

## NCOSS

### Advice on employee's ownership and insurance of motor vehicles

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You have asked us to provide advice on the legal implications of requiring an employee to own and insure their own motor vehicle. We understand that this advice may be used by a number of organisations throughout New South Wales. We are unaware of the identity and industrial arrangements of these organisations, and therefore recommend that should any questions arise, further advice is obtained which is more specific to the organisation's individual situation.

Our advice can be conveniently distilled into five questions, which appear below.

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#### **1 Is it legal for an organisation to make owning a vehicle and using it for work purposes a condition of employment?**

- Normal contractual principles apply to employment contracts. Thus parties to a contract are free to contract on whatever terms they like.
- This freedom is subject to the proviso that a contract is unenforceable to the extent that it breaches the minimum requirements of any relevant Award or other industrial instrument. Accordingly, care should be taken to ensure arrangements such as the one detailed in Question 1 do not involve any contravention of an Award or other industrial instrument.
- Further, it is illegal to discriminate either directly or indirectly in an offer of employment. For example, consider an epileptic who is not permitted to hold a drivers licence. He or she will not be able to be considered for such positions, and could argue that such a condition of employment is discriminatory.
- Discrimination will be permissible in circumstances where an employer can demonstrate that ownership of a motor vehicle, and the use of that motor vehicle in the course of employment, is an inherent requirement of the position. Eg: that the job requires travel over large distances, or that the job requires transport of people. Permissible discrimination is also qualified by consideration of whether an employee's particular needs can be reasonably accommodated within the organisation by the consideration of alternatives. This qualification may be relevant if, for example, alternative roles not involving the use of a motor vehicle are available.

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## **2 Is it legal for an organisation to require that employees using their motor vehicles for work purposes take out comprehensive insurance coverage?**

- The position is the same as outlined above in Question 1. An employer and employee are free to reach agreement upon certain conditions of employment, and a contract may be entered into on this basis. Therefore, a contract of employment can require that employees using their motor vehicles for work purposes take out comprehensive insurance coverage.
- However, the utility of this requirement should be considered in light of the answer to Question 4. It is possible that employers will be liable to third parties for damage suffered as a result of the actions of their employees carried out in the course of their employment.

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## **3 Are organisations required to pay for expenses incurred by employees as a condition of employment?**

### **3.1 if a worker does not have comprehensive insurance and is required to purchase it for work?**

- There is a general obligation on the employer to reimburse the employee for any expense incurred on behalf of the employer in the course of employment and which is authorised either expressly or by necessary implication.
- However, this is a matter which can be expressly contracted out of by the employer and employee. That is, the employer and the employee can expressly agree that the expense of a comprehensive insurance policy is to be borne by the employee.
- Therefore, contracts of employment should make it clear exactly what level of insurance coverage is required by employees, and that the employee is expected to shoulder that cost.

### **3.2 if a worker has to upgrade from private comprehensive to business comprehensive insurance as a result of using their car for work purposes?**

- We again refer to the above answer, and the possibility of expressly including in the contract of employment that an employee is to bear the cost of a certain level of insurance.
- However, we note in relation to both 3.1 and 3.2 that a slightly different circumstance exists with regard to *existing* employees. A variation of the contract of employment cannot be forced upon an employee, so that if an employee has already signed a contract not expressly requiring them to pay for business comprehensive insurance, the employee must agree to a variation of the contractual terms. In such circumstances, specific advice should be sought.

## 4 If a worker has an accident while using their car for work purposes and does *not* have comprehensive cover:

### 4.1 could the worker sue their employer for damage to their property while working?

- The obligation to indemnify an employee against loss incurred in the course of employment does not oblige an employer to make good damage to an employee's property in any general sense.
- There has been some disagreement in the case law in existence over whether any implied terms exist in the contract of employment regarding insurance for employer's vehicles driven by employees.
- Some cases (*Lister v Romford Ice, Bolton Gems v Gregoire*, Mahony JA in *Rowell v Alexander Mackie College of Advanced Education*) say that there is no implied term in the contract of employment that the employee was entitled to the benefit of their employer's insurance policy, or indeed a term that the employer would insure its own property. Hence in these cases the loss was the responsibility of the employee. However, this view has been statutorily amended in some state jurisdictions: see below in 4.2.
- Other cases (*Kelly v Alford*, Samuels JA and Hope JA in *Rowell v Alexander Mackie College of Advanced Education*) say that a term should be implied into the contract of employment that the employer will take out statutorily-required or appropriate insurance. Hence in these judgments the employers were found to be responsible for the loss.
- However, this case law does not expressly deal with a situation in which it is the employee's vehicle which suffers damage.
- To protect the employer from any claims, this is probably another matter which should be expressly contracted out of, in case a term could be implied into the contract of employment that the employer was responsible for such damage.
- Terms may be implied into the contract of employment by law when a series of legal tests has been satisfied. However, no term will be implied where it would be inconsistent with an express term of the contract. Therefore, we recommend that written contracts specify that:
  - (1) the employee should take out comprehensive insurance cover; and
  - (2) the employee is responsible for any loss or damage that may occur to their vehicle in the course of their employment.

### 4.2 could the other party to the accident sue the employer for the damage to their vehicle?

- When harm is suffered as a result of conduct of the employee during the course of employment, both the employee and employer will be liable to a fellow employee or to a third party injured as a result.
- An employer can be liable vicariously for an employee's conduct. Vicarious liability exists if it can be shown that
  - (1) the employee committed a wrong; and

(2) that the wrong had a sufficient connection to the employment.

If the wrong is committed in the normal course of the employee's duties, that will be a sufficient connection to the employment.

- Under the *Employees Liability Act* (NSW), where an employee causes loss or damage in the course of their employment for which his or her employer is also liable (because of vicarious liability, explained above):
  - (1) the employee does not have to indemnify, or pay any contribution to, the employer if they are sued for vicarious liability; and
  - (2) the employer has to indemnify the employee for the liability (unless the employee has another indemnity for that liability, i.e. an appropriate insurance policy).

as long as the conduct occurred within, or arose out of, the course of employment, and did not constitute serious and wilful misconduct.

- Although the legislation does not prevent an injured person suing the employee directly, the employer would usually be a more reliable source of recovery and can in fact be joined as a third party by the employee if a claim is commenced against an employee (that is, the employee can bring the employer into the action so that the employer is liable to pay for damage).
- If the employer is covered by a relevant insurance policy, section 66 of the *Insurance Contracts Act 1984* (Cth) prevents the insurance company recouping from the employee as long as
  - (1) the loss occurred during, or arose out of, the employment; and
  - (2) the employee has not been guilty of serious or wilful misconduct.
- These answers in 4 remain the same regardless of whether the worker is at fault or not, although presumably in the 4.2 scenario, it is the employee who is at fault.

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## 5 Would the answers in (4) be different if a *volunteer* (receiving reimbursement for expenses) was using their own car while volunteering for an organisation and had the accident but did not have comprehensive cover?

- If there was held to be no contractual employment relationship between the parties in the case of a volunteer there would be no vicarious liability on the part of the employer. Therefore, there would be no liability on the part of the employer for damage caused to a volunteer's vehicle, or to another vehicle.
- The reimbursement for expenses raises the possibility that a contractual relationship does exist, but it is unlikely that this nominal amount for a specific expense could be regarded as consideration for work performed.
- Further, there would appear to be no intention to give rise to legal relations between the organisation and volunteer, which is another requirement for the formation of a contract.

- We would therefore recommend that consideration be given to volunteers signing a disclaimer before commencing any volunteer activities which recognised that all responsibility for any loss or damage to property suffered by either the volunteer or a third party would be the volunteer's and not the organisation's.
- We also note with regard to volunteers, that workers compensation for personal injury suffered by volunteers may be a difficult area. Volunteers will be covered while in the workplace, but may not be covered in the same way employees are while travelling outside the workplace. Should you require any advice on this point, please let us know.

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## **6 Conclusion**

For ease of use, we have not included detailed legal reasoning in this advice.

FREEHILLS

17 August 2004