



**COOPER GRACE WARD**  
LAWYERS

# **CHECKLIST FOR REVIEW OF TRANSPORT CONTRACTS**

**(PREPARED FOR THE AUSTRALIAN TRUCKING ASSOCIATION)**



## 1. INTRODUCTION

---

- 1.1 This checklist has been prepared by Cooper Grace Ward Lawyers at the request of the Australian Trucking Association. It is intended to assist transport operators in reviewing transport contracts. The Australian Trucking Association proposes to commission regular reviews of this checklist:
  - (a) based on feedback from member organisations; and
  - (b) as legislation changes.
- 1.2 The intellectual property rights in this checklist belong to Cooper Grace Ward Lawyers.
- 1.3 Cooper Grace Ward Lawyers has granted an exclusive and limited licence to the Australian Trucking Association and member organisations of the Australian Trucking Association to use this checklist and to distribute this checklist to their members.
- 1.4 Unless the written consent of Cooper Grace Ward Lawyers is first obtained, the checklist and any copies of the checklist must not be:
  - (a) reproduced in whole or in part or used by parties, other than those licensed by Cooper Grace Ward Lawyers as set out in paragraph 1.3, and then only on the condition that the copyright notice and this page are not removed from the checklist; or
  - (b) provided to any person or organisation other than as set out in paragraph 1.3.
- 1.5 This checklist sets out a summary of important issues and legislation that you should consider when reviewing any transport contract. Some of the legislative provisions referred to may have exceptions and qualifications that are relevant to you or your circumstances. The checklist is not a substitute for legal advice and you should not rely upon it as legal advice.



## CONTENTS

1.	INTRODUCTION .....	2
2.	PURPOSE OF THIS CHECKLIST AND HOW TO USE IT .....	4
3.	IDENTITY/WHO ARE YOU CONTRACTING WITH? .....	4
4.	IS THE FORM OF CONTRACT BEING USED SUITABLE FOR TRANSPORT SERVICES?... 4	
5.	TERM OF THE AGREEMENT .....	5
6.	LEGISLATIVE CONSIDERATIONS .....	5
7.	PRICING .....	9
8.	EXCLUSIVITY AND RESTRICTIONS .....	10
9.	LIABILITY FOR CONSEQUENTIAL LOSS .....	11
10.	INSURANCE .....	11
11.	INDEMNITIES .....	11
12.	LIMITATION AND RELEASE CLAUSES .....	12
13.	RIGHT TO SUBCONTRACT .....	12
14.	COMMERCIAL CONSIDERATIONS .....	12
15.	SECURITY .....	13
16.	CODES AND PROCEDURES .....	13
17.	FORCE MAJEURE .....	14
18.	DISPUTE RESOLUTION .....	14
19.	OTHER FINAL CHECKS .....	14
	APPENDIX 1 – CHAPTER 6 OF THE <i>INDUSTRIAL RELATIONS ACT 1996</i> (NSW) .....	15
	APPENDIX 2 – <i>OWNER DRIVERS AND FORESTRY CONTRACTORS ACT 2005</i> (VIC).....	16
	APPENDIX 3 – <i>OWNER-DRIVERS (CONTRACTS AND DISPUTES) ACT 2007</i> (WA) .....	19
	APPENDIX 4 – EXCLUDING CONSEQUENTIAL LOSS .....	21
	APPENDIX 5 – SPECIFIC CLAUSES IN TRANSPORT CONTRACTS .....	22
	APPENDIX 6 – CLAUSES GRANTING SECURITY INTERESTS .....	23



## 2. PURPOSE OF THIS CHECKLIST AND HOW TO USE IT

---

- 2.1 This checklist is designed for use if you are reviewing a contract for your business to provide transport, storage or related services to a customer. The checklist can be used:
- (a) if your customer is a principal contractor that itself provides transport services (i.e. your business will be a subcontractor); and
  - (b) where your customer is engaging you directly to provide transport services.
- 2.2 The checklist is **not** designed for reviewing other forms of contracts such as:
- (c) banking and lending documents;
  - (d) sale or purchase of land or other real property; or
  - (e) leases of property or equipment.
- 2.3 Before you begin to review any contract, ensure that you have all of the documents that comprise the contract including:
- (a) standard terms that are referred to but not contained in the contract, such as conditions on consignment notes or conditions on webpages; and
  - (b) policies that are referred to in the contract.
- 2.4 You should also ensure that all of the schedules in the document have been completed. For example, if the pricing schedule is blank, you should not even consider signing the document as you do not know how much you will be paid for doing the work.
- 2.5 If you are uncertain about any aspect of a proposed contract, you should:
- (a) seek additional information from your ATA member association; or
  - (b) consult a lawyer.

## 3. IDENTITY/WHO ARE YOU CONTRACTING WITH?

---

- 3.1 Check your ACN and ABN and that of any other party to the agreement are correct, using the ASIC website and ABN website.
- 3.2 For **ACN** - see <https://connectonline.asic.gov.au> – search ASIC’s registers > search within ‘Organisation & Business name’.
- 3.3 For **ABN** - see <http://www.abr.business.gov.au>.

## 4. IS THE FORM OF CONTRACT BEING USED SUITABLE FOR TRANSPORT SERVICES?

---

- 4.1 You should ensure that any standard form contract you are asked to sign:
- (a) relates to the provision of services; and
  - (b) is suitable for the transaction.
- 4.2 It is not unusual for transport providers to be asked to sign ‘standard agreements’ that are designed for service providers like accountants or lawyers, or for the supply of goods instead of services. You should:



- (a) ask for a contract that is appropriate to the transaction; or
- (b) remove all of the clauses that are not relevant to the provision of transport services.

## 5. TERM OF THE AGREEMENT

---

### What is the term or period during which the agreement will operate?

- 5.1 Can either party terminate the agreement early? If so, on what grounds?
- 5.2 Ensure that if the agreement is terminated early, the agreement provides that you will be paid for all work performed by you to that point in time.

### Are there any options to renew or extend the term?

- 5.3 Ensure any option is workable and will not result in you potentially being 'locked in' to an agreement with pricing or services that are unacceptable to you.

## 6. LEGISLATIVE CONSIDERATIONS

---

### **Heavy Vehicle National Law (HVNL)**

*(The HVNL applies to heavy transport in all states and territories other than Western Australia and the Northern Territory)*

- 6.1 Ensure that the agreement does not:
  - (a) provide for incentives to speed (prohibited by section 216 of the HVNL);
  - (b) provide for incentives to breach fatigue laws (prohibited by sections 235, 236 and 241 of the HVNL);
  - (c) contain provisions that seek to annul, restrict or change the application of any provisions in the HVNL (which are void pursuant to section 742 of the HVNL); or
  - (d) contain provisions requiring one party to reimburse the other party for any penalties that the party is ordered to pay under the HVNL (which are void pursuant to section 742 of the HVNL).

### **Road Traffic (Administration) Act 2008 (WA)**

- 6.2 Ensure that the agreement does not seek to exclude, limit or modify the operation of any road laws (such a provision has no effect and is effectively void – section 138).
- 6.3 'Road law' means:
  - (a) the *Road Traffic (Administration) Act 2008 (WA)*;
  - (b) the *Road Traffic Act 1974 (WA)*;
  - (c) the *Road Traffic (Authorisation to Drive) Act 2008 (WA)*;
  - (d) the *Road Traffic (Vehicles) Act 2012 (WA)*.

(section 4 *Road Traffic (Administration) Act 2008 (WA)*)



**Road Traffic (Vehicles) Act 2012 (WA)**

- 6.4 Ensure that the agreement does not 'threaten, intimidate, coerce, induce or offer an incentive to another person to commit an offence in relation to mass, dimension, loading or restraint' (section 106).

**Chapter 6 of the Industrial Relations Act 1996 (NSW)**

- 6.5 Chapter 6 of the *Industrial Relations Act 1996* (NSW) applies to contracts of carriage as defined in the Act.
- 6.6 Under section 309, a 'contract of carriage' is an agreement for the transportation of goods by motor vehicle or bicycle in the course of a business of transporting those goods, but only where:
- (a) if the carrier is not a partnership or body corporate, no person except the carrier is employed in driving the vehicle in the course of that business; or
  - (b) if the carrier is a partnership, no person other than a partner is employed in driving the vehicle in the course of that business; or
  - (c) if the carrier is a body corporate, no person is employed in driving the vehicle in the course of that business, unless they are:
    - (i) a director of the body corporate or family member of a director;
    - (ii) a person who, together with members of their family, has a controlling interest in the body corporate; or
    - (iii) a member of the family of a person, who together with the members of his or her family, has a controlling interest the body corporate.
- 6.7 There are some qualifications to this definition in section 36 of the *Industrial Relations (General) Regulation 2015*. In addition, some types of contracts are excluded from the definition of 'contract of carriage' – see Appendix 1.
- 6.8 The Act provides that the Industrial Relations Commission of New South Wales may make a contract determination with respect to matters under 'contracts of carriage', including the remuneration of carriers under these contracts (section 313).
- 6.9 The length of each determination will be specified by the Commission, but must not be more than 3 years (section 319).
- 6.10 A party can apply for an exemption from the whole or any part of a contract determination if they can satisfy the Commission it is not contrary to the public interest (section 321).
- 6.11 A list of all contract determinations and their variation histories can be found on the [Industrial Relations Commission website](#).
- 6.12 The Act also contains provisions in relation to the payment of compensation where a 'contract of carriage' is terminated in circumstances where a premium or entry fee was paid by the carrier (section 346).

### **Owner Drivers and Forestry Contractors Act 2005 (Vic)**

6.13 The *Owner Drivers and Forestry Contractors Act 2005 (Vic)* applies to contracts with an owner driver or a person involved in the business of transporting forest products (forestry contractor) where:

- (a) the contract is made in Victoria or is subject to the law of Victoria;
- (b) the goods or forest products are transported wholly within Victoria; or
- (c) the goods or forest products are transported interstate either to or from Victoria and a substantial part of the services under the contract are performed in Victoria.

(section 8 *Owner Drivers and Forestry Contractors Act 2005 (Vic)*)

6.14 See Appendix 2 for the definitions of 'owner driver' and 'forestry contractor'. Appendix 2 also contains a list of considerations and requirements where the Act applies.

6.15 A Code of Practice, made under the Act, also applies to contracts that are covered by the Act.

### **Owner-Drivers (Contracts and Disputes) Act 2007 (WA)**

6.16 The *Owner-Drivers (Contracts and Disputes) Act WA 2007* applies to certain contracts with owner-drivers who operate a vehicle with a GVM of more than 4.5 tonnes.

6.17 See Appendix 3 for definitions of 'owner-driver' and 'owner-driver contract'.

6.18 In addition, if the Act applies, you must also have regard to the *Owner Driver Contracts Code of Conduct 2010 (Code)* made under the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*.

6.19 The Act:

- (a) allows an owner-driver to appoint a negotiating agent, or a group of owner-drivers to jointly appoint a negotiating agent, to negotiate their owner-driver contracts; and
- (b) allows a hirer to appoint a negotiating agent to negotiate owner-driver contracts.

(sections 28 and 29 *Owner-Drivers (Contracts and Disputes) Act 2007 (WA)*)

6.20 Any contract between a hirer and an owner-driver should include the information set out in Appendix 3. There are certain terms that will be implied by law if the contract does not include provisions to deal with these issues.

### **WHS legislation**

6.21 Federal and state legislation imposes onerous work health and safety obligations on parties operating a business. These include duties to 'eliminate risks to health and safety, so far as is reasonably practicable' and if this is not reasonably practicable to eliminate risks to health and safety, to 'minimise those risks so far as is reasonably practicable'.

6.22 It is beyond the scope of this checklist to consider WHS legislative obligations, but you should ensure that there are no provisions in the agreement that would result in risks to the health and safety of any person involved or associated with providing services under the agreement.

### **Unfair contract provisions of the Australian Consumer Law (ACL)**

**NOTE:** If you consider that any term in a proposed agreement with another party is not fair, you should attempt to have that term varied or removed before you sign the agreement. From a practical



*and business perspective, it is impossible to determine in advance whether a court will later find that a term of a contract was 'unfair'. In addition, the legal costs associated with bringing court proceedings are likely to be significant, and may not be completely recoverable, even if you win any court action.*

6.23 Determine whether the unfair contract provisions apply. The provisions apply to standard form consumer contracts and, from 12 November 2016, standard form small business contracts.

6.24 In determining whether a contract is a standard form contract, a court must consider whether:

- (a) one party had all or most of the bargaining power relating to the transaction;
- (b) one party prepared the contract before discussions between the parties;
- (c) one party was required to either accept or reject the contract as presented;
- (d) one party was not given an opportunity to negotiate;
- (e) the terms of the contract are not specific to one party or to the particular transaction.

(section 27 ACL)

6.25 A **consumer contract** is a contract for the supply of goods or services or sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

(section 23(3) ACL)

6.26 A small business contract is one where:

- (a) at the time it is entered into, at least one party to the contract is a business that employs fewer than 20 persons (in counting the persons employed by a business, a casual employee is not counted unless he or she is employed by the business on a regular and systematic basis); and
- (b) the contract relates to the supply of goods or services or sale or grant of an interest in land; and
- (c) the upfront price under the contract does not exceed either \$300,000 or \$1,000,000 if the contract is for a duration of more than 12 months.

(section 23(4) ACL commencing on 12 November 2016)

6.27 It is also important to note that a term cannot be declared unfair to the extent that the term:

- (a) defines the main subject of the contract;
- (b) sets the upfront price payable under the contract; or
- (c) is required, or expressly permitted by a law of the Commonwealth, a State or Territory.

(section 26 ACL)

6.28 Consider the terms of the agreement. A term may be unfair if it:

- (a) would cause a significant imbalance in the parties' rights and obligations under the contract; and
- (b) is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and



- (c) would cause detriment (whether financial or otherwise) to a party to the contract if the term were applied or relied on.

(section 24(1) ACL)

6.29 In determining whether a term is unfair, a court may also take into account:

- (a) the extent to which the term is transparent, that is, if the term is expressed in reasonably plain language, legible and presented clearly and readily to the party affected by it; and
- (b) the contract as a whole.

(section 24(2)-(3) ACL)

6.30 The sorts of clauses that the ACL specifically states **may** be unfair include terms that:

- (a) permit, or have the effect of permitting, one party to avoid or limit performance of the contract;
- (b) limit, or have the effect of limiting, one party's vicarious liability for its agents (liability of a party for the conduct of a person acting as their agent);
- (c) limit, or have the effect of limiting, one party's right to sue another party (e.g. clauses requiring court proceedings to be commenced within a specific period); and
- (d) permit, or have the effect of permitting, one party to vary terms of the contract without the consent of the other party.

(section 25 ACL)

## 7. PRICING

---

7.1 Ensure that the price you will be paid to provide services is sufficient to allow you to make a reasonable profit margin, particularly having regard to:

- (a) your staff costs;
- (b) your overhead costs; and
- (c) the age of your fleet and the need to maintain and replace your vehicles.

### **Additional costs**

7.2 Is any surcharge payable to you for out-of-hours deliveries or deliveries on public holidays?

7.3 Do you have to deliver or pick up from airports? (Expensive supplementary insurance cover is usually required).

### **Price review**

7.4 Is there a provision for price review? If so, on what basis?

7.5 If the agreement contains a price review mechanism based on formulas, ensure that you check that the review mechanism actually works to your benefit by carrying out a number of theoretical examples.

7.6 What will be the effect on your business if third party charges are increased? (For example, fuel prices, port fees, slot fees, tolls). Can you increase your price if these charges increase?



- 7.7 Potential methods of managing price review include:
- (a) annual or twice annual price review based on:
    - (i) consultation with your customer; or
    - (ii) CPI movement; or
  - (b) CPI (Transport) movement; or
  - (c) fuel levy clause (you need to consider the base price for fuel and what mechanism will be used to benchmark fuel pricing).
- 7.8 You should ensure that any index that is used to review prices is relevant to your business and its costs. For example, fuel prices in Sydney may be different to Brisbane so, if all your work is in Queensland, a New South Wales index may be inappropriate.
- 7.9 Your ATA member association may be able to provide you with access to price indexes and other tools that are appropriate for use in measuring any increase in your costs.
- 7.10 You also need to consider the term of the agreement. The longer the term, the greater the likelihood that your costs will change over that period and the greater the risk of accepting a fixed price for work.
- 7.11 Some agreements contain provisions that require you to ascertain and implement productivity improvements with a view to the price paid to you decreasing over time. Unless you can be certain that you will be able to reduce your direct costs or overhead costs, do not agree to these provisions.

#### **Payment terms**

- 7.12 What is the payment term for invoices? Is this term excessively long and can you manage cashflow while waiting to be paid? In deciding whether you can manage the credit terms provided for in any agreement consider how frequently you are required to pay:
- (a) your staff;
  - (b) your subcontractors; and
  - (c) other suppliers such as fuel suppliers.
- 7.13 Does the agreement allow one party to withhold payment of invoices during a dispute or because of damage to goods? These clauses can result in long periods of time during which you receive no cashflow.
- 7.14 Does the agreement remove any lien you may have over stored goods? A lien is often a useful remedy where you have not been paid and want to retain goods until payment is made.

#### **8. EXCLUSIVITY AND RESTRICTIONS**

---

- 8.1 Do you have the exclusive right to provide services with respect to particular freight or in a particular area or corridor or is the other party entitled to use other transport operators?
- 8.2 Must you accept every job that is submitted to you or do you have a right to refuse to undertake particular work?
- 8.3 Are you prevented from working for clients of your customer directly, or from canvassing work?



- 8.4 If the agreement is terminated or at the end of the term, are you limited or prohibited from providing services to customers of the other party for a period of time? What would be the effect of that on your business?
- 8.5 Will you be required to signwrite your vehicles or use particular side curtains? What if the agreement is terminated? Who arranges for the vehicles to be restored to their original condition and at whose expense?

## **9. LIABILITY FOR CONSEQUENTIAL LOSS**

---

- 9.1 Consequential loss is a term usually used to refer to indirect losses such as profits lost or expenses incurred as a result of a breach of contract. An example would be if a machine designed to produce widgets is damaged in transit and it is six months before another machine can be sourced and imported. The owner of the machine may claim damages for the profit it would have made from the production of widgets during that six month period.
- 9.2 Consequential loss is generally uninsurable or only insurable with very high premiums, so attempt to include provisions that remove or at least limit your liability for these losses.
- 9.3 If looking to remove liability for consequential loss, it is important, as a result of recent cases, to define 'consequential loss'. An example of a clause that seeks to remove liability for consequential loss and a definition of consequential loss is set out in Appendix 4.

## **10. INSURANCE**

---

- 10.1 Are the classes of insurance required by the agreement generally available to the industry?
- 10.2 Are requirements imposed (including policies in joint names or noting interests) able to be achieved?
- 10.3 For example:
- (a) professional indemnity insurance is not generally available to transport operators;
  - (b) 'all risks' cover is not a form of insurance that is readily available; and
  - (c) clauses requiring the policy to note the interest of the customer can be an issue in that the insurer may refuse to allow this, or allow some limited endorsement only.
- 10.4 Clauses requiring insurance for 'full replacement value' are an issue because such cover (new for old) is generally unavailable.
- 10.5 Have your insurance broker comment, in writing, on the insurance clause and whether the cover required can be arranged and, if so, the likely additional premium.
- 10.6 Are high value goods involved (such as pharmaceutical products)? (This may mean a potential liability over and above the insured amount.) If so, you need to ensure that the agreement contains a provision requiring your customer to notify you (preferably in writing) in advance of any goods of a value that exceeds your limit of insurance cover.

## **11. INDEMNITIES**

---

- 11.1 An indemnity is a legal obligation to compensate another party for the amount for which that other party is legally liable to a third party.
- 11.2 Indemnities are often included in clauses dealing with site access. As a condition of accessing a site or premises, you may be required to assume all liability associated with such access and



to indemnify the property owner or business operator with respect to any claim arising out of such access.

- 11.3 We recommend you always obtain legal advice in relation to indemnity clauses, release clauses and limitation of liability clauses, as this is a complex area of law and signing agreements with these clauses may affect the coverage offered by your insurance policies and may expose your business to significant claims for damages which are not covered by insurance.
- 11.4 Any form of reflexive indemnity may affect insurance cover. A reflexive indemnity is one that requires the service provider (carrier) to indemnify the customer for damages even where the customer's own negligence causes an accident or any loss or damage. Such a clause should be removed. If this cannot be achieved, such a clause should be modified so that you are not liable for the negligent acts or omissions of any third parties or of your customer. See Appendix 5 for an example of an indemnity clause that has been modified to reduce the potential liability of the transport operator.
- 11.5 Any form of indemnity (regardless of the wording) should also be referred to your insurer via your insurance broker for comment/confirmation that it will not affect your rights under the relevant policy.
- 11.6 If you cannot negotiate the removal of all indemnity clauses and you still want to take on the risk associated with entering into an agreement with indemnity clauses, you should look to restrict the operation of such clauses by removing broad terminology like 'in connection with', 'in relation to' and 'indirectly'. See the example indemnity clause and modifications in Appendix 5.

## **12. LIMITATION AND RELEASE CLAUSES**

---

- 12.1 Limitation clauses are clauses that limit one party's liability to a fixed amount or an amount less than the actual damages suffered or amount payable. For example, a clause might limit the customer's liability under the agreement to \$10,000 or a multiple of the price to be paid under the agreement. You should look to remove any limitation clauses or release clauses in so far as they relate to your customer's obligations to you as otherwise your ability to recover any damages for breach of contract may be limited or removed. Examples of these sorts of clauses are set out in Appendix 5.
- 12.2 Please note that limitation clauses and release clauses are often used by transport providers to remove or limit the liability of the transport provider for loss of or damage to goods that are being carried. In contracts where you are the transport provider and your customer is agreeing that your liability is limited or released if goods are damaged, these clauses can operate for your benefit.

## **13. RIGHT TO SUBCONTRACT**

---

- 13.1 Does the agreement require you to provide written notice or obtain your customer's prior consent on each and every occasion you propose to engage a subcontractor?
- 13.2 If you intend to use subcontractors to perform parts of the work, can this be managed by including an approved panel of subcontractors in the agreement?

## **14. COMMERCIAL CONSIDERATIONS**

---

- 14.1 How much notice does each party have to give to terminate the agreement? If the agreement can be terminated 'for convenience' or 'at will' by the customer, what will be the effect on you? Will you be significantly out of pocket because of capital or other expenses you have incurred?
- 14.2 Are any KPIs that are specified both practical and achievable?



14.3 What are your likely costs to comply with:

- (a) reporting requirements;
- (b) audit requirements;
- (c) meeting requirements;
- (d) training and induction for drivers or other staff; and
- (e) altering or modifying vehicles or vehicle systems to meet contractual requirements?

14.4 Be careful that you are able to fulfil all of your contractual responsibilities. For example, if an agreement requires you to transport all of your customer's goods on a particular route and you are unable to fulfil this requirement due to insufficient resources (e.g. drivers or vehicles), you could be liable to pay damages to your customer if they have to hire an alternative transport company, at higher cost, to complete the work you were supposed to carry out.

14.5 Agreements often provide that if you are liable for breach of the agreement or under any indemnity, you are also responsible for legal costs on an 'indemnity basis', or a 'solicitor client' or 'solicitor and own client' basis. These words may appear in the definition of 'claim' or elsewhere in the agreement. For example:

The Transport Provider will indemnify and keep indemnified the Customer against all legal costs (on a solicitor client basis) incurred by the Customer in connection with any breach or alleged breach of this agreement by the Transport Provider

You should look to delete provisions that make you liable for the legal costs of your customer.

14.6 Can you assign (transfer) the benefit of agreement to the purchaser if you sell your business? Often an agreement will contain a provision to the effect that it can only be assigned with the consent of the customer. For example:

Transport Provider may only assign the benefit of this agreement with the consent of the Customer which consent may be withheld in the absolute discretion of the Customer

## 15. SECURITY

---

15.1 Avoid signing directors' guarantees. These expose the directors' personal assets if your company is sued for breaching the agreement.

15.2 Avoid agreeing to any charging clauses or other clauses creating security rights. An example of such a clause is set out in Appendix 6.

## 16. CODES AND PROCEDURES

---

16.1 Check any references to codes and procedures incorporated into the agreement. You should not agree to such clauses unless you have a copy of the relevant code and consider that compliance is practicable.

16.2 Industry accreditation schemes such as TruckSafe® can improve your business operations and help you win contracts. In considering an agreement that requires you to be a member of an accreditation scheme, you should consider:

- (a) the benefits of such membership to your business, both in relation to the agreement you are considering signing and for your business generally; and



- (b) whether the costs of membership, accreditation and on-going compliance are affordable having regard to the amount you will be paid to provide services under the agreement.

## 17. FORCE MAJEURE

---

- 17.1 A force majeure is an extraordinary event which is beyond the control of the parties.
- 17.2 Check whether there is any protection under the agreement if there is an unexpected event that prevents you performing the agreement such as a fire, flood or fuel shortage.

## 18. DISPUTE RESOLUTION

---

- 18.1 Check which state has jurisdiction and ensure that you are not agreeing to another state (where you do not have an office) having jurisdiction, as you may be obliged to commence or defend any court proceedings in that state.
- 18.2 Carefully consider any clauses that require you to submit to arbitration, as arbitration can be a very expensive process.
- 18.3 Check whether there are time limits on bringing legal action. Are these appropriate and fair? See paragraph 6.23 to paragraph 6.30 in relation to unfair contracts.
- 18.4 In relation the unfair contract provisions of the *Australian Consumer Law (ACL)*, the ACCC can both:
  - (a) investigate and act on complaints that a small business contract is unfair; and
  - (b) apply to the court for a declaration that a provision of a small business contract is unfair.
- 18.5 The ACCC's website dealing with unfair contracts can be found at:  
<http://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms#if-you-think-a-term-in-your-contract-is-unfair>

## 19. OTHER FINAL CHECKS

---

- 19.1 Make sure that the contract includes everything that you have agreed in any discussions, or in any previous correspondence. Most agreements contain an 'entire agreement' clause. Such a clause essentially provides that the parties agree that everything relevant that has been agreed to is set out in the agreement and no other discussions or correspondence form part of the agreement.
- 19.2 Reading a contract can be complex and time consuming. If there are changes you would like to make to a contract, it is usually more effective to mark these on a copy of the document. For these reasons, it is a good idea to:
  - (a) obtain a soft copy Word version of the agreement;
  - (b) mark up any changes you would like; and
  - (c) do a final search of the document using Word for terms like 'indemnify', 'release', 'limit', 'responsible' and 'penalty' to make sure you have picked up and considered any clauses that contain these terms.



## APPENDIX 1 – CHAPTER 6 OF THE *INDUSTRIAL RELATIONS ACT 1996* (NSW)

---

1. Under section 309(4) of the *Industrial Relations Act 1996* (NSW) a contract of carriage does not include a contract:
  - (a) where the carrier is a common carrier and the contract is made in the ordinary course of the business of the carrier; or
  - (b) that is made in the ordinary course of business for the carriage of packaged goods for different principal contractors by use of the same motor vehicle; or
  - (c) for the carriage of mail by or on behalf of Australia Post; or
  - (d) for the carriage of bread, milk or cream for sale or delivery for sale;
  - (e) for the carriage of goods that are to be sold pursuant to orders solicited during the carriage of the goods; or
  - (f) for the carriage of livestock;
  - (g) where the principal contractor is a primary producer or a member of a family of a primary producer and the contract is for the transportation of primary produce (other than timber);
  - (h) for the transportation of primary produce (other than timber) from or to land used for primary production; or
  - (i) for the delivery of meals by couriers to homes or other premises for consumption.



## APPENDIX 2 – OWNER DRIVERS AND FORESTRY CONTRACTORS ACT 2005 (VIC)

---

### Which drivers does the Act apply to?

1. The *Owner Drivers and Forestry Contractors Act 2005 (Vic)* applies to the following contractors:
  - (a) a natural person (whether as an individual or in a partnership) who carries on a business of transporting goods (**owner driver**), provided less than four vehicles are owned by the business and operated by the person (whether solely or with the use of additional or relief operators);
  - (b) a corporation (other than a listed public company) that carries on a business of transporting goods (**owner driver**), provided less than four vehicles are owned by the corporation or an officer of the corporation, and the vehicles are operated by an officer of the corporation (whether solely or with the use of additional or relief operators);
  - (c) a natural person (whether as an individual or in a partnership) who carries on a business of transporting forest products in vehicles that are owned by the business and operated by the person (whether solely or with the use of additional or relief operators) (**forestry contractor**);
  - (d) a corporation (other than a listed public company) that carries on a business of transporting forest products and the corporation or an officer of the corporation owns the vehicles, and an officer of the corporation operates the vehicles (whether solely or with the use of additional or relief operators) (**forestry contractor**).

(sections 4 and 5 of the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* and section 4 *Owner Drivers and Forestry Contractors Regulations 2006 (Vic)*)

### What legislation and regulations must you comply with?

2. The following Acts and regulations apply to contractors covered by the Act:

*Owner Drivers and Forestry Contractors Act 2005 (Vic)*

*Owner Drivers and Forestry Contractors Regulations 2006 (Vic)*

*Owner Drivers and Forestry Contractors Code of Practice (Vic)* (contained in schedule 1 of the regulations)

### What must be in any contract?

3. A contractor covered by the Act who is engaged for a period of at least 30 days or for an indefinite duration must be provided with a written contract that:
  - (a) sets out the rates that will be paid (note the requirements to provide rates schedules and information booklets discussed at paragraphs 5 to 11 below);
  - (b) states the guaranteed minimum number of hours of work or income level that the contractor will receive and the rates to be paid to the contractor;
  - (c) sets out the minimum period of notice of termination or payment in lieu of notice. NOTE the minimum notice periods are set out under the heading 'notice of termination' at paragraph 12 below.

(section 20 *Owner Drivers and Forestry Contractors Act 2005 (Vic)*)



### What must not be in any contract?

4. The contract must not require the contractor:
  - (a) pay a 'penalty' (a penalty is a payment that must be made by a party for an amount in excess of the amount necessary to remedy the actual loss or damage suffered as a result of the conduct (Clause 17 Code of Practice));
  - (b) pay, or allow the hirer to deduct from moneys due to the contractor, for:
    - (i) insurance amounts, unless a contract of insurance is in force and the hirer has provided a copy of the relevant insurance policy to the contractor (section 23);
    - (ii) any other amounts (eg tolls, equipment hire charges) unless the amounts are set out in the contract, are a direct reflection of the actual cost involved and, if it is practicable, the contractor is given the opportunity to obtain the service or the equipment from another source (section 24).

These prohibitions apply to all payments to contractors, regardless of the term of their engagement.

### Information booklet

5. A hirer must give the contractor an **information booklet** at least three business days before the hirer engages the contractor. This requirement does not apply if the contractor is engaged for a period of fewer than 30 days. However, if the same hirer or the same freight broker engages the contractor for a total of at least 30 days in any three month period, the information booklet must be given to the contractor on the 30th day on which the contractor is engaged in that period.
6. In the case of hirers going through a tender process, the hirer must not accept a tender from a contractor unless the hirer gave the contractor an information booklet at least three business days before the contractor lodged its tender.
7. The [owner driver information booklet](#) and the [forestry contractor information booklet](#) can be found on the Victorian Government's Treasury and Finance website.

(sections 10 to 13 *Owner Drivers and Forestry Contractors Act 2005 (Vic)*)

### Rates and costs schedules

8. A hirer must give a contractor a copy of the most recently published **rates and costs** schedule applicable to that contractor and the relevant class of vehicle at least three business days before the hirer engages the contractor. This does not apply if the contractor is engaged for a period of fewer than 30 days. However, if a contractor is engaged by the same hirer or through the same freight broker for a total of at least 30 days in any three month period, the most recently published applicable schedule must be given to the contractor on the 30th day on which the contractor is engaged in that period.
9. If the hirer is engaging in a tender process, the hirer must not accept a tender from a contractor unless the hirer has given the contractor a copy of the most recently published rates and costs schedule applicable to that contractor at least three business days before the tender is lodged.
10. A hirer must give a contractor a copy of each revision of the applicable rates and costs schedule as soon as practicable after the revision is published.
11. The published rates and costs schedules can be found at the following links:



- (a) For owner drivers – <http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Transport/Rates-and-costs-schedules-for-owner-drivers>; and
- (b) For forestry contractors – <http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Transport/Rates-and-costs-schedules-for-forestry-contractors>

(sections 14 to 18 *Owner Drivers and Forestry Contractors Act 2005* (Vic))

#### **Notice of termination**

- 12. The minimum period of notice of termination of engagement is as follows:
  - (a) forestry contractor – three months;
  - (b) owner driver of a heavy vehicle – three months; and
  - (c) other owner driver – one month.
- 13. A contractor may apply to the Small Business Commissioner for a certificate waiving the application of these minimum notice periods.
- 14. The minimum notice periods do not apply where:
  - (a) the hirer terminates the engagement on the ground of serious and wilful misconduct;
  - (b) the contractor terminates the engagement on the ground of a material breach of contract by the hirer; or
  - (c) the ongoing engagement is for a period of less than three months.

(section 21 *Owner Drivers and Forestry Contractors Act 2005* (Vic))

#### **Payment in lieu of notice**

- 15. The Act sets out how payment in lieu of notice must be calculated. The amount is the gross amount less the deductible amount.
- 16. The gross amount is either the amount that would have been paid for the minimum number of hours specified in the contract over the minimum required period of notice, or the monthly average of the amount to be paid to the contractor over the period of six months immediately before the termination multiplied by the number of months of the minimum required period of notice, whichever is the higher. The deductible amount is the amount of variable overhead costs applicable to the vehicle.

(section 22 *Owner Drivers and Forestry Contractors Act 2005* (Vic))

#### **Code of Practice**

- 17. Section 30 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic) provides that a person to whom a Code of Practice applies must comply with the Code of Practice to the extent that it imposes duties or obligations on the person or prohibits the person from engaging in certain conduct.
- 18. The Code of Practice made under the Act is available from: <http://www.dtf.vic.gov.au/Victorias-Economy/Transport-and-forestry-industries/Key-features-of-the-Owner-Drivers-and-Forestry-Contractors-Act>.



## APPENDIX 3 – OWNER-DRIVERS (CONTRACTS AND DISPUTES) ACT 2007 (WA)

---

### Which drivers does the Act apply to?

1. An 'owner-driver' is:
  - (a) a natural person:
    - (i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and
    - (ii) whose principal occupation is the operation of those vehicles (whether solely or with the use of other operators); or
  - (b) a body corporate (other than a listed public company) that carries on the business of transporting goods in one or more heavy vehicles that are:
    - (i) supplied by the body corporate or an officer of the body corporate; and
    - (ii) operated by an officer of the body corporate (whether solely or with the use of other operators) whose principal occupation is the operation of those vehicles; or
  - (c) a partnership of persons, at least one of whom is a person referred to in paragraph (a),

where:

**listed public company** has the same meaning as it has in the *Income Tax Assessment Act 1997* of the Commonwealth; and

**officer**, of a body corporate, has the same meaning as it has in the *Corporations Act 2001* of the Commonwealth.

(section 4 *Owner-Drivers (Contracts and Disputes) Act 2007 (WA)*)

2. A 'heavy vehicle' is a vehicle with a GVM of more than 4.5 tonnes (see section 3 of the Act and section 3 of the *Road Traffic (Vehicles) Act WA 2012*).
3. An 'owner-driver contract':
  - (a) is a contract (whether written or oral or partly written and partly oral) entered into in the course of business by an owner-driver with another person for the transport of goods in a heavy vehicle by the owner-driver;
  - (b) may provide for an owner-driver to perform services other than transporting goods, as long as the services to be performed under the contract predominantly relate to the transport of goods;
  - (c) does not include a contract of employment.

(section 5 *Owner-Drivers (Contracts and Disputes) Act 2007 (WA)*)

### What must be in any contract?

4. Matters that should be covered in any owner driver contract:
  - (a) payment term (must not be more than 30 days);



- (b) the interest rate payable by the hirer on any late payments; and
- (c) deductions that may be made from payments to contractors (see paragraph 5(d) below).

A failure to include provisions in relation to (a) and (b) will result in terms being implied into the contract.

(sections 9 to 12 *Owner-Drivers (Contracts and Disputes) Act 2007* (WA))

#### What must not be in any contract?

5. A contract with an owner driver **must not**:
- (a) purport to make the liability of a party (**A**) to pay money under the contract to another party contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party);
  - (b) provide for a payment to an owner-driver to be made more than 30 days after a payment claim for the payment is made;
  - (c) contain a penalty clause whereby the owner-driver is required to pay the hirer an amount that exceeds the amount necessary to compensate the hirer for any breach of contract or default (section 9 Code of Conduct); or
  - (d) provide for deductions to be made from the amount due to an owner-driver unless that deduction is authorised by the contract or by section 10 of the Code of Conduct.

(sections 13 to 16 *Owner-Drivers (Contracts and Disputes) Act 2007* (WA))

#### Guideline rates

6. Before entering into a contract with an owner-driver, the hirer must give the following documents to the owner-driver:
- (a) a document setting out all current guideline rates under the *Owner Driver Contracts Code of Conduct 2010* (see [http://www.transport.wa.gov.au/mediaFiles/rail-freight/Freight\\_GuidelineRates.pdf](http://www.transport.wa.gov.au/mediaFiles/rail-freight/Freight_GuidelineRates.pdf)); and
  - (b) a copy of the form in Appendix 1 of the [\*Owner-Drivers \(Contracts and Disputes\) \(Code of Conduct\) Regulations 2010\*](#).
- (see section 7(2) *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*).
7. The guideline rates are likely to be reviewed and new rates released by mid 2016.

## APPENDIX 4 – EXCLUDING CONSEQUENTIAL LOSS

---

### Example of a clause excluding a transport provider's liability for consequential loss

Notwithstanding any other provision of this agreement, the Transport Provider will not be liable to the Customer for Consequential Loss.

Consequential Loss includes any indirect or consequential loss; loss of use; loss of product or production; delayed, postponed, interrupted or deferred production; an inability to produce, deliver or process; loss of profit, revenue or anticipated revenue; loss of bargain, contract, expectation or opportunity; punitive or exemplary damages; in each case arising from or in connection with the performance of this agreement and whether or not such loss was foreseeable at the time of entering into this agreement



## APPENDIX 5 – SPECIFIC CLAUSES IN TRANSPORT CONTRACTS

---

### Example of reducing the coverage of an indemnity clause and making the clause proportionate

*(The recommended amendments marked in the clause below reduce the scope of the indemnity and also make it clear that the indemnity does not extend to cover any negligent acts or omissions of the Customer)*

The Service Provider indemnifies the Company and its officers, employees and agents against all claims, losses, actions, damages, costs ~~(including legal costs)~~ and expenses of any kind whatsoever including in contract, negligence and equity arising directly ~~or indirectly~~ out of ~~or in connection with~~ the performance of the Services provided always that the Service Provider will not be liable to the Company for any such claims, losses, actions, damages, costs or expenses to the extent that such claims, losses, actions, damages, costs or expenses are caused by or contributed to by an act or omission of the Company, its employees, agents or any other person who is not the Service Provider or the Service Provider's Employee.

Nothing in this agreement:

1. prevents the Service Provider from having any liability of the Service Provider reduced in respect of any act, omission, negligence, breach of contract, breach of statute, breach of duty or failure to comply with any law by the Company, any officer, director, agent, representative, employee or related body corporate of the Company or of any person who is not the Service Provider or the Service Provider's Employee; or
2. makes the Service Provider in any way liable to the Company for any claim, loss, action, damages, cost or expense where that the claim, loss, action, damages, cost or expense arises without any negligence on the part of the Service Provider.

### Example of limitation of liability clause

Notwithstanding any other provision of this Agreement, and except to the extent that liability cannot be limited or excluded, the total aggregate liability of the Company, its affiliates, officers, subcontractors and service providers, agents and employees, to the Service Provider whether arising under or in connection with this Agreement or the performance or non-performance of, or anything incidental to, this Agreement is limited to the Price (as adjusted strictly in accordance with this Agreement).

### Example of a release clause

Final payment under this Agreement constitutes all the moneys finally due and payable by the Customer to the Service Provider on any account. The Service Provider releases and discharges the Customer from all liability of whatever kind and howsoever arising upon the Customer making payment of the Price.



## APPENDIX 6 – CLAUSES GRANTING SECURITY INTERESTS

---

### **Example of charging clause – do not agree to grant another party such a security interest**

The Transport Provider hereby charges and grants a Security Interest to the Principal in all of the Transport Provider's right, title and interest in any property whatsoever and wheresoever both present and future as security for the payment of all monies which are now or in the future owed by the Transport Provider to the Principal. As security for the payment of any monies which are now or in the future owed by the Transport Provider to the Principal the Transport Provider hereby irrevocably appoints as its duly constituted attorney the Principal's company secretary from time to time to execute in the Transport Provider's name and as the Transport Provider's attorney any real property mortgage, bill of sale or consent to any caveat and to do all things necessary to obtain the registration of any such document. The attorney may exercise any power conferred on the attorney by this power of attorney even if it involves a conflict of duty, the attorney has a personal interest or benefits from doing so and the Transport Provider agrees to ratify anything done by the attorney under this power of attorney.

GYB10164672 3452-3588-3778v1

