be incurred at the pump, but instead at the end of the financial year when their fuel tax credits are lower.

Given that fuel tax credits are not granted to household and light vehicle business transport, there will be no effective carbon price applied to these fuel types. Additionally the fishing, forestry and agricultural industries and the off-road fuel they consume are exempt from the fuel tax credit.

The Government proposed to introduce further legislation to apply a carbon price on heavy on-road vehicles from 1 July 2014, however this was not agreed to by all members of the Multi-Party Climate Change Committee.

From 1 December 2011, fuels such as LNG, compressed natural gas and LPG will have fuel tax (and accordingly fuel tax credits) applied for the first time. Over the next four years, it is predicted that fuel tax rates will progressively increase.

**Implications for Transporters** For many businesses involved in the transport and logistics sector, the calculation of annual fuel tax credit entitlements may become a complex exercise, involving a comprehensive analysis of the fuel usage activities for each business.

It is envisaged that the reduction of fuel tax credits will present a significant cost to businesses in this sector. Such costs may be passed on to the consumer, however this will depend on the terms of the cartage agreement between the parties. On this point, the ACCC has announced that, post-introduction of the carbon mechanism, it will be monitoring claims in relation to these new changes and the passing on of such costs.

On the flipside, the potential to invest in lower emissions technologies and biofuel may offer businesses the opportunity to save on costs.

As a result, businesses in this sector should formally analyse their costs structure and amend all cartage and supply agreements to reflect such changes in the business' fuel tax credit entitlements.

**Implications for Customers** Customers of transporters should review their supply agreements to clarify whether they are exposed to the price increases as a result of reductions in fuel tax credits. If a customer is exposed to such increases, then we recommend that the customer communicates directly with the supplier to negotiate a commercially agreed outcome. This will ultimately depend on the circumstances, including the scope of the supply and the relationship between the parties.





## Update on Progress of OH&S Harmonisation

In our last edition of In Transit, we reported that most Australian States had begun the process of ‘harmonisation’ of occupational health and safety (OH&S) laws to give effect to a national *Work Health & Safety Act* (Model Act).

Transport and logistics employers in Victoria should note that the Victorian government had recently indicated that implementation of the Model Act in Victoria will *not* commence on 1 January 2012, but will be delayed until 1 January 2013, to enable Victoria to assess the impacts of the proposed laws. This means that the current *Victorian Occupational Health and Safety Act 2004* will remain in force until the Model Act commences.

Laws mirroring the Model Act are still expected to commence on 1 January 2012, in New South Wales, Queensland, ACT and possibly South Australia. The new laws will replace existing OH&S laws in those States.

Transport and logistics employers operating across State borders will need to understand the differences between current and proposed duties and obligations under the Model Acts commencing on 1 January 2012, and existing legislation, particularly in Victoria and Western Australia, which will not change next year.

Our Employment Law and Workplace Relations team can assist with compliance. Contact Ross Levin or Paul O’Halloran on 9321 7840.

## New Discrimination Laws in Victoria

A recent discrimination complaint lodged against a transport company highlights the need for employers in the industry to understand and comply with new anti-discrimination laws. The complainant was a female driver with a transport company who had recently taken maternity leave. At the end of her leave, she told the company she wanted to return to work part-time, because

she did not have full-time care for her baby. The company told the employee she had to come back to work full-time or resign. The employee made a complaint of discrimination on the grounds of “family responsibilities” to the Australian Human Rights Commission. The matter settled at conciliation when the transport company agreed to allow the employee to return to work part-time.

The above complaint serves as a timely reminder that employers in the transport industry should ensure that managers and employees are educated about anti-discrimination laws. This article provides an overview of the new discrimination laws that commenced in Victoria on 1 August 2011. *The Equal Opportunity Act 2010 (EO Act)* introduces some key changes to discrimination laws in Victoria, creating obligations that will impact on all businesses that operate within the State.

Employers will need to review and amend existing equal opportunity policies for compliance with the EO Act, as well as consider conducting a risk assessment of potentially discriminatory practices within the business.

### 10 Key Changes You Need To Know About

The 10 key changes under the EO Act are these:

#### 1. A new positive duty to eliminate discrimination

Employers must take ‘reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible’. This duty has not existed under discrimination laws before. It will mean that employers will have to think proactively about addressing discrimination and complying with the duty, rather than waiting for an employee to make a complaint of discrimination. To comply, employers should consider undertaking an assessment of work systems, procedures and policies to identify any discriminatory practices.

A failure to comply with the positive duty may result in your business being investigated by the Victorian Equal Opportunity and Human Rights Commission.

#### 2. Discrimination can be “direct” and “indirect”

There are new definitions of discrimination in the EO Act, which avoid the technicalities under the previous legislation:

- a. direct discrimination will occur if a person treats, or proposes to treat another person with a protected attribute (eg. age, race, sex, pregnancy, disability etc) *unfavourably* because of that attribute. For example, an employer advises an employee that they will not be trained to work on new machinery because they are too old to learn new skills.
- b. indirect discrimination will occur where a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging people with a protected attribute, and that is not reasonable. For example, an advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may *disadvantage* a person on the basis of their race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.

The effect of these new definitions of discrimination is that it will make it easier for employees to argue that they have been discriminated against.

*Continued on next page*

### 3. **Broad scope for discrimination on the ground of 'carer status'**

The EO Act requires employers to consider reasonable requests made by employees to adjust their working arrangements so they can meet their caring responsibilities. The definition of 'carer' under the EO Act means 'a person on whom another person is wholly or substantially dependent for ongoing care and attention'. This covers a broader range of relationships than the more limited definition in the *Fair Work Act 2009* which only covers a member of a person's 'immediate family' or 'household'.

### 4. **A duty to provide reasonable adjustments**

Employers are required to make 'reasonable adjustments' for a person who is offered employment or is an employee and who has a disability. The duty goes further than the federal *Disability Discrimination Act 1992* (Cth), which only provides that a failure to make reasonable adjustments may amount to discrimination. A breach of the duty will constitute discrimination without the need to prove direct or indirect discrimination.

### 5. **Protection for volunteers**

Discrimination laws in Victoria have not previously covered volunteers. The EO Act will now protect volunteers and unpaid workers from sexual harassment, but not discrimination.

### 6. **Extended definition of disability**

This is specifically aimed at addressing genetic predispositions and behaviour that is a manifestation of a disability.

### 7. **Exception for religious bodies**

An exception has been retained for 'religious bodies' that allows them to discriminate against people on the basis of sex, marital status, gender identity and sexuality in some **circumstances** where discrimination is required to confirm with religious beliefs.

### 8. **Changes to dispute resolution**

Employees bringing complaints will now have direct access to the Victorian Civil and Administrative Tribunal. There will be no need to bring a complaint to the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) first.

### 9. **Powers of the Victorian Equal Opportunity and Human Rights Commission**

The VEOHRC has new powers to investigate systemic discrimination without waiting for individual complaints to be lodged.

### 10. **Removal of the small business exemption**

Prior to 1 August 2011, a small business could discriminate in determining who should be offered employment if the employer employed no more than the equivalent of 5 people on a full-time basis. This exemption no longer applies.

### How Your Business Can Comply

Do not wait until a complaint of discrimination is made in your workplace. The new EO Act requires preventative steps to be taken now. The Employment Law & Workplace Relations team at Rigby Cooke Lawyers can assist employers to comply with the new EO Act in the following ways:

- Review and amend your existing Equal Opportunity, Discrimination and Harassment policies;
- Amend contracts of employment making compliance with equal opportunity laws a contractual obligation on employees;
- Conduct an "EEO Audit" to identify discriminatory practices in your business that may need to be eliminated to comply with the new proactive duty; and
- Conduct training workshops for staff and managers on the new laws.

Please direct any queries about Employment Law issues to Paul O'Halloran.

### Our Team

**Elizabeth Guerra-Stolfa** / Partner  
Commercial Litigation  
T +61 3 9321 7864  
eguerria@rigbycooke.com.au

**Rob Oxley** / Senior Associate  
Commercial Litigation  
T +61 3 9321 7818  
roxley@rigbycooke.com.au

**Andrea Drobnik** / Senior Associate  
Commercial  
T +61 3 9321 7821  
adrobnik@rigbycooke.com.au

**Natalie Chapman** / Associate  
Property  
T +61 3 9321 7804  
nchapman@rigbycooke.com.au

**Paul O'Halloran** / Associate  
Employment  
T +61 3 9321 7840  
pohalloran@rigbycooke.com.au

**Timothy Stokes** / Associate  
Tax & Wealth  
T +61 3 9321 7819  
tstokes@rigbycooke.com.au

### To unsubscribe from this publication

If you do not wish to receive publications of this type from us in the future, please notify us by sending an email to: [marketing@rigbycooke.com.au](mailto:marketing@rigbycooke.com.au). Your request to remove you as a subscriber should include the word "unsubscribe" and your full email address to allow us to correctly identify your removal from our lists.

### Images sourced from FreeDigitalPhotos.net

The Big Party - Photostock  
Hand pushing button - Twobee  
World nature image - Danilo Rizzuti

### Reprinting articles

Articles in this publication may be reproduced in whole or in part, provided that appropriate recognition is given to the author and the firm, and prior approval is obtained.

To obtain approval, please contact Rigby Cooke on +61 3 9321 7888 or email [marketing@rigbycooke.com.au](mailto:marketing@rigbycooke.com.au).

© Rigby Cooke Lawyers 2011