General Liability

Emerging Talent Series (Part 3)

Shaping the future of insurance law

Key Issues & Jurisdictional Nuances

29 April 2021

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SUMMARY PACK

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RESOURCES

Video recording of the session:

https://vimeo.com/543382385/f75e49f03a

Presentation slides:

https://online.flippingbook.com/view/85944020/

Other W+K articles and insights:

https://www.wottonkearney.com.au/knowledge-hub/

FEEDBACK & QUESTIONS WELCOME!

We welcome any feedback you have on the presentation materials, format, or what could be done to improve the next session in our Emerging Talent Series. If you have any feedback or further questions, please don't hesitate to **email one of our presenters**.

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KEY TAKEAWAYS

- ✓ Take a methodical approach to determining whether a claim is covered.
- ✓ Limitation periods enforceable however extensions are (relatively) easy to obtain
- ✓ DRA defence very difficult to establish due to narrow conception of risk; in practice it has added little to the common law
- ✓ High incidence of Worker to Worker claims expected to continue, along with high deductibles
- ✓ Contractual transfer of risk is difficult to establish, absent an express requirement to indemnify for Party A's 'own negligence' or include Party A as a named insured
- ✓ Settlement agreements capable of being set aside, however a high bar is applied; specific facts of settlement highly relevant

Q&A

What views do you have on internal labour hire and how to manage this?

In short, internal labour hire (being where an entity provides its own labour-hire workforce via a related entity for the completion of works) is still 'labour hire'. The same issues presented by 'traditional' labour hire arrangements will arise including claims by typically young and inexperienced workers, and the prevalence of 'Worker to Worker' type claims (and associated policy considerations). Where the internal labour hire arrangement results in:

- a significant proportion of the host employer's workforce being direct employees of the employer (potentially including supervisors, managers and/or trainers); and/or
- the employer having a more intimate knowledge and understanding the host employer's business (and associated risks of injury).

we can argue for a greater than usual apportionment of liability to the employer.

Q&A

The three-year statute of limitations period is already too long and makes it very difficult for defendants to mount a defence. The ease with which plaintiffs can then get a court to waive any statute of limitations renders them meaningless. Would it be better to move to a PIPA type regime, where a claimant at least has to notify the defendant of a claim within 9 months? (even if courts do have a propensity to waive PIPA notice periods in any case).

- The timeframes in section 9 of the Personal Injuries Proceedings Act 2002 (Qld) tend to result in early service of the notice of claim, and an associated early opportunity to investigate the loss and Claimant.

- The questioner is correct that courts will waive the 9 month notice period in response to any meaningful explanation offered by the Claimant, as long as the claim is served within the broader 3 year limitation period. In practice, the only potential 'hard' deadline in Queensland remains the 3 year limitation period. If that were removed and replaced with a 'soft' notification deadline of 9 months or some other period, we suspect the courts would be equally willing to waive late notice, meaning potential defendants would have no protection against grossly delayed claims.

- On balance we think the combination of both a 'soft' notification timeframe of 9 months coupled with the 'hard' 3 year limitation period provides the best outcome (despite the difficulties identified in the presentation with resisting extensions). Naturally the extension of that dual system into other States would likely provide a net benefit to defendants.

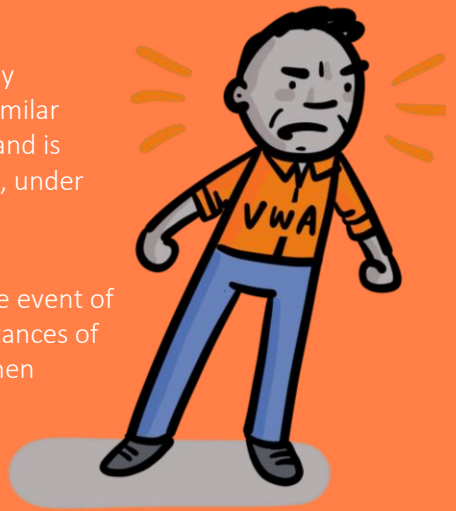
Q&A

What if the claimant is doing "work experience"? For example, a Tafe student.

- A work experience placement is not a traditional labour hire scenario, because there is unlikely to be an employer of the student which can be sued. It has been argued that the educational organisation owes a duty to take reasonable steps to ensure the safety of the placed student. The primary issue for determination is the same as a traditional labour hire claim: the degree to which each entity was capable of controlling the relevant risk. The host employer will invariably have the vast majority or sole control over relevant risks. As the educational organisation's duty of care would be delegable (as opposed to an employer's non-delegable duty), it is very likely all liability for injury to a work experience student would rest with the host. The application of a worker to worker excess to this scenario would be questionable, and would depend on the policy definition supporting the higher excess.

- A workers compensation recovery will be available whenever an employer has paid compensation (i.e. weekly payments, medicals) to an injured 'worker' as a result of a workplace injury. The definitions of 'worker' are similar around the nation and are usually quite broad (i.e. any person to whose service an industrial award applies and is engaged by another person for work for the purpose of trade or business for which compensation is payable, under section 5 of the Workers Compensation & Injury Management Act 1981 WA).

- If the injured worker was a work experience / Tafe student, whether workers compensation is available in the event of an injury (and therefore, whether compensation is paid and a recovery available) would turn on the circumstances of that work experience arrangement. If the student is merely attending on site with no formal arrangement, then workers compensation is likely to be unavailable in the event of injury.



UPCOMING FINAL SESSION:

- Session 4: **Quantum Regimes by State** (20 May) Save the date to calendar

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