

KNOWLEDGE IN TRANSIT

WHO NEEDS TERMS AND CONDITIONS?

There are many participants in the transport supply chain, be they warehouse-keepers, freight forwarders, packers, transport providers or cargo owners. For the purposes of this paper we will focus on road hauliers although many of the principles will equally apply to other participants.

Whether or not a road haulier can impose their own trading terms and conditions will depend upon their relative bargaining position. If the haulier is a small subcontractor to, for instance, Linfox, it is unlikely that Linfox will agree to be bound by the hauliers conditions. Similarly, if the haulier is the principal carrier contracting with the likes of Woolworths, it may well be that Woolworths will impose their own transport conditions as part of the overall tender for the provision of transport services.

Brokers need to ensure that liability insurers are aware of any contracts which may increase clients' liability exposure.



BACK TO BASICS

If one party has another's property in their care, custody or control, at common law a duty of care for that property will exist under what is known as 'bailment'. If a charge or fee is levied the relationship becomes that of 'bailee for reward'. This is important as generally a higher duty of care is needed when a party is acting as a bailee for reward as against bailment where no money is exchanged.

As an example, if a friend lets me park my car in his garage and it gets stolen from the garage my friend's duty of care will be much lower than, for instance, if my car was stolen from a transport company's warehouse facility.

Participants in the transport chain will invariably always charge for their services and as such they are bailees for reward and are responsible to their clients for the safe handling of their cargo. This duty will exist even when the cargo is being handled by subcontractors.

In Australia, it is a free contracting regime (in relation to transport and storage) and parties are able to either exclude or limit their liability for the various risks that cargo transportation is exposed to. This contrasts with countries like New Zealand which has a national Carriage of Goods Act that limits carriers' liability to NZD 2,000. For international ocean or air freight various Conventions exist that similarly limit carriers' liability for cargo loss or damage.

CONTRACT LAW

Transport operators are bound by the Competition and Consumer Act's consumer protection provisions. Of particular importance is the inability of transport operators to contract out of negligence when they are providing nonbusiness services, for instance, household removals. As home removalists can't effectively limit their liability many insurers will be reluctant to provide them with carriers liability insurance.

Additionally, from 12 November 2016, transport operators' standard contracts with small businesses will be bound by the provisions of The Australian Consumer Law. Courts will have the power to declare that a contract term is 'unfair' in which case it will be void.

Previously the unfair contract provisions in this only protected consumers (e.g. mobile phone contracts, gym memberships etc.) With the widening of it to include small businesses there will be an impact on transport companies and warehouse keepers who may no longer be able to rely on certain conditions in their standard form contracts and consignment notes.

INSURANCE ISSUES

Many haulage liability insurance policies, often called 'carriers liability', will contain conditions that make cover reliant upon the carrier's conditions being given to customers.

With such draconian provisions it should be obvious that insured road hauliers could be left without cover if they fail to properly advise their customers of their trading conditions. However some insurers' covers are more generous and only restrict cover if the conditions are deliberately not given to customers.

Essentially, the insurers are covering the risk of the carrier accidentally not providing their customers with their transport conditions.

Another potential pitfall is that transport liability policies will be conditional upon the insurer having pre-approved any transport conditions.

Risks exist therefore if the insurer has not vetted the conditions, if they have requested changes to the conditions that have not been made by the insured, or if the insured changes their conditions without advising the insurer.



INCORPORATION OF CONDITIONS INTO THE OVERALL TRANSPORT CONTRACT

It is extremely important that hauliers' existing and future customers are given adequate notice of the existence of conditions of carriage. If adequate steps are not taken to put a customer on notice of the existence of the conditions of carriage then the hauler may not be entitled to rely on them with that customer. The majority of insurance claims against a transport liability policy generally hinge on two matters: 1) were the conditions drafted adequately to limit liability in the circumstances being claimed? 2) were the conditions adequately brought to the attention of the customer?

Remember – if a customer has not seen the conditions before the transit commences it could be difficult to rely upon those conditions to protect the carrier at a later stage.

In order for the incorporation of the conditions of carriage to be most effective, we recommend that the following processes be implemented in haulage company's sales and customer service department(s):

- Any written quote that is sent by letter or facsimile should include a statement to the effect of, "All quotes are made and all services are provided subject to our conditions of carriage, a copy of which is attached to this correspondence". A copy of the conditions of carriage should then be attached to the letter or facsimile.
- Any quote that is sent by email should include a similar statement and attach, in 'PDF' format, a copy of the conditions of carriage.
- Ideally, each customer should be asked to sign and return a copy of the conditions of carriage. Photocopies should be kept of each letter and facsimile sent to customers enclosing any new conditions of carriage. A record should also be kept of regular, new and potential customers confirming that they have been sent copies of the conditions.
- Any standard form consignment notes should have the conditions of carriage printed on the reverse side. On the front page of that consignment note there should be a signature box where the consignor/ customer signs before the services are commenced. There should be a statement in the customer signature box to the effect of, "I/We hereby accept the conditions of carriage printed overleaf". The signature box to be signed by the receiver/ consignee of the goods should continue to have the statement in it, "Goods received in good order and condition". Finally, there should be a clearly visible statement on the front page of the carriage document, in bold type, to the effect of, "All services are provided subject to our conditions of carriage, printed overleaf".
- Include the conditions on your website and if business is conducted on the website ensure that customers have to acknowledge the terms and conditions before finalising an order.
- Circulate copies of trading terms and conditions at regular intervals to regular customers and keep copies of the correspondence.
- Ensure that prospective customers receive a copy of the conditions at the commencement of negotiations.
- If the existing trading terms and conditions are changed a copy of the amended conditions will need to be provided to all customers, preferably asking them to sign acknowledgement of those amended conditions.
- The haulage companies letterhead, receipts, invoices, statements, consignments notes and shipper's forwarding instructions should include a statement at the foot of the page in bold type to the effect of, "All services are provided subject to our conditions of carriage, printed overleaf". The conditions of carriage would then be printed on the reverse side of those documents.

INFORMATION CONTAINED IN THIS DOCUMENT IS INTENDED AS A GUIDE ONLY.

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