

## Common carrier blues – more Marine lessons

Road freight carriers who fail to issue standard trading conditions that clearly define their liability to customers could find themselves out of pocket if goods are damaged in transit whilst in their care.

***By Chris Kelsey, National Manager Marine and Logistics***



Many Australian road transport carriers are inadvertently exposing themselves to unnecessary claims for loss or damage to customer goods if they don't define liability in their conditions of carriage.

In contrast to most other countries, Australian domestic road transport carriers can contract out of and exclude all liability for loss or damage to goods they carry on behalf of their business clients. If they do not use conditions of carriage excluding liability, they are deemed to be a 'bailee for reward' and 'common carrier' in the eyes of the law.

In this situation, the carrier has an absolute liability under common law for loss or damage to goods unless the damage is caused by factors beyond its control, such as Act of God or goods with inherent issues, where the loss or damage is caused by the owner or shipper.

Let me give you an example. A truck departs Wagga Wagga laden with general freight and machinery bound for Sydney and it runs off the road and rolls over after attempting to avoid another unidentified vehicle. The truck and its cargo are both destroyed. The freight company hasn't issued a properly constructed consignment note and/or terms and conditions to the client.

In this situation, the road freight company will become liable for the client's losses including any legal expenses incurred in defending claims.

The road carrier may avoid liability for loss or damage to the goods by setting themselves up as a 'non-common carrier' by implementing carriage terms and conditions. These can be in the form of a 'consignment note' and/or 'standard trading terms and conditions' that incorporate a statement to confirm the company:

1. is not a common carrier
2. has the right to refuse or accept cargo at its discretion
3. is not responsible for any loss or damage to the goods carried
4. has the right to sub-contract the carriage to other parties.

The terms and conditions must be given to the customer prior to the commencement of the transit in a suitable form so the customer is made aware of these conditions and exclusions in the carriage contract. If the above parameters are met, the carrier will be in a good position to defend any potential claims made against them by their commercial clients.

### **Special consumer protection for private individuals**

Under consumer legislation (Competition & Consumer Act [2012]), road carriers can't contract out of all liability when they are dealing with private individuals. For example, commercial carriers cannot exclude liability in a contract they enter into with an individual who is sending their household and personal effects that are not related to a commercial venture. The carrier in this case will have a strict duty of care to deliver the goods in the same condition as they received them and can be held responsible for any loss or damage.

However, even here they may be able to protect themselves by defining that their exposure is limited to Indemnity value only.

### **Other exceptions to the rule**

As someone once said, life was not meant to be easy! And even where the road carrier has done all the right things in terms of contracting out of liability, there are a number of situations that may allow a customer to set aside their carriage conditions and successfully sue for loss or damage.

For example, the courts may find that the carrier unreasonably deviated from the normal course of transit or that they failed to properly incorporate their carriage conditions when negotiating the business. They can also be held liable if the carrier makes a misleading representation and/or participates in conduct that could be construed as misleading.

In addition to the issues already mentioned, some additional safeguards that road transit carriers should consider include:

- Buy insurance to cover the risk when carrying goods outside the standard carriage terms. Assess your level of exposure to potential loss or damage including the possibility substantial legal expenses in the event of a dispute.
- Buy at least major perils cover to protect against a major loss when electing not to use carriage conditions.

- Get proper legal advice and check with your insurer before implementing changes to carriage contract terms to ensure you are not exposing your business to additional risk.
- Never offer or advise a customer that you can arrange insurance on their behalf unless you have written authority from your insurer to do so.
- When acting as a sub-contractor, assess the liability you are accepting and what indemnities are provided by the principal carrier. Make sure your insurance cover supports what the principal carrier has agreed to.
- When utilising the services of a sub-contractor, always check they are adequately insured before utilising their services.

### **Help with drafting consignment notes and trading term letters**

The Lumley Insurance Marine team specialises in the Logistics area and can provide a comprehensive Combined Carriers Package to cover most of the above-mentioned exposures.

The team can also assist your Lumley clients check 'consignments notes' and 'trading terms' letters for customers or recommend appropriate, experienced legal advisers if required.

For assistance, contact your local Lumley Marine specialist.

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