House of Representatives

Inquiry into Independent contracting and labour hire arrangements

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Table of Contents

The Insurance Council of Australia (ICA) welcomes the opportunity to comment on the House of Representatives Inquiry into independent contracting and labour hire arrangements and has provided comments on three of the four issues raised that affect the insurance industry.

The ICA is the representative body of the general insurance industry in Australia. ICA members account for over 90 per cent of total premium income written by private sector general insurers.

ICA members, both insurance and reinsurance companies, are a significant part of the financial services system. Recently published statistics from the Australian Prudential Regulation Authority (APRA) show that the private sector insurance industry generates direct premium revenue of $19.8 billion per annum and has assets of $66.6 billion. The industry employs about 25,000 people.

ICA members issue some 37.8 million insurance policies annually and deal with 3.5 million claims each year.

Our industry interest involves two distinct classes of insurance, namely workers' compensation and liability. In our submission, we have commented on the issues separately for these classes of insurance.

Workers' Compensation

Current complex definitions and inconsistencies in workers compensation and occupational health and safety regulations across jurisdictions can be a source of confusion for employers and employees. Each jurisdiction bases their definitions of the work relationship that should be covered by workers compensation schemes on the common law definition of employee. However, in the State and Territory workers compensation legislation, each jurisdiction supplements the common law definition through the use of a unique set of inclusions and exclusions. The definition is further complicated by the multitude of definitions for purposes of superannuation, taxation and industrial law and how they inter-relate. In addition, there is confusion arising over case law that has developed over the years[1].

Examples of non-traditional forms of employment, which may or may not be defined in workers compensation legislation to be "employees" for compensation purposes, include:

- Employees of labour hire companies "supplied" to a workplace;
- Contracted labour (whether they are contracted as individuals, or as a sole trader business or a partnership or company);
- Employees of a contractor;
- Directors of a contractor (so-called "working directors", where the contractor is a very small company which has one or two directors and no employees, and the directors are the people who actually do the work).

[1] Pareezer v Coca-Cola Amatil (NSW) Pty Limited (2004) and Emoleum (Aust) Pty Ltd v Cecil Henry Bond & Ors [2004] NSWCA 352

Definition of Employer and Employee

The definitions of employer and employee hold great significance to industry sectors that utilise independent contractor and labour hire arrangements. The definition is used to determine the level of premiums to be paid and it could be used in such a way that would lead to underpayment of premiums. Whether this is intended or not, the consequences have the potential to be serious for the premium pool and can disadvantage some occupational groups.

Premium Payments

Current labour hire arrangements often involve splitting what would otherwise be a direct employment contract into a number of contracts for the provision and supply of labour between the labour supplier and the host, and between the worker and the labour supplier. This can lead to a degree of uncertainty and confusion regarding the employer responsible for premium payments with these arrangements.

In circumstances where labour hire workers are deemed to be the employees of the labour hire company that actually employs them, the labour hire company would be entirely responsible for workers compensation premiums, as well as carrying a legal responsibility (shared with the host employer) to provide a safe workplace. The issue with this appears to be that the labour hire company often has little leverage to influence the safety performance of host employers, or whether they are willing or able to provide alternative duties to facilitate the early return to work of workers injured whilst working on their premises.

This is problematic because the responsibility for the financial consequences of an accident will be borne by the workers compensation policy of the labour hire company by way of premium payment prior to a claim and after a claim through “experience” adjustments, resulting in higher premiums. Added to this, the labour hire company will usually not have the (legal or other) means to influence the incidence of such accidents.

Other Concerns

As the labour hire company will usually not be the legal occupiers of the host employer’s work site, and may not even have any right of entry onto it, they will have a very limited ability to influence the system of work. This is even though they have been allocated the exclusive legal responsibility for the consequences of failure to set up a safe system, in the event of a claim.

Host employers by contrast under this arrangement are freed of any financial responsibility for the accidents which may take place at their worksite, over which they have regular day-to-day control.

If the responsibility for premiums is to be exclusively allocated to labour hire companies, then their responsibility for occupational health and safety on the worksite could be clarified by recognition in the legislation, with some rights to enter and inspect the site to require changes to unsafe practices and other issues.

The alternative of making the host employer exclusively responsible for the premium payable would at least be more consistent with the actual ability of the various parties to influence the incidence of claims and would avoid any troubling division of responsibility in this area. This would again reinforce their Occupational Health and Safety responsibilities.

However, the host employers in such a situation may not be aware that the component of the fee they are paying for the hire workers is actually wages, and so would be obliged to pay premiums on the whole fee, including the labour hire company's profit margin, administration costs and other sundry costs. This would obviously not be fair or equitable and so would have to be matched with a requirement that labour hire companies must declare to the host employer the wages component of their fees for the purposes of calculating the workers compensation premium.

Conclusion

For workers compensation and occupational health and safety purposes, ensuring a clear definition, applicable across all State and Territory jurisdictions would be beneficial in maintaining a high level of legitimacy for the workplace safety arrangements of independent contract/labour hire workers. However, careful consideration needs to be given to the implications of simply "deeming" independent contract/labour hire workers as the sole responsibility of either the labour hire firm or the host employer, particularly in regard to Occupational Health and Safety requirements of most workers' compensation legislation.

Liability

When considering the liability insurance issues, we need to consider both the labour hire company and host employer.

The labour hire company staff may be employed on either a temporary or permanent basis to businesses and are employees of the labour hire company. The labour hire company may specialise in a particular industry or provide staff across many industries.

The host employer approaches a labour hire company to obtain staff to fill either temporary or permanent positions. The labour hire staff are not considered employees of the host employer. This situation creates liability insurance exposures, which are identified as follows:

Labour Hire Company

For the labour hire company, there are three areas of exposure:

- Labour hire employee injured whilst working at host employer;
- Labour hire employee injures host employee worker or other third party; and
- Labour hire employee causes property damage to host employer's property, also third party property.

Host Employer

For the host employer, there are two areas of exposure:

- Labour hire worker injured whilst working for host employer; and
- Labour hire worker causes property damage to host employer/third party property whilst working host employer.

The policy coverage under public liability provides that the insurance company will pay in respect of death, personal injury or property damage up to sums insured where the insured becomes legally liable. The insurance company will pay for damages and all costs awarded against the insured or his employees.

The coverage is subject to the terms and conditions of the policy and will apply in a claim situation. The following exclusions may impact as follows:

Employment Liability

- Excludes claim for personal injury to an employee (because employee compensation is covered by workers compensation policies); and
- May extend to exclude such people as contractor/sub-contractors.

Contractual Liability

- This excludes any obligation that may be assumed by the insured under any agreement or contract except to the extent that:

  - The liability would have been implied by law;
  - The obligation is assumed under those agreements specified in the schedule.

In the case of contract labour, labour hire and other non-traditional forms of employment, a person injured on a worksite may have a number of legal remedies. (In the traditional workplace with the employer and employees, injured employees only have access to a claim under the relevant workers compensation arrangement for that workplace.)

Non-traditional workers may have a workers compensation claim against their "employer", the labour hire company. They may also have a public liability claim against the host employer if the premises are unsafe or some other activity of the host employer contributed to the injury. With differing levels of damages applying across differing legal remedies (workers compensation, public liability, etc), injured workers will no doubt pursue the legal remedy likely to lead to the most generous compensation award. This is leading to the erosion of workers compensation systems as the mechanism by which workplace injury is compensated.

One of the issues arising from this is that some host employers are now taking the approach that they require the labour hire company to provide them with a full indemnity in relation to personal injury suffered by the labour hire worker.

There are a number of reasons why host employers are requesting the indemnities. These are increased activity from workers compensation systems seeking recovery of their claims costs and insurance companies taking underwriting action to reduce exposure to potential workers compensation recoveries by excluding cover for injury to labour hire workers. The underwriting action some insurance companies could take are higher premiums/deductibles if the cover is to be provided.

Major Concerns

The major concerns for liability insurers are that there is a marked delay in reporting workers compensation claims and the recovery process against liability insurers can be quite long and many range from three to four years. For liability insurers, there are problems in identifying the industry that has the most potential for claims and reserving for claims when the potential number and cost are unknown.

Conclusion

For liability insurers, the claims they receive from the workers compensation insurers for the labour hire companies appears to represent a cost shifting exercise. The person injured is for all relevant purposes an employee of the labour hire company.

It is very difficult for the liability insurer to deny a claim when the labour hire employee is on their insured's premises and under that organisation's supervision.

What is occurring in the liability insurance market is that in some cases insurers will not provide cover to an organisation that employs labour hire staff, or they substantially increase premiums and excesses.

With the tort reform that has been undertaken by State, Territory and Commonwealth Governments, the labour hire employment arrangement can undermine the benefits that businesses should be receiving on its premium charge.

One solution would be to alter workers compensation legislation to allow for host employers to be able to add labour hire worker or contract workers to their workers compensation cover and pay a premium accordingly.

To highlight the problems of labour hire arrangements for businesses, ICA has obtained permission from Mark Goodsell, Director, Australian Industry Group, to provide your Inquiry with a copy of his letter dated 16 June 2004 to the NSW Department of State and Regional Development. This is Appendix A of our Submission.

AUSTRALIAN INDUSTRY
GROUP

APPENDIX A

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16 June 2004

Ms Janine Ricketts
Executive Director
Small Business Development
NSW Department of State and Regional Development
PO Box N818
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Dear Ms ~~Ricketts~~ Janine,

Public Liability Insurance

Thank you for your correspondence regarding the availability and affordability of public liability and professional indemnity insurance.

Ai Group welcomed the tort reforms made by the NSW Government as a significant step forward to alleviating the burden of public liability insurance that was placed on business, and the community, following the difficulties with the world reinsurance market after 11 September 2001. The subsequent insurance pricing shocks revealed structural problems in the apportionment of liability that could only be addressed by legislation.

While the results are encouraging, there are continuing issues of concern surrounding public liability insurance. Some of these issues may not come within the scope of your specific interest, but we believe it is wise to bring them to DSRD's attention.

Anecdotal evidence has emerged from our members that those who use labour hire or other guest workers (including group training apprentices and trainees) on their sites are being quoted either significantly higher premiums, or a higher excess component on their public liability insurance.

The higher premiums and excesses appear to be driven by two causes.

Firstly there is an emerging trend for employees of labour hire firms when working on client sites electing to pursue claims for injuries or illnesses caused on the client site against the client's public liability insurance rather than their (labour hire) employer's workers compensation insurance. This is based on the perception that public liability is more attractive jurisdiction for claimants than workers compensation where lump sum compensation is being sought.

Secondly, it appears the workers compensation insurers for labour hire providers and for other employers who provide workers who work at another employer's premises are becoming more aggressive in seeking recovery from the public liability insurance of the company where the work is being performed. Insurers are passing on this cost to the host company in the form of increased premiums. Essentially, it represents a cost shifting exercise from the workers compensation insurer to the public liability insurer with the employer footing the cost.

It is not immediately apparent what the net cost to business is of this trend, due to the difficulty in comparing workers compensation premiums with public liability costs, even in the short term, given all the variables that determine the premiums in workers compensation. However we would be concerned if it resulted in increased total costs, or undermined reform efforts in either jurisdiction.

Ai Group is of the view that the Government should consider legislation to address at least the first of these loopholes. In our correspondence to the Premier supporting the tort law reforms, we specifically drew attention to the possibility for jurisdictional leakage to occur, undermining statutory reform measures such as liability caps.

Specifically, incidents where the claimant is covered by workers compensation insurance should be dealt with under the workers compensation system not public liability. The workers compensation system is designed to cater for injuries that occur at work with its concentration on injury management and rehabilitation to return to work. Public liability insurance does not have the same emphasis.

The other problem that has been identified by some of our members is that micro employers are still finding affordable public liability insurance extremely difficult to find. Small employers who often employ less than 5 employees report that a number of domestic insurers are declining to insure them and they are forced to either operate without insurance or consider finding insurance from international providers, often at an exorbitant cost.

We trust this provides you with a picture of some of the issues faced by employers in this area. I am more than happy to speak with you further if you require more information. I can be contacted on 02 9466 5566.

Yours sincerely

Mark Goodsell
Director - NSW