

# Legal Torque

## What is Risk Management

- Catherine Bormans -

**R**isk management is regarded as a process or strategy which organisations can work on and develop to give them a greater insight into the risks associated with their businesses and the impact of those risks. It is about identifying opportunities and avoiding losses by developing strategies to ensure that risks are minimised or eliminated. By adopting effective risk management techniques you can help to improve safety, quality and business performance.

As you are all aware, the transport industry is by its nature high risk. The simplest definition of risk is the possibility of loss, injury, disadvantage or destruction. A transport business, perhaps more so than a lot of other types of business, is vulnerable to these sorts of threats. It is a high risk enterprise - operating with large and expensive vehicles on the road which are inherently dangerous, operating in a highly regulated industry, vulnerable to economic factors and affected by constant changes in legislation.

Risk Management is all about identifying opportunities and avoiding losses by developing strategies to minimise risk.

Any organisation can benefit from a risk management strategy. Benefits can include:

- Increasing your knowledge and understanding of your exposure to risks;
- Better use of your resources;
- Minimising losses and maximising opportunities;
- Minimising disruptions to your business.

Risk management strategies are usually cited as avoidance, control, assumption, risk transfer, and knowledge and research.

- **Avoidance** is where you choose to use an alternate approach that does not have the risk. This is not always an option but it is the most effective risk management technique if it can be applied.
- **Controlling risks** involves the development of a risk reduction plan and then tracking to the plan.
- **Assumption** is simply accepting the risk and proceeding.
- **Risk transfer** is an attempt to pass the risk to someone else for example insuring the risk.
- **Knowledge and research** which is essentially doing one's homework and being informed so that you are able to make sound decisions.

It is not often that lawyers talk about risk management. Lawyers more often act as the ambulance at the bottom of the cliff, acting on instructions from clients when a problem has already arisen. However, lawyers can act in a more proactive way assisting operators to develop best practices. We can do this by completing a full audit or health check on your business or by looking at specific areas of your business which you think could benefit.

The first step in risk management is to identify the various risks. Risks can be many and varied – financial, the risk of criminal prosecution or the risk of civil liability. The second step is to look at how to manage those risks.

Risk management is about identifying risks, managing risks, and for those risks which cannot be managed or removed, looking at ways to perhaps transfer those risks from the business.

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Some of the more pressing risks are criminal or quasi-criminal risks and health and safety risks.

### **Criminal or quasi-criminal risks**

The offences in the Transport Act and Land Transport Act are stringent and can be onerous for transport operators. Some of the common mistakes we find are in relation to driving hours and goods service licences.

### **Driving hours**

The Transport Act 1962 sets out the requirements in relation to driving hours.

A problem which we see constantly is drivers incorrectly calculating the 24 hour driving period. A lot of drivers think that the fact that they have to have a nine hour rest period wipes the slate clean, that is, that the 24-hour period starts at the conclusion of any nine-hour break. That is not the case. The 24 hour period relates to any 24 hour period in the logbook. Drivers need to ensure that when they are planning to start work in the morning, that they calculate back 24 hours from their anticipated start time to that same time the previous morning to determine whether or not they are within the driving hours limits.

### **Goods Service Licence**

There are many drivers in the transport industry who operate as sole traders and have obtained their goods service licence in their personal name.

It is often the case that owner drivers decide to incorporate a limited liability company to operate the business. More often than not the owner driver is the sole director and shareholder of the company.

A common mistake occurs when a company is incorporated and the owner driver overlooks obtaining a goods service licence in the name of the company. Because the company is a separate legal entity, a goods service licence needs to be obtained in the company's name separately. The consequences for failing to do so can be severe (up to \$10,000 for a first offence and up to \$25,000 for a second offence

and mandatory confiscation of the operator's vehicles for a maximum of 90 days).

### **Health and safety**

The recent changes to the health and safety legislation a few months ago introduced a whole new level of risk to the industry.

Among the changes to the legislation were:

- 1 Stress and fatigue were both expressly stated to be a "hazard". Transport operators must now have in place a process for monitoring stress and fatigue levels and must take steps to eliminate, isolate and minimise fatigue.
- 2 The penalties have also increased – up to a \$500,000 fine and/or 2 years' imprisonment for those offences under the Act which require fault or intention or a maximum fine of up to \$250,000 for those offences where no fault is required.
- 3 It is no longer possible to obtain insurance that covers fines for health and safety prosecutions. Employers are now prohibited from insuring the risks of breaching the law.

Self employed people do not escape liability under the health and safety legislation. There is a duty on self employed people to ensure their own safety while at work as well as ensuring that no action or omission by them while at work causes hardship to any other person.

While the above risks may seem onerous, a well planned strategy will go a long way to minimise your risks.

For further information please contact **Catherine Bormans** on telephone **09 915 2412**, email **cmb@fmlaw.co.nz** or visit our website **www.fmlaw.co.nz**

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