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Focus

Insurance & Corporate Risk

Changes affecting the labour hire industry in Queensland

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Legal developments affecting labour hire that elevate the importance of revisiting contracts and insurance programs

WHO SHOULD READ THIS

- Queensland labour hire providers and those who contract with them.

THINGS YOU NEED TO KNOW

The last few years have seen pressures increasing on the labour hire industry. Those pressures include downturns in the resources and construction sectors, mounting claims and premium costs, the increasing commercial pressure exerted by hosts and principals for labour hire to provide contractual indemnities and now the introduction of legislation which will no doubt increase operational costs, namely:

- the passing of the *Labour Hire Licensing Act 2017* (Qld) (**LHL Act**) – details of the LHL Act were discussed in our firm's earlier articles on 5 June 2017 and 7 September 2017

- 'black lung' legislation known as the *Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis) and Other Legislation Amendment Act 2017* (Qld) (**CWP Act**) – details of the CWP Act were discussed in our firms earlier articles on 28 June 2017 and 12 September 2017, and

- the passing of the *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld) (**WHS Amendment Act**) – details of the WHS Amendment Act were discussed in our firm's earlier articles on 25 August 2017 and 23 October 2017.

In the following article, we consider the implications of the above legislative enactments, and a number of decisions regarding the enforcement of contractual indemnities, for labour hire providers and those companies that contract with them.

There is no debating the increased operational pressures and costs and regulatory and legal exposure faced by the labour hire sector. With that in mind, we have highlighted the insurance solutions available to protect the labour hire industry in the face of increasing exposure.

WHAT YOU NEED TO DO

At a minimum, labour hire providers and those who contract with them must:

- ensure proper registration of labour hire providers and consider exposure in the event the legislative requirements for registration are not met, and
- urgently review all contracts and insurance programs in place to ensure there is insurance in place that responds to:
  - black lung legislation
  - charges for industrial manslaughter introduced under the WHS Amendment Act, and
  - contractually assumed liabilities (this is equally important for companies benefitting from a contractual indemnity, as without proper insurance in place, the indemnity may not able to be effectively enforced).

Inquiry into the labour hire industry in Queensland

A Parliamentary Committee Inquiry Report (**Report**) released in June 2016 became the impetus for reform affecting the labour hire industry.

The Report considered issues ranging from the economic and social impacts of labour hire to allegations of poor conduct of some labour hire operators, including undercutting, phoenixing and sham contracting.

Interestingly, the statement of reservation appearing at the end of the Report noted that:

> *'The labour hire inquiry revealed that the vast majority of labour hire firms operate in compliance with legislative requirements and guidelines and provide an invaluable service to industry. Evidence submitted by a number of key stakeholders suggested that estimates of the number of rogue traders operating are in the low single percentages.'*

The statement cited a submission from the Chamber of Commerce and Industry Queensland (**CCIQ**) which suggested:

> *'any additional regulatory scheme as an outcome of this inquiry would add to the already significant compliance burden for business using labour hire and labour hire companies, undermine job growth and create an unnecessary layer of legal requirements to which a sufficient safety net for temporary forms of employment already exists.'*

Labour hire, safety and workers' compensation

The Report also highlighted data that the labour hire industry:

- either performed or had the perception of performing poorly in the workplace health and safety space, and
- in terms of workers' compensation, had a significantly higher claims costs as a percentage of wages than other industries, including manufacturing, construction, transport, retail trade and education. According to WorkSafe Queensland:

  > *'In some industries, the claims cost as a percentage of wages* ***is more than double*** *all other employers in that industry.'*

Labour hire licensing

On 7 September 2017 the Queensland Parliament passed the LHL Act, which introduced a licensing system for labour hire providers that operate in Queensland. The LHL Act will commence on 16 April 2018. The licensing system will include licence fees and requirements that management of labour hire providers are 'fit and proper' persons. A brief recap of the LHL Act is set out as follows:

- 'labour hire services' is broadly defined to mean supplying to another person a worker to do work
- a person who wants to provide 'labour hire services' will need a licence to do so. The licence comes with significant reporting requirements, will need to be renewed annually and licences may be suspended or cancelled, and
- providing labour hire services without a licence or entering into an 'avoidance agreement' can attract a penalty of up to $378,450 for each corporation providing or hiring those services (so the penalty applies for both labour hire and host employers).

Industrial manslaughter

On 12 October 2017, the *Work Health and Safety and Other Legislation Amendment Bill 2017* was passed, which significantly amended Queensland work health and safety legislation, including the *Work Health and Safety Act 2011* (Qld) (WHSA).

One of the key changes includes creating an offence of industrial manslaughter in Queensland, which has the following implications for businesses and individuals:

- the offence of industrial manslaughter (negligence causing death) has been introduced
- the defence of 'accident' to an industrial manslaughter charge (based on section 23 of the *Criminal Code 1899* (Qld)) is removed
- maximum penalties for the offence of industrial manslaughter of 20 years imprisonment for an individual or 100,000 penalty units ($10,000,000) for a body corporate apply
- limitation periods for prosecutions do not apply to industrial manslaughter, and
- enforceable undertakings in circumstances involving a category 1 offence, a category 2 offence that results in a fatality and for the offence of industrial manslaughter cannot be entered into.

The charge of industrial manslaughter commenced on 23 October 2017.

Details of other changes under the WHS Amended Act are set out in the firm's 25 August 2017 Focus Article.

Black lung legislation

On 31 August 2017 the CWP Act commenced. The CWP Act (amongst other things) introduced a new scheme for responding to 'black lung' and other dust lung diseases based on a new definition in the *Workers' Compensation and Rehabilitation Act 2003* (Qld) of '*coal mine dust lung disease*', which is defined as a respiratory disease caused by exposure to coal dust.

Some of the legislative changes introduced by the CWP Act include:

- the creation of a 'pneumoconiosis score' for workers who can demonstrate six months or more exposure, which is a medically assessed score that grades pneumoconiosis disease based on changes shown on chest x-ray
- entitlement for a worker to receive up to $120,000 in lump sum compensation on a graduated scale calculated on the basis of the pneumoconiosis score and other factors
- acceptance of the lump sum compensation will not preclude a worker's ability to seek common law damages from their employer and will not prevent re-opening of the claim if the worker's condition deteriorates, and
- power to WorkCover Queensland to charge an additional premium (at an amount determined by WorkCover) to employers who before 1 January 2017 engaged a 'former coal worker' to work in an industry that involved mining, loading, transporting or otherwise dealing with coal.

Anecdotally, we have received reports from the labour hire sector of an increase in workers' compensation premiums already being felt as a result of the black lung amendments.

Common law apportionment of liability

Of some importance to labour hire employers (particularly given they may have a contractual liability to indemnify hosts) is the apportionment of liability between labour hire and host employers.

Following the decisions in *TNT v Christie* and *Duong v Versacold Logistics Limited & Ors* [2010] QSC 266, the usual apportionment of liability in the event of injuries to workers occasioning damages in Queensland has been 25% to 30% to the labour hire employer and the remaining 70% to 75% to the host employer.

However, the apportionment of liability turns on the facts of the individual cases (as opposed to some formulaic apportionment based on *TNT v Christie*), as demonstrated by the following recent decisions.

Kerle v BM Alliance Coal Operations Pty Limited & Ors [2016] QSC 304

On 30 October 2008 the Plaintiff suffered injury when he was involved in a motor vehicle accident during his five hour drive home from work. The Plaintiff was ordinarily employed as a dump truck operator and had just finished his fourth consecutive twelve hour shift at Norwich Park Mine.

The Plaintiff sought damages in negligence from his employer, Axial HR Pty Ltd (**Axial**), his host employer, HMP Constructions Pty Ltd (**HMP**) and the operator of the Norwich Park Mine, BM Alliance Coal Operations Pty Ltd (**BMA**). He claimed that they each breached duties owed to him in various ways and thereby caused his injuries. Damages were agreed at a gross amount of $1,250,000.

The Court found all three defendants were liable. It apportioned 10% of the liability against BMA as the operator of the mine on the basis that it failed to take any adequate measure to manage the risk of injury to workers at the mine from fatigue following the completion of a roster (in particular the risk created by its insistence on the consecutive 12 hour night shifts).

It found that HMP as the host employer was 90% responsible, and of that responsibility apportioned 60% to HMP and 40% to the labour hire provider, Axial, finding that Axial had not discharged the 'heavy' burden of proof which can only be discharged in '*quite exceptional circumstances*' that the '*entire and absolute control over the workman had passed to HMP*'.

Donald v Rail Corporation (NSW) (No 11) [2016] NSWC 1897

In this matter, the Plaintiff suffered a severe injury to his back whilst labouring and jackhammering for Rail Corporation New South Wales (Rail Corp), his host employer, whilst his services had been hired to Rail Corp by his labour hire employer, Staff Innovations Pty Ltd (Staff Innovations).

The Court of Appeal was of the view that liability between Rail Corp and Staff Innovations should be apportioned 90% against Rail Corp and 10% against Staff Innovations on the basis that Rail Corp had vastly superior control over the Plaintiff.

Kabic v Workers Compensation Nominal Insurer (No 3) [2017] NSWSC 1281

In this case, the Plaintiff suffered injuries when he fell from a raised platform constructed of smooth, wet and slippery form ply during the course of his labouring work.

The Plaintiff was employed by a labour hire company, Caringbah Formwork Pty Ltd (Caringbah), who hired his labour to Calcono Pty Ltd (Calcono). Calcono was the subcontractor to Deicorp Pty Ltd (Deicorp), the principal contractor at the building site.

The Plaintiff claimed damages against Caringbah, Calcono and Deicorp. The claims against his labour hire employer, Caringbah, and the principal contractor, Deicorp, failed.

Whilst the Court accepted that Caringbah owed a duty as the employer, it found that it was not in breach in circumstances where it was in no position to control the state of the building site. The claim against Deicorp failed because, whilst it had control over the site, it exercised no relevant control over the way in which the Plaintiff worked at the site.

In finding 100% against the host employer, Calcono, the Court held that it was his '*de facto*' employer, in terms of actually and directly controlling the conditions under which the Plaintiff worked. Calcono breached its duty by failing to take reasonable precautions against the possibility that the Plaintiff could fall from the raised platform.

Summary on common law apportionment

The above decisions highlight a few issues:

- the apportionment of liability between labour hire and host employers at common law will continue to be determined by reference to the facts of that case and the respective degrees of control over the worker exercised by the labour hire provider versus the host
- in Queensland, the Courts are still inclined to find against labour hire employers, even when they lack direct control over the working environment, equipment or system, and
- in New South Wales however, there have been a number of cases including *Kabic* in which the labour hire employer was exonerated on the basis of lack of control, and the assignment of the worker to the host as 'defacto' employer (a similar concept to employment *pro hace vice* or 'for that occasion').

It will be interesting to see if in coming years, the Queensland Courts start to follow the New South Wales decisions, which may result in lower apportionments or even nil apportionments against labour hire employers, due to their lack of control over workers.

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Contractual indemnities given by labour hire to host employers

Contractual indemnities

Labour hire companies provide workers to their principals, also known as host employers.

In the event of an injury to a worker resulting in a common law claim, Courts have traditionally assigned or apportioned liability between the labour hire and host employers to reflect the level of control over the worker at the time of injury. The apportionment ultimately turns upon the facts of each situation.

Increasingly, labour hire companies are called upon by host employers to give contractual indemnities when entering into contracts. The indemnities are designed to contractually assign responsibility for accidents involving labour hire workers from the host to the labour hire employer.

The contractual indemnities are frequently incorporated by a formal labour hire agreement, or via 'Standard Terms and Conditions' reflected on a Purchase Order for the labour hire services delivered by the labour hire to the host employer.

Understanding if the indemnity is backed by insurance

It is important for both sides to a contract containing such indemnities to understand the effect. Both parties must consider whether appropriate insurance is in place. For the party providing the indemnity, most often the labour hire provider, failure to insure or adequately insure can be catastrophic in that the labour hire provider directly wears the cost of the indemnified host employer's common law liability exposure (as per the above, in the vicinity of 75% of the claim plus relevant costs). For the indemnified party, most often the host, if such insurance has not been affected by the labour hire provider, the labour hire employer may not have financial capacity to honour the indemnity.

Following the 2014 decision in *Byrne v Peoples Resourcing*, WorkCover Queensland has been obliged to indemnify labour hire employers to the extent of joint and several ('*in solidum*') liability to the worker under the *Workers' Compensation & Rehabilitation Act 2003* (Qld) (WCRA). The indemnity by WorkCover Queensland does not extend to damages and costs for which the employer was not liable under the WCRA (such as gratuitous care and claimant's costs, known as Gap Damages).

Late last year, section 236B of the WCRA was enacted. This section was introduced with a view to preventing principals such as host employers from relying on a contractual indemnity in circumstances where WorkCover Queensland claims contribution from the host. The section proposes to 'void' the contractual indemnity. Section 236B was intended to be retrospective via section 275.

However, section 236B is widely believed to be ineffective in voiding contractual indemnities. It was intended to be introduced along with clear amendment to the section 10 meaning of 'damages' indemnified by the WCRA (to exclude from that definition – damages for contractual breaches or indemnities). However, whilst section 236B passed, the proposed amendment to the section 10 definition of damages did not pass.

Section 236B also does not deal with the situation where litigated proceedings are issued, given section 6(c) of the *Law Reform Act 1995* (Qld), which states that, '*no person shall be entitled to recover contribution from any person entitled to be indemnified by the person in respect of the liability in respect of which contribution is sought*'. In the event of litigated proceedings, the labour hire employer is prevented by this section from pursuing a contribution claim for a host employer it has agreed to contractually indemnify. At the very least, there is incongruity between section 236B of the WCRA and section 6(c) of the *Law Reform Act 1995* (Qld).

The end result appears to be that contractual indemnities given by labour hire employers to host employers are not voided, WorkCover Queensland must indemnify labour hire employers to the extent damages are payable under the WCRA and labour hire employers remain uninsured for Gap Damages.

Construction of indemnity clause

Given the increasing reliance by hosts on contractual indemnities and the issues identified above, it is unsurprising that litigation over the enforceability of contractual indemnities has continued to be prolific.

Of concern to labour hire employers, is the recent decision in the case of *CSR Limited v Adecco (Australia) Pty Limited* [2017] NSWCA 121. This New South Wales Court of Appeal decision involved a contractual indemnity dispute between CSR Limited and Holcim (Australia) Pty Ltd (together, CSR) and Adecco (Australia) Pty Ltd (Adecco) arising out of a personal injuries claim involving a labour hire worker provided by Adecco to CSR.

The worker was provided pursuant to a supply agreement, which expired on 1 April 2002. The expired agreement contained an indemnity clause requiring Adecco to indemnify CSR '*against any claim by temporary staff for personal injury … arising out of or in connection with the performance of assignment duties*'.

Following the expiration of the agreement, Adecco continued to provide CSR with labour while actively re-negotiating the terms of a new contract. The worker suffered injury after the agreement expired.

The worker commenced proceedings against Adecco and CSR seeking damages for personal injury. The proceedings settled, subsequent to which CSR made a contractual indemnity claim against Adecco in reliance on the indemnity within the expired agreement.

CSR failed in the claim at first instance. However, on appeal, the New South Wales Court of Appeal unanimously held that:

- the expired agreement continued in existence on the same terms through conduct of the parties, and
- the 'intended effect' of the indemnity was to oblige Adecco to make good any loss suffered by CSR as a result of the worker being assigned, even if CSR caused or contributed to the incident.

In so construing the indemnity clause, the Court of Appeal gave it a broad operation. As a matter of principle, the Court decided that it would approach the clause in the same way as it would construe any other clause in the contract, except in the event of an ambiguity, in which case it would construe it strictly against the party attempting to rely upon it.

The competing approach, relied upon in such cases as *Erect Safe v Sutton*, that the Court should construe the contractual indemnity strictly against the party attempting to rely upon it by resolving any doubt in favour of the indemnifying party, was rejected.

On 17 November 2017, the High Court of Australia refused a special leave application to hear the matter. The decision is therefore binding law in New South Wales and likely to be highly influential here in Queensland.

In dismissing the special leave application, the High Court found the case presented '*an inappropriate vehicle for the exploration of the questions of contractual construction sought to be agitated by*' Adecco.

The ramifications for labour hire providers going forward is the broad interpretation of indemnity clauses, which have traditionally been read down.

Both labour hire and host employers should ensure that contractual indemnity clauses are well drafted and that appropriate insurance is in place to respond to a claim in the event of injury to a worker.

Contractual requirement to insure

A contractual indemnity clause may be accompanied by a contractual clause require the indemnifying party (usually the labour hire employer) to insure for, in the name of or on behalf of the public liability for the host or principal.

In our experience, labour hire employers infrequently review their insurance programs to ensure that this type of coverage is in place. We have also seen that frequently the insurance has not been extended to the host or principal or is accompanied by a deductible that renders the host effectively uninsured.

Failure to insure for the host or principal renders the labour hire employer in breach of contract and susceptible to suit by the host for damages in breach of contract. The measure of damages in breach of contract is an amount that 'makes good' the host's loss, which is equivalent to making the labour hire employer responsible for insuring the host against the cost of the claim.

Finding the legal and insurance solution

There could be significant financial consequences for Queensland businesses operating in the labour hire sphere who are not properly insured having regard to the legal developments outlined in this article.

Employers may already be feeling some premium impact from the Black Lung changes in their WorkCover Queensland policy. This cannot necessarily be insured against but, as an additional operational cost, should encourage employers to see where else they can save on regulatory, operational or premium costs.

Statutory Liability

In the regulatory space, employers must consider the impact of new legislation introducing further penalties and fines. A responsive Statutory Liability Insurance program is becoming increasingly important in ensuring that your business is insured for costs of defending regulatory claims in the face of increasing regulation under the LHL Act and WHS Act, as outlined in this article.

It is important to note that there will not be insurance cover in circumstances, for example, where an industrial manslaughter offence under the new legislation is determined to be a criminal offence at final adjudication. However, 'negligent accidents' is usually covered depending on the wording of the insurance policy involved.

One of the widest insurance covers available to business is the Statutory Liability+ policy developed by McCullough Robertson and Allegiant IRS. For further information please contact a member of our team (details on page one).

Public Liability

Companies should review their contracts to see whether they have given, or stand to benefit, from a contractual indemnity clause. You must consider:

- is the clause clearly drafted?
- does it conflict or contravene any other clauses in the policy?
- does each party to the transaction understand the effect of the clause?

McCullough Robertson can assist your business with our contracting pillars protocols and training to ensure that contracts are clear in their intent and effect. For further information please contact a member of our team (details on page one).

It is critical that businesses revisit their insurance programs to ensure they have the right level of cover for their business operations. Some of the key considerations are outlined below.

It is critical that your business has in place an appropriate Public Liability policy that covers liability for injury or property damage to third parties. There are various influencing factors in getting your policy to operate in compliance with your position in contract. For example, contractual liability coverage is limited or excluded from most Public Liability insurance policies. This standard exclusion is relevant to all industries, particularly relevant to high volume contracting (e.g. Construction, Resources and Property, etc.).

There are however varying levels of write back for contractual liability (in other words, not all contractual liability extensions are 'created equally'). Whilst there are limited markets that provide blanket coverage for contractual liability, Allegiant IRS has designed a policy wording with no contractual liability exclusion that it can offer to the market for its clients who are able to demonstrate prudent contract risk management (typically by adopting the contracting pillars protocol).

Other common considerations include extensions of cover under a Public Liability policy to a principal/host employer. These extensions are available on the market, but it's important that a business understands the specific insurance requirements under their contracts with principals/host employers to ensure that they are taking out the appropriate extension of cover on their policy. Often, the extension can be far wider than intended if not dealt with correctly.

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