

Between the Lines

November 2017

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Worker to Worker Claims

Worker to Worker (W2W) claims involve a subcontractor or labour hire employee sustaining injury at a work site, typically involving numerous contractors.

How they work

The workplace is often a construction or industrial site. The site and its operations are controlled by a principal, with public liability insurance. Often one or more subcontractors are present on site, either as specialised businesses or via labour hire arrangements. A person is injured in an accident. His or her lawyer realises that it is more lucrative to commence Common Law proceedings rather than purely launching a damages claim against the injured person's employer. This is where jurisdictions restrict access to damages against employers.

Proceedings are commenced against one or more of the parties involved. In our experience, the head contractor is usually joined first. Plaintiffs' lawyers, knowing that joint and several liability exists for personal injury claims in all Australian jurisdictions, often leave it to the defendants to identify and impugn other subcontractors who may be responsible.

Defence Strategies for Public Liability Defendants in W2W Claims

1. Be proactive. Investigate and interview witnesses early. Find out from those witnesses which other contractors were on site and what they were doing. Find out who was in charge of supervision and the system of work. Issue Cross-Claims where those parties are believed likely to bear liability.
2. If your investigations indicate that your insured is not liable, your attempts to persuade the plaintiff to release your insured from the proceedings will be more successful if you can present other defendants who the plaintiff can pursue.
3. Consider a Cross-Claim against the employer, subject to jurisdictional restrictions in claims against employers. The employer is almost always found liable to some extent, given that an

employer's duty of care is non-delegable.

4. Look carefully at responsibilities for training and instruction, and the terms of any labour hire agreement. If your insured was entitled to receive trained, qualified workers – the labour hire employer will be in breach of contract if its workers were unskilled or not properly trained.
5. Have regard to the following defences which have been successfully mounted by defendants in decided cases:
 - a) When acting on behalf of a head contractor, be mindful of *Leighton Contractors Pty Ltd v Fox & Ors and Calliden Insurance v Fox & Ors* (2009) HCA 35.
 - b) If the labour hire employer provides a 'whole service' (i.e. designs and controls the system of work), that entity will usually be solely liable; *Unilever Australia Limited v Pahi & Anor; Swire Cold Storage Pty Ltd v Pahi & Anor* [2010] NSWCA 149.
 - c) In 'freak accident' cases where the system of work does not create the risk of harm, the claim is usually defensible; *Optus Administration Pty Ltd v Glenn Wright by his tutor James Stuart Wright* [2017] NSWCA 21.

Our Recent Experience

Recent examples of our W2W caseload include:

1. Claim by a senior project manager for debilitating injuries sustained from falling through an unsecured penetration on a hospital construction site. Our strategy involved carefully interviewing our insured's director, eventually learning that he sub-contracted the relevant work orally to another company, which enabled us to reduce our client's exposure substantially.
2. Claim by a bricklayer in relation to injuries sustained falling from scaffolding which collapsed underneath him. Our strategy as the principal contractor was to rely on *Leighton Contractors v Fox* and contractual indemnity clauses in re-directing liability from our client to the scaffolding subcontractor, which enabled our client to contribute only a commercial amount towards resolution.

Conclusion

W2W claims are not straightforward. Often there are multiple parties involved. Construction industry contractors regularly go in and out of business, so it is common to find insolvent companies. Contractual documentation is usually voluminous, and construction cases generally involve hundreds of pages of Safe Work Method Statements, site diaries and 'toolbox meeting' records. Despite the paperwork, evidence as to the accident itself usually can only be established

by evidence from other workers – if they can be found. It is common to get conflicting reports as to how an accident happened, or who was responsible for what duties on site. On quantum, there are usually hundreds of pages of Workers Compensation records to digest by the time the public liability claim is in action.

With our experience in acting for defendants in W2W proceedings, Thompson Cooper Lawyers is ideally placed to assist in responding to such claims.

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