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Insurance insights

Certain contractual indemnities void in Queensland injury claims – some traps for brokers

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Changes to Queensland workers' compensation legislation mean that contractual indemnities previously used (largely by principals with their contractors) to transfer exposure to injury claims onto WorkCover Queensland, as the insurer of the employer of the injured person, are now void.

Large corporates will now look for other ways to transfer that liability, which may create problems for the brokers of SMEs subject to the unequal bargaining power of large principals.

The *Workers' Compensation and Rehabilitation (National Injury) Insurance Scheme Amendment Bill 2016* was passed (with amendment) on 31 August 2016 and assented to on 8 September 2016.

Apart from the provisions to incorporate the National Disability Insurance Scheme within the Queensland workers' compensation framework, the Act removes the ability of a principal to impose contractual indemnities on a contractor, which require the contractor to pay the entire damages claimed by an injured employee even if the principal's negligence caused the loss. This was to overcome the effect of the decision in *Byrne v People Resourcing (Qld) Pty Ltd & Ors* [2014] QSC 39.

The amendments are retrospective and apply to all claims for damages that have not either been settled or where a hearing has not already started.

The pre–amendment situation

The most common scenario in which this occurred was where an employee of a contractor was injured and the contract contained a contractual indemnity whereby the contractor was obliged to indemnify the principal for any damages claimed by the worker, even where the principal negligently caused the loss. These indemnities were more common than generally realised.

Prior to the amendments, in these cases, the contractor was required to indemnify the principal for 100% of the damages, even if in the absence of a contractual indemnity the Court would have apportioned liability on a different basis (for example, 50/50). The contractor could then obtain indemnity for that amount from WorkCover Queensland.

The only exception was any heads of damage excluded from the WorkCover policy by the legislation (for example, gratuitous care). The contractor would then be left with a small shortfall for those amounts. Sometimes the contractor would have cover for the shortfall from its public liability insurer but if the public liability policy excluded claims for liability assumed by contract, the contractor would be left with a small uninsured liability.

The situation now

The amendments are designed to prohibit the contractual transfer of liability for injury costs from non-employers to employers with a statutory workers' compensation insurance policy. The amendments do this by rendering contractual indemnities void in certain situations as set out below.

The amendments apply to any agreement where an employer agrees to indemnify another person for any legal liability of that person to pay damages to the worker. Those agreements will be void to the extent that they have the effect of requiring the employer to indemnify the non-employer for any claim for contribution. In effect, any contractual indemnity that requires the employer to indemnify the non-employer for the non-employer's own negligence will have no effect.

Consequences and potential traps for brokers

Principals that previously relied on contractual indemnities will now increasingly use their unequal bargaining power to require contractors to enter into contracts that require them to take out insurance that indemnifies the principal for injury claims made by the contractor's employees, where the injury arises out of the principal's own negligence.

Some SMEs may not fully understand the consequences of agreeing to those clauses. If the contractor does not take out such a policy, it will have breached the contract and the principal can recover the entire amount of the claim from the contractor.

In circumstances where a policy was taken out but does not respond to that claim the contractor could potentially look to the broker to recover that loss.

Contractors – potential traps

- Has the contractor taken out cover that will effectively indemnify the principal in accordance with its contractual obligations?
- Has the insured entered into such contracts and brought them to the broker's attention? They can be difficult to interpret, especially if an interest is just "noted" – this may not prevent the contract requiring the policy to respond to claims involving negligence of the principal.
- An insured that has entered into such a contract will seek cover for it. Has the broker advised the insured of the effect of any policy term excluding liability assumed by contract? Is the principals extension adequate?

Principals – potential traps

- Has a premium with an insurer been negotiated on the basis that the insured has very strong contractual indemnities in respect of injury claims to employees of contractors?
  - Those indemnities are probably now void;
  - Has the risk agreed to by underwriters changed substantially?
  - Disclosure of the changed contractual protection at renewal is probably required.
  - Principals should be advised to review their contracts to ensure they are adequate in light of these recent amendments.

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