Submission to the Education, Tourism, Innovation and Small Business Committee on the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016*

SUMMARY

Master Builders' submission on the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016* ("the Bill") is confined to the sections of the Bill that set out to reverse the decision in *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269 ("the Byrne decision"). The amendments prohibit the contractual transfer of liability for injury costs from principal contractors or host employers to employers with a workers' compensation insurance policy[1].

The Byrne amendments must be read and interpreted against the liabilities of Principal Contractors and host employers for the injured employees of another employer (such as a subcontractor/labour hire company/Group Training Organisation) in a contractual relationship with the Principal Contractor/host employer. Subcontracting is part of the nature of the construction industry (whether constructing a multi-million dollar high-rise building or a single house) and results in a complex system of contractual arrangements, risk allocations, insurances and indemnities between the different stakeholders involved in a construction projects throughout the life of a project. The Byrne amendments impact directly on these established contractual arrangements between construction industry participants and will potentially affect all employers within the industry. The Byrne amendments will also affect all industries where there are subcontracting, labour hire and Group Training Organisations involved in the engagement of workers.

The *Workplace Health and Safety Act 2011 (Qld)* (WHSA) assigns statutory liability and a duty of care to all Principal Contractors for the workers on a construction site, and Principal Contractors therefore have significant duties of care and potential liability for injuries to any of the workers on the site under their control, irrespective of whether or not there is a direct employment relationship with the workers on site. This means that when an injured worker sues for common law damages, in most cases the Principal Contractor as well as the worker's employer will be sued. The resultant litigation is complex, lengthy and very costly and has created a significant amount of complicated legal precedent, of which the Byrne decision is but one example.

As the *Workers' Compensation and Rehabilitation Act 2003 (Qld)* (WCRA) currently stands, the Principal Contractor is, however, not covered by WorkCover for common law damages claims brought by injured employees of subcontractors or labour hire employers. Therefore, despite the WHSA creating a basis for Principal Contractor liability for common law damages claims, Principal Contractors are shut out of WorkCover coverage.

There are construction sites in Queensland at this very moment where the Principal Contractor has a WorkCover policy, the subcontractor has a WorkCover policy, but should an employee of the subcontractor be injured on that site, both the

[1] Explanatory Notes Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016, p. 4.

subcontractor and the Principal Contractor may be wholly uninsured or underinsured against a common law damages claim. This defeats the original intention of the Workers' Compensation scheme since 1990, which was to capture all liabilities for worker injuries. Equally worrying about this state of affairs is that all three parties concerned (Principal Contractor, subcontractor and injured worker) may make the incorrect assumption that the claim is ultimately covered by WorkCover.

Due to Principal Contractors and host employers being excluded from WorkCover coverage, the industry has responded by relying on a combination of contractual risk transfers (including the use of indemnity clauses) and Public Liability Insurance in an attempt to cover the "gap" created in WorkCover. These responses to cover the "gap" has led to sub-optimum outcomes in the industry, and further negative flow-on effects for employers and injured workers.

Principal Contractors and host employers have not always been excluded from WorkCover coverage for these types of claims, and other jurisdiction have provided solutions to accommodate the unique contracting arrangements within the construction sector.

Master Builders urges the Committee to recommend a thorough review process to find the most suitable and fair solution for all parties concerned. The legal issues are extraordinarily complex, it affects numerous industries and is worthy of an inclusive and consultative process to secure a workable and fair solution to all involved.

The Byrne amendments themselves are only aimed at limiting the workers' compensation scheme's liability, in the same way that private insurers commonly exclude contractual liabilities from their standard cover. An analysis of the impact of the Byrne amendments show a number of unintended consequences that will expose injured workers' claims to uninsured employers. Master Builders contend that the proposed amendments do not resolve the underlying issue of uninsured or underinsured Principal Contractors and subcontractors but in actual fact may exacerbate the problem. Master Builders also contends that allowing the Byrne amendments to operate retrospectively is manifestly unfair and creates significant exposure for employers to be uninsured for events that have occurred up to three years ago.

Until the underlying issue of the exclusion from WorkCover of Principal Contractors and host employers is addressed, piecemeal amendments to the WCRA will continue to be ineffective and result in unjust outcomes for subcontractors, host employers, Principal Contractors and injured workers.

SCOPE AND CONTENT OF THIS SUBMISSION

The State Government in enacting the 2011 Productivity Commission recommendations for a National Injury Insurance Scheme ("NIIS") which operates alongside the National Disability Insurance Scheme ("NDIS") and to this effect introduced the Bill.

This submission does not address any of the provisions in the proposed Bill dealing with the NIIS. Rather, it is limited to a wholly unrelated set of proposed amendments, placed within this Bill, which deals with the discreet issue of parties' liability for contractual indemnities for worker injuries.

According to the Explanatory Notes, these unrelated amendments are intended to restore the original policy intent of the scheme by overriding recent Queensland court decisions including the judgement in Byrne. The amendments prohibit the contractual transfer of liability for injury costs from principal contractors or host employers to employers with a workers' compensation insurance policy[2]. The totality of amendments contained in the Bill aimed at reversing the Byrne decision will hereafter be referred to as "the Byrne amendments" and this submission deals only with the Byrne amendments.

[2] Explanatory Notes Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016, p. 4.

This submission is divided into three parts:

- **Part A: What is the issue that the Byrne amendments are attempting to address?**

  In order for the Committee to understand the impact of the Byrne amendments, it is important to appreciate the organisation of work on a construction site. The inherent nature of the industry and the current legislation result in Principal Contractors and host employers being excluded from WorkCover coverage for common law damages claims brought by injured employees of another employer – this is the underlying issue that needs to be addressed. As a direct result of this exclusion from WorkCover coverage the industry response has been to rely on Public Liability insurance and the use of contractual indemnities to manage their risks. Both of these responses result in sub-optimum outcomes for the industry and create negative flow-on effects for injured workers. It is also important to understand that the Byrne amendments will impact all host employers across numerous other industries (and in particular the mining and transport industries) as well as all host employers of apprentices and trainees in Queensland.

- **Part B: A Workable Solution is required**

  In Part B Master Builders contends that what is required is a focus on resolving the underlying issue of the exclusion of Principal Contractors and host employers WorkCover coverage for certain types of claims. In previous iterations of the WorkCover legislation Principal Contractors and host employers were covered by WorkCover. Further, other jurisdictions have successfully addressed the issue: In Western Australia, Tasmania and the Northern Territory a contractor is deemed to be the employer of all workers engaged by their subcontractors. There are numerous pathways to achieve WorkCover coverage for Principal Contractors and host employers, such as: amending the definition of "employee" in the legislation, using deeming provisions, extending existing Principal Contractor's WorkCover policies or introducing a new separate cover designed specifically for Principal Contractors and host employers.

- **Part C: Comments on the proposed Byrne amendments**

  In Part C the impact of the proposed Byrne amendments is analysed, including cost imposts on the industry and a number of presumed unintended consequences of the current draft wording, which will put subcontractors and injured workers at a disadvantage. Master Builders further contends that the retrospective nature of the proposed amendments is patently unfair to all parties and the Bill therefore does not conform with the fundamental legislative principles of having regard to the rights and liberties of individuals.

PART A: WHAT IS THE ISSUE THAT THE BYRNE AMENDMENTS ARE ATTEMPTING TO ADDRESS?

The Byrne amendments must be read and interpreted against the liabilities of Principal Contractors and host employers for the injured employees of another employer (such as a subcontractor/labour hire company/Group Training Organisation) in a contractual relationship with the Principal Contractor/host employer. In order to understand the practical implications of the proposed amendments, an understanding of the organisation of work on a construction site and the accompanying coverage of WorkCover is essential.

The Organisation of Work on a Construction Project

Subcontracting

The normal arrangement of work on a construction project, whether it involves the construction of a large multi-million dollar project or a single residential dwelling, involves at least the following parties:

1. A Person in Control of a Business or Undertaking (a PCBU, as defined in the *Workplace Health and Safety Act 2011 (QLD)* ("the WHSA");
2. A Principal Contractor (as defined in the WHSA and commonly referred to as the builder);
3. Subcontractors (who typically employ their own employees, often within a specific trade) and/or host employers (such as labour hire companies or Group Training Organisations who employ apprentices and trainees); and
4. Employees of the different employers (Principal Contractor, subcontractor/s and host employer/s).

The Construction industry has always relied on a range of contracting and subcontracting arrangements to complete a construction project. Multiple employers are engaged on a single project, each contributing in its own area of expertise and employing its own workforce. Even on small residential construction projects a builder will rely on, for example, an earthmoving subcontractor, an electrical subcontractor and a landscaping subcontractor to complete distinct components of the construction project.

A subcontracting chain is therefore the inescapable reality of every construction project, regardless of the size of the project. The nature of construction projects is reflected in the way the WHSA assigns obligations and duties of care between employers, Principal Contractors and PCBU's. Subcontracting results in a complex system of contractual arrangements, risk allocations, insurances and indemnities between the different stakeholders involved in a construction projects throughout the life of a project.

The Byrne amendments impact directly on these established contractual arrangements between construction industry participants and will potentially affect all employers within the industry.

Labour Hire

One distinct group of employees on a construction site are labour hire employees. In April 2016 Master Builders made submissions in response to the Queensland Parliament's Finance and Administration Committee (FAC) Inquiry into the practices of the labour hire industry in Queensland. As part of the submissions into this inquiry, the Office of Industrial Relations (OIR), Queensland Treasury provided written brief containing background information on the labour hire industry (hereafter referred to as the "OIR Brief"). According to the OIR Brief labour hire employees make up a small minority of employees within the

construction industry: the number of labour hire workers to all workers in the building and construction industry is 1.8% and trending down over the past 3 years.[3] This downward trend is confirmed by our members, who believe there is a permanent reduction in activity in labour hire services.

The largest concentration of labour hire workers in Queensland are found in the manufacturing industry (17.3%), followed by mining (13.57%), public administration and safety (8.5%) and then construction (7.2%). Although labour hire employers will, like all employers in the construction sector, be impacted by the Byrne amendments, under legislation they are treated no different in relation to their liability for injured workers than other employers. The Byrne amendments impact in the same way on subcontractor and labour hire companies.

Unique Role and Obligations of a Principal Contractor

The Byrne amendments essentially deal with liability allocation in relation to a common law damages claim by an injured worker against a Principal Contractor or host employer. For common law damages claims to succeed, negligence must be proven. And for negligence to be proven, it must be shown that the negligent party had some underlying duty of care towards the injured party. The WHSA assigns statutory liability and a duty of care to all Principal Contractors for the workers on a construction site, irrespective of whether the Principal Contractor is that worker's direct employer or not.

In simplified terms, under the WHSA a person conducting a business or undertaking (PCBU) that commissions construction work valued at $250,000 or more (often referred to as the client) is also the Principal Contractor. There is only one Principal Contractor for every construction project, and the role carries with it significant obligations under the WHSA.

It is also important to note that Principal Contractors are not just large commercial building companies. The following are examples of Principal Contractors as defined in the WHSA:

- An owner-builder constructing his own house where the value exceeds $250,000;
- A small residential builder who has been appointed the Principal Contractor by the PCBU if constructing a house where the value exceeds $250,000.

Chapter 6 of the *Workplace Health and Safety Regulation 2011 (Qld*) ("the Regulations") gives rise to Principal Contractor duties for a construction project. Under Part 6.3 of the Regulations a Principal Contractor also has dual duties as a PCBU.

The duties of a Principal Contractor as specified in Part 6.4 of the Regulations generally relate to the management and coordination of activities concerning health and safety at a particular workplace. A Principal Contractor must, with respect to the relevant construction project:

- display signage showing its name and contact details;
- prepare and review a written WHS management plan (WHSMP) in relation to the work;
- inform all persons carrying out construction work of the WHSMP;
- obtain copies of, and review, safe work method statements (SWMSs) for any construction work that is designated as high risk under the WHS Regulations;
- manage risks related to:
    - storage, movement and disposal of materials and waste;
    - storage of plant not in use;
    - traffic in the vicinity of the workplace; and
    - essential services.
- Ensure that general construction induction training is provided for workers who carry out construction work.

[3] See page 3 of the Submission from The Office of Industrial Relations, Queensland Treasury (the OIR Brief)

A Principal Contractor has liability to the extent that they have management and control of the activities undertaken on the construction site and will be liable for the actions of their subcontractors to the same extent.

Under the WHSA, Principal Contractors therefore have significant duties of care and potential liability for injuries to any of the workers on the site under their control, irrespective of whether or not there is a direct employment relationship with the workers on site. This means that when an injured worker sues for common law damages, in most cases the Principal Contractor as well as the worker's employer will be sued.

WorkCover coverage on Construction Projects

The *Workers' Compensation and Rehabilitation Act 2003 (Qld)* (WCRA) requires that every Principal Contractor, subcontractor and host employer on a construction site must have a WorkCover policy to cover their own employees. An employer's WorkCover policy covers any costs that may be incurred from their employee's work related injuries, including the costs of statutory compensation under the WCRA and the costs of any common law claims made against the employer.

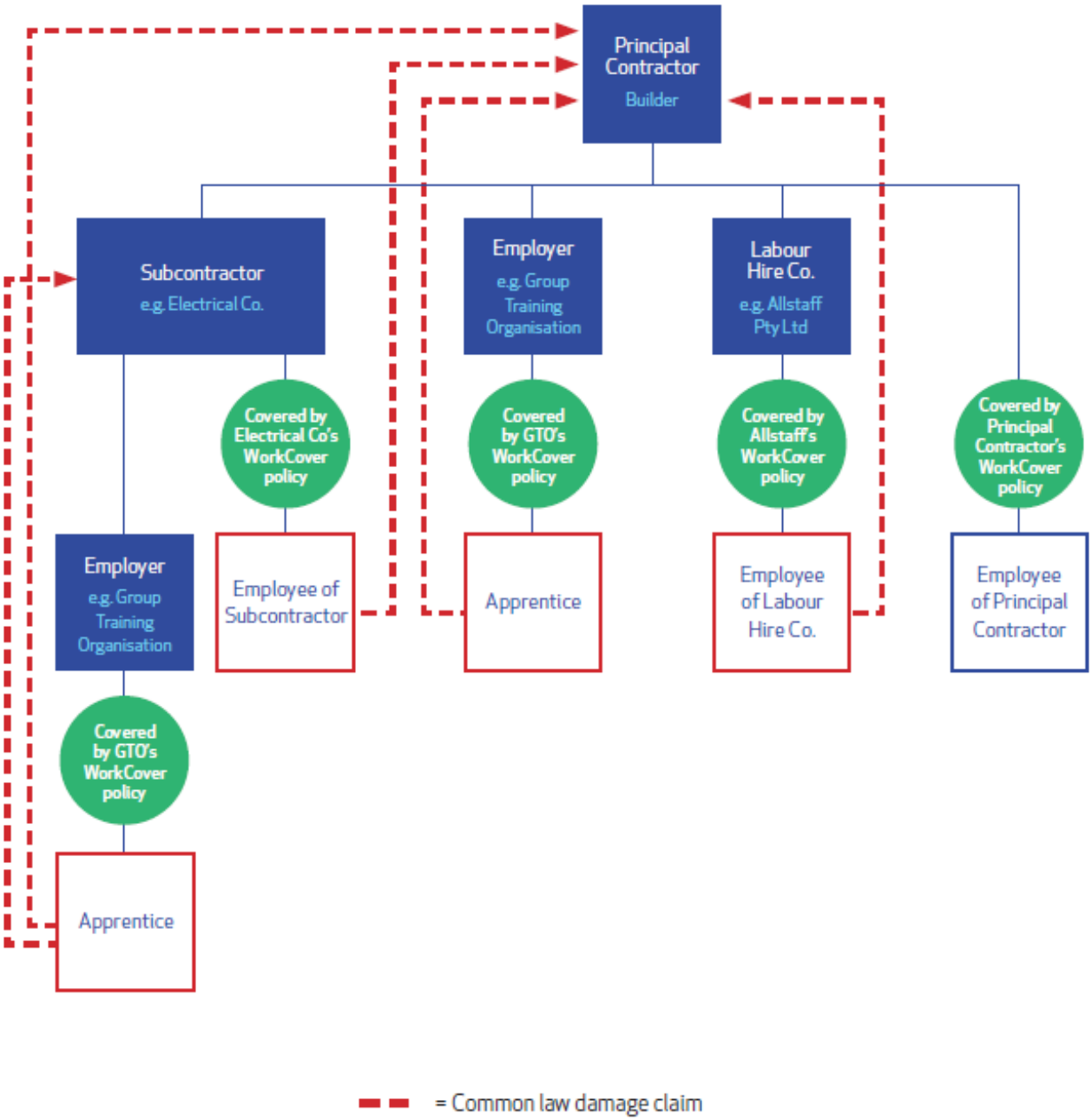
Principal Contractors are excluded from WorkCover coverage for common law claims

As the WCRA currently stands, the Principal Contractor is, however, not covered by WorkCover for common law damages claims brought by injured employees of subcontractors or labour hire employers. This is because the Principal Contractors' WorkCover policy can only cover its *own* employees. Under section 11 of the WCRA, an "employee" is defined in accordance with the ATO definition of an employee and must be an individual. (This is in contrast to the WHSA's section 7 which has an extended meaning attached to "worker" and includes employees of subcontractors, employees of labour hire companies as well as apprentices).

Therefore, despite the WHSA creating a basis for Principal Contractor liability for common law damages claims, Principal Contractors are shut out of WorkCover coverage.

To complicate matters further, the *Civil Liability Act 2003 (Qld)* and its various amendments, in conjunction with the WCRA, allows an injured worker to pursue non-employers under the *Personal Injuries Proceedings Act 2002 (Qld)* (PIPA). Principal Contractors and host employers are therefore exposed to common law damages claims under both the WCRA and PIPA. The extent and nature of damages that can be claimed under each piece of legislation differs, and as PIPA respondents, Principal Contractors' are exposed to significantly higher common law damages and costs than other employers under the WCRA.

It should also be noted that the contractual chain, even on smaller construction projects, may consist of several layers of contractors, subcontractors and sub-subcontractors. The diagram (1) below illustrates, in simplified format, the current exposure of Principal Contractors and host employers in the contractual chain to claims made for or on behalf of employees of subcontractors:



Where a worker is injured on site and elects to bring a common law damages claim (based on negligence), the worker may choose to bring such a claim only against his/her own employer or only against the Principal Contractor or against both. The injured worker may bring the claim under WCRA or PIPA, or both. Under common law principles of tort each of the parties is *in solidum* liable for the total damages claim[4], even where both employer and Principal Contractor are sued. Where both employer and Principal Contractor are sued, the Courts will, based on the findings of contributory negligence, apportion liability for the damages claim between the two parties. The employer's WorkCover policy will provide coverage for these types of claims, but the Principal's WorkCover policy will not.

[4] See High Court decision in *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR228.

If the worker decides to only bring a claim against his/her own employer, that employer can cross claim against the Principal Contractor on the basis of contributory negligence under principles of tort. If the worker decides to bring a claim only against the Principal Contractor, the Principal Contractor can similarly cross claim against the employer based on contributory negligence. The resultant litigation is complex, lengthy and very costly and has created a significant amount of complicated legal precedent, of which the Byrne decision is but one example.

Construction Industry's response to being excluded from WorkCover

Due to Principal Contractors and host employers being excluded from WorkCover coverage, the industry has responded by relying on a combination of contractual risk transfers (including the use of indemnity clauses) and Public Liability Insurance in an attempt to cover the "gap" created in WorkCover. These responses to cover the "gap" have led to sub-optimum outcomes in the industry, and further negative flow-on effects, as discussed below.

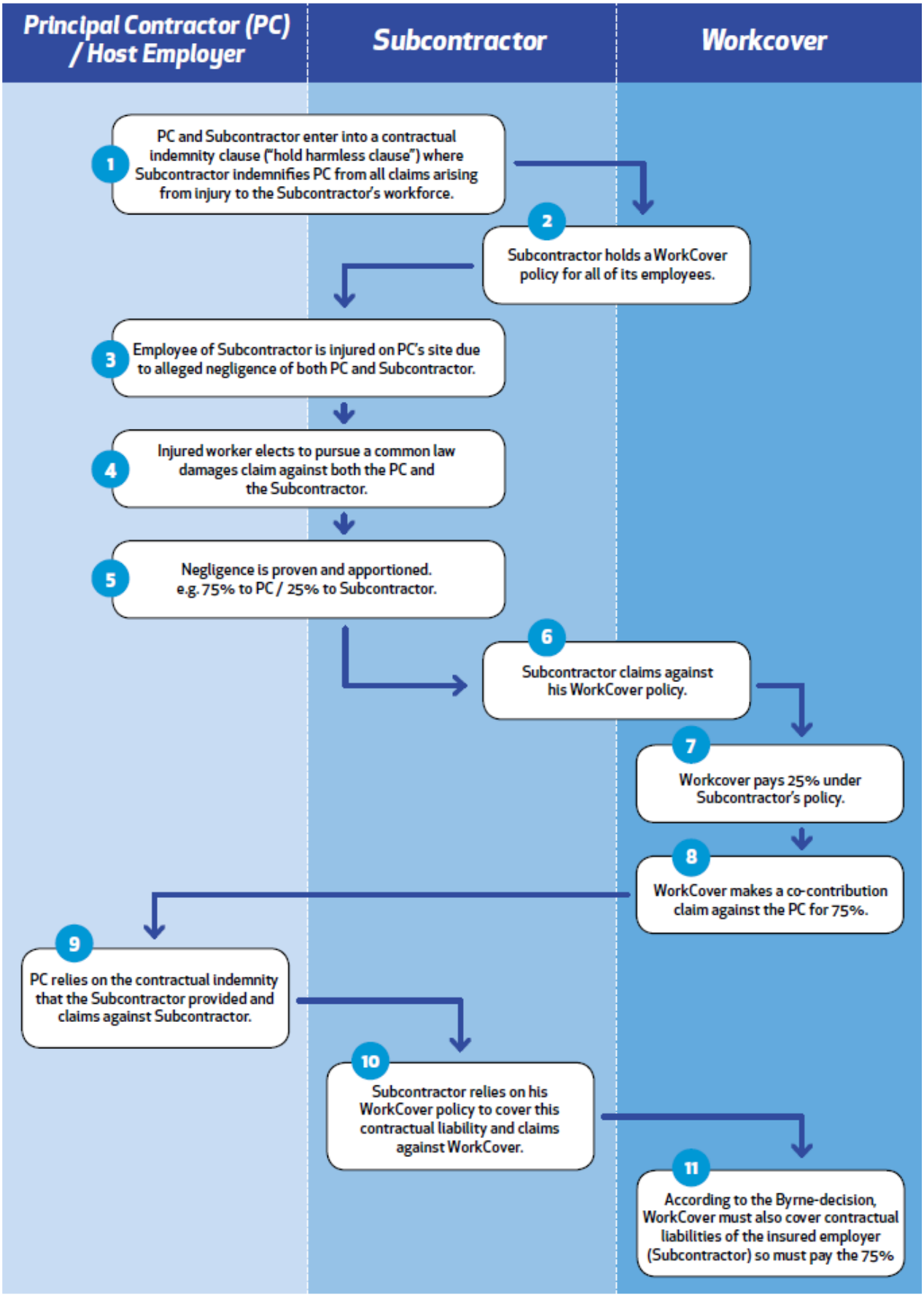
Use of contractual indemnities to cover the risk

Some larger Principal Contractors and host employers use indemnity clauses to deflect any liability for worker injuries to the worker's direct employer. As the direct employer already has mandatory WorkCover coverage for all its employees, many in the industry view this practice as a fair apportionment of risk.

Commonly referred to as "hold harmless clauses", these indemnity clauses vary widely in terms of scope and application. There is no "standard" indemnity clause used within the industry and injuries to workers are but one of a number of types of damages listed for which indemnity is given. Some include indemnity against liability for the proportionate wrongdoing of the Principal Contractor, whereas others only provide indemnity to the extent of damages incurred due to "failure to insure" (where under the contract a subcontractor has agreed to obtain public liability insurance for injuries to its own workforce) and does not cover damages due to the negligence of the Principal Contractor. A wide variety of indemnity type clauses have become a common inclusion in construction industry contracts. (It is also not uncommon for subcontractors to enter into "sideways" indemnity clauses, where subcontractors working on the same project indemnify each other from claims arising from each other's injured workers).

In the Byrne decision an indemnity clause between the Principal Contractor and a subcontractor was applied, which lead to the subcontractor claiming his contractual liability to the Principal Contractor from Workover. The legal precedent upon which the Byrne decision relied is that of the High Court decision in *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR228, where it was found that the employer with the WorkCover policy remains liable for 100% of a common law damages claim irrespective of the presence of co-tortfeasors, and therefore WorkCover's coverage extends to the full liability faced by the employer. The Byrne decision did not make new law, but simply followed the existing precedent on tort law which has been in place for many decades.

From a subcontractor's perspective, the Byrne decision therefore had the effect of potentially decreasing the subcontractor's exposure to pay damages out of its own pocket (due to the effectively uninsurable nature of contractual liabilities – see discussion below). The diagram (2) below illustrates, in a very simplified manner, the typical flow of a common law damages claim where a contractual indemnity was provided and the Byrne decision was applied:


Principal Contractor (PC) / Host Employer
Subcontractor
Workcover
1
PC and Subcontractor enter into a contractual indemnity clause ("hold harmless clause") where Subcontractor indemnifies PC from all claims arising from injury to the Subcontractor's workforce.
2
Subcontractor holds a WorkCover policy for all of its employees.
3
Employee of Subcontractor is injured on PC's site due to alleged negligence of both PC and Subcontractor.
4
Injured worker elects to pursue a common law damages claim against both the PC and the Subcontractor.
5
Negligence is proven and apportioned. e.g. 75% to PC / 25% to Subcontractor.
6
Subcontractor claims against his WorkCover policy.
7
Workcover pays 25% under Subcontractor's policy.
8
WorkCover makes a co-contribution claim against the PC for 75%.
9
PC relies on the contractual indemnity that the Subcontractor provided and claims against Subcontractor.
10
Subcontractor relies on his WorkCover policy to cover this contractual liability and claims against WorkCover.
11
According to the Byrne-decision, WorkCover must also cover contractual liabilities of the insured employer (Subcontractor) so must pay the 75%

The use of indemnity clauses to address the lack of WorkCover coverage for Principal Contractors and host employers is a problematic solution, because:

- The drafting of contractual indemnity clauses requires precise wording and difficulties are often encountered when their scope and application are interpreted in legal proceedings. The legal precedent is to "read down" indemnity clauses, which means that Principal Contractors and host employers who rely on these clauses often have little certainty as to whether the clause has legal effect in shifting risk or not.

- Larger companies tend to make indemnities and waivers a condition of contract and the contractor is often not in a position to negotiate or refuse, for fear of losing the opportunity of engagement.

- This in turn, impacts negatively on small to medium sized employers, because indemnity clauses create a contractual liability for the subcontractor, which the subcontractor in turn will find very hard to insure against. A cursory review of the standard cover provided by insurers most commonly used in the construction industry reveals that none of the following insurers offer contractual liability insurance as part of their standard terms: Allianz (Business Pack Policy), CGU Insurance Limited (Broadform Liability Insurance Policy), QBE Trades Pack (Broadform Liability Section), Vero (Part of the Suncorp Group) (Mobile Business Insurance Policy) and Youi (Business Liability Policy). In practice this means that subcontractors, possibly unbeknownst to them, are likely to be uninsured for the contractual liabilities they have assumed.

- A further review of the standard cover provided by insurers (as listed above) reveals that none of these insurers offer as part of their standard terms coverage for claims arising from employer liability. Thus, an employer (subcontractor) will find it very difficult to obtain insurance cover for claims arising from an injury to its own employee. This is a result of the fact that workers' compensation policies are compulsory. Again, the employer will find itself uninsured.

- Some liability insurance policies may provide cover for contractual liabilities, however as demonstrated above, it is not a standard cover. Therefore, terms are normally offered only upon request and payment of additional premium. The extent of the cover, if provided, can also vary greatly and may not cover all contractual liabilities.

Use of Pubic Indemnity Insurance to cover the risk

The industry also makes use of Public Liability insurance to cover the risk of injuries to workers not covered by their own WorkCover policy. General feedback obtained from insurers in the construction industry reveals the following about worker to worker claims in Public Liability insurance policies:

- The average worker to worker Public Liability insurance claims cost is $200,000.
- Worker to worker claims account for one third of bodily injury claims in numbers, but two thirds of claims in costs.
- The excess ranges imposed by Public Liability Insurers for worker to worker claims:

Small Contractors	$2,500 to $25,000
Medium – large Contractors	$25,000 to $50,000
Major Contractors	$100,000 to $250,000

The use of Public Liability insurance to address the lack of WorkCover coverage for Principal Contractors and host employers is a problematic solution, because:

- This type of insurance is not readily available to smaller Principal Contractors or host employers, as it is usually excluded from standard form policies.

- Small employers and their representatives do not possess the same resources as larger employers to review and interpret complex contracts and insurance obligations. Interactions between contractual indemnity provisions and insurance coverage create uncertainty, and often the risk unknowingly remains uninsured.

- The cost of this type of insurance has become prohibitive, as has the excess payments typically attached to this type of coverage. The cost of arranging insurance for smaller Principal Contractors and a host employer is generally disproportionate to the risk.

Not only a construction industry issue

The Byrne amendments will affect all businesses that "employ" workers through a labour hire arrangement. The OIR Brief provided a detailed analysis of the prevalence of labour hire in Queensland and reported that in September 2014 there were 103,900 persons in Queensland who found their job through a labour hire firm or employment agency. There was a broad presence across the occupational groups with 20,100 (19%) clerical and administrative workers, 19,900 (19%) technicians and trade workers, 18,700 (18%) professionals, 15,400 (15%) machinery operators and drivers, 14,600 labourers (14%). There were 13,900 (13%) workers who identified as public sector workers and 90,600 (87%) who identified as private sector workers. These workers are employed across all industries with Manufacturing (11,200 persons, 11%), Construction (10,900 persons, 10%), Health Care and Social Assistance (9,400 persons, 9%) and Public Administration and Safety (9,300 persons, 9%) accounting for a significant proportion of the total.

Furthermore, the Byrne amendments will also affect all employers across Queensland engaging host apprentices or trainees. For the quarter ending December 2015, the National Centre for Vocational Education Research (NCVER) reported a total of 60,914 apprentices and trainees 'in training' across all industries in Queensland. Of those approximately 8% (4,577) are employed by a Group Training Organisation. Of this total there are 25,398 apprentices and trainees currently undertaking a construction related qualification, of which 12% (3,140) are employed through a Group Training Scheme[5]. Based on data provided to Master Builders by the Apprentice Employment Network, an apprentice or trainee engaged by a group training scheme may work with up to 10 host employers across the duration of their training contract. This results in up to 31,400 host employers taking on an apprentice or trainee to assist in the attainment of their construction related qualification.

Although the organisation of work in the construction industry means that the Byrne amendments will particularly affect all employers in the industry, all labour hire employers and employees, Group Training Organisations, host employers and apprentices throughout Queensland will also be affected by the proposed changes.

[5] National Centre for Vocational Education Research (2016) *Apprentices and trainees 2015 - December quarter*. Retrieved From https://www.ncver.edu.au/publications/publications/all-publications/apprentices-and-trainees-2015-december-quarter

PART B: A WORKABLE SOLUTION IS REQUIRED

A reversal of the Byrne decision as proposed in the Bill will not address the underlying problem: under common law Principal Contractors and subcontractors remain exposed to significant damages claims arising from workplace injuries, despite the operation of WorkCover.

Principal Contractors and host employers have not always been excluded from WorkCover coverage for these types of claims, and other jurisdiction have provided solutions to accommodate the unique contracting arrangements within the construction sector.

There are construction sites in Queensland at this very moment where the Principal Contractor has a WorkCover policy, the subcontractor has a WorkCover policy, but should an employee of the subcontractor be injured on that site, both the subcontractor and the Principal Contractor may be wholly uninsured or underinsured against a common law damages claim. This defeats the original intention of the Workers' Compensation scheme since 1990, which was to capture all liabilities for worker injuries. Equally worrying about this state of affairs is that all three parties concerned (Principal Contractor, subcontractor and injured worker) may make the incorrect assumption that the claim is ultimately covered by WorkCover.

Master Builders contend that the underlying problem of the exclusion of Principal Contractors and host employers from WorkCover for common laws damages claims needs to be addressed. To this effect, numerous solutions present themselves and Master Builders urges the Committee to recommend a thorough review process to find the most suitable and fair solution for all parties concerned. The legal issues are extraordinarily complex, it affects numerous industries and is worthy of an inclusive and consultative process to secure a workable and fair solution to all involved. Below follows a brief summary of a number of solutions that may be worthy of consideration during such a review:

The solution in place for the period 1990 - 1997

The issue of including Principal Contractors and host employers is not new to the Queensland's workers' compensation scheme. Following the 1990 reforms, the scheme extended indemnity to host employers and Principal Contractors until 1997. In the original legislation a Principal Contractor was deemed to be the employer of a subcontractor's employees through the use of the following definition:

> *"When a contract is made between a principal and a contractor for work to be carried out and workers are used in carrying out the work, or any part of it:*
>
> > *(a) the principal is hereby declared to be an employer of every such worker used in carrying out work in performance of the contract, or in performance of any other contract made with a view to carrying out the work for which the first mentioned contract is made, or any part of that work;*
> >
> > *(b) the cover of a policy maintained by the principal with the Board extends to indemnify the principal against the principal's legal liability existing independently of this Act to pay damages in respect of injury to any such worker while used in carrying out work for which the contract is entered into, or any part of that work."*

In 1997 the definition was changed to exclude Principal Contractors and until 2014 the scheme recovered proportionate liability contributions from host employers and Principal Contractors in direct contradiction to its original inclusive objectives. This practice by scheme insurers including WorkCover Queensland resulted in a growing number of uninsured Principal Contractors, host employers and subcontractors.

Master Builders' Proposals in 2013

The 2013 FAC inquiry considered submissions from Master Builders regarding the issue of host employers and Principal Contractors. In its submission Master Builders proposed that host employers and Principal Contractors should be covered under their own WorkCover policy and that WorkCover should manage the entire claim and apportion liability between the two WorkCover policies. Master Builders identified that restoring common law coverage as previously provided by the repealed *Workers' Compensation Act 1990 (Qld)* for host employers and Principal Contractors will deliver a number of key advantages to the Workers Compensation Scheme in Queensland including:

1. Significant efficiencies and cost reductions are gained through dealing with one insurer (WorkCover Queensland) delivering faster claim resolution, capturing additional premiums for the Insurer, delivering larger claim payments to workers, and proportionate liability split between the host employer or Principal Contractor and subcontractor employers allowing for premium assessment on claims history.

2. Removing the operation of the *Personal Injuries Proceedings Act 2002(Qld)* preventing the recovery of plaintiff lawyers' costs and ensures damages are assessed under the *Civil Liability Act 2003 (Qld).*

3. The advantage of a single Insurer will allow joint responsibility for rehabilitation where the Principal Contractor is better resourced to manage the process and possess a wider range of alternative duties producing a better return to work outcome for the Industry.

The 2013 FAC report confirmed the Department acknowledged that Public Liability insurers are increasingly excluding this type of cover from their policies so host employers will potentially be uninsured for these types of claims.[6] The FAC recommendations in May of 2013 included **Recommendation 32:**

> *'The Committee recommends that the Attorney-General and Minister for Justice investigate the financial implications of the suggested alternative methods offered before addressing this anomaly.'*[7]

Solutions in Other Jurisdictions

In Attachment 2 of the OIR Brief a table is provided which provides a jurisdictional comparison of circumstances in which a contractor may be deemed the employer of a labour hire or subcontractor's workers. An analysis of the table shows that Queensland is the only state where there are no circumstances under which a contractor may be deemed to be an employer of a subcontractor's employees.

Master Builders acknowledges that there are differences in how workers' compensation schemes operate in other jurisdictions, and wholesale adoption of a solution used in another jurisdiction may be ill advised. However, the nature of the construction industry, and the problem of coverage for Principal Contractors are of course similar in all jurisdictions, and it is therefore useful to analyse successful approaches in other States.

In Western Australia, Tasmania and the Northern Territory a contractor is deemed to be the employer of all workers engaged by their subcontractors. In Victoria only individuals engaged by the contractor in dependant subcontractor arrangements are deemed to be workers of the contractor. In New South Wales, ACT and South Australia, only when a subcontractor does not hold insurance at the time the worker is injured, is the contractor deemed to be the employer.

The WA workers' compensation scheme appears to address the issue of coverage for Principal Contractors most comprehensively. Section 175 of the relevant legislation is designed to protect sub-contractors engaged in contractual arrangements which involve more than one employer:

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[6] Inquiry into the Operation of Queensland's Workers' Compensation Scheme' Report No. 28, page 223
[7] Inquiry into the Operation of Queensland's Workers' Compensation Scheme' Report No. 28, page 221

- Section 175(1) provides that if the principal employer arranges for a contractor to do work (which is for the principal's normal trade or business), then both the principal and the contractor are considered to be the employer of any workers the contractor may employ.

- As employers, both principals and contractors must take out workers' compensation insurance for a contractor's workers.

- In the event of a claim for injury, a worker may claim compensation either from the principal or the contractor, or both. This applies right down the contractual chain.

In the WA scenario, if a head contractor on a building site engages various contractors who engage subcontractors, then all parties (principal, contractor and subcontractor) are liable to cover any workers the subcontractor may employ. If one of the subcontractor's workers is injured at work, a compensation claim could be made on the principal, the contractor or the subcontractor.

The principal will be liable only if the work being done at the time of the injury is directly a part or process in the principal's trade or business and if the injury happens at the principal's workplace or a workplace that is under the principal's control or management. Under section 175(2), if the principal is required to pay the claim in the first instance, he or she may sue the contractor to recover the full cost of the claim.

Principals must ensure that contractors have current workers' compensation insurance policies. It appears that suitable arrangements are made with approved insurers to strike an appropriate or discounted premium for principals.

A separate WorkCover Policy for Principal Contractors and Host Employers?

The FAC report in 2013 also identified a further option from the Department to allow WorkCover Queensland to offer an insurance product to Principal Contractors and host employers to cover these claims.[8] This may involve Principal Contractors taking out additional stand-alone coverage for the employees of their subcontractors.

By offering such a product, WorkCover Queensland will be providing an insurance product in competition with private insurers, but private insurers are demonstrating an increasing reluctance to provide coverage in the situation of host employers or Principal Contractors. Master Builders believe that, provided such an insurance product is offered on a voluntary basis and competitive in the market, it will provide significant advantages to all parties concerned:

- Coverage for injured workers will improve because an insurance product will be readily available and will be specifically designed for Principal Contractors and host employers.

- Injured workers will benefit from having to deal with one insurer only, and even though cross claims between the Principal and employer may still occur, this will happen within the same scheme, resulting in a reduction in the number of parties involved, legal costs and the time it takes for damages to ultimately be paid to injured workers.

- Principal Contractors and subcontractors will no longer try to manage this risk through complicated and often ineffective or unfair indemnity provisions within their commercial contracts, and all parties will be certain that the risk is covered. This will also dramatically reduce the risk of subcontractors being uninsured for contractual liability claims for injured workers.

While acknowledging that this recommendation does come at a cost to the scheme resolving the underlying problem will dramatically improve the risk sharing arrangements between Principal Contractors or host employers and subcontractors or labour hire.

[8] Ibid

PART C: COMMENTS ON THE PROPOSED BYRNE AMENDMENTS

The Explanatory Notes to the Bill on page 4 describes the objectives of the Byrne amendments as follows:

> *The Bill will achieve its objective of re-establishing the original policy intent of the act and reversing the effects of the Supreme Court decision in Byrne v People Resourcing (Qld) Pty Ltd & Anor [2014] QSC 269 by amending the act to expressly exclude from coverage under an employer's workers' compensation policy that employer's liability flowing from an indemnity granted to a third party in respect of that third party's liability to pay damages to a worker and ensure that liability is retained by a contributing third party.*

When the Byrne amendments are analysed, it is clear that the chief intent is to ensure that WorkCover will not have to indemnify an employer (i.e. subcontractor) for any claims arising from contractual indemnity clauses between a Principal Contractor and subcontractor. To achieve this cost shifting, the amendments:

1. Make contractual indemnities between a Principal Contractor and subcontractor void to the extent that the indemnity relates to a contribution claim made by WorkCover.

2. Change the definition of "damages" to exclude a liability by an employer to pay damages arising from a contractual indemnity; and

3. Preserves the right of WorkCover to make a contribution claim against a Principal Contractor regardless of any indemnities provided by a subcontractor.

In other words, in the example provided in the diagram (2) above, WorkCover will only pay the portion of the claim assigned to the subcontractor, in the example 25%. The remaining 75% of the claim must now be paid by the Principal Contractor, because WorkCover will not indemnify the subcontractor for the contractual claim arising from the indemnity clause. The Byrne amendments are therefore aimed at limiting the workers' compensation scheme's liability, in the same way that private insurers commonly exclude contractual liabilities from their standard cover.

Master Builders contend that the proposed amendments do not resolve the underlying issue of uninsured or underinsured Principal Contractors and subcontractors but in actual fact may exacerbate the problem. Below follows an explanation of the presumed unintended consequences of the Byrne amendments.

We do, however, also wish to point out that we do not agree with the contention in the Explanatory Notes (p. 19) that the Byrne amendments simply seek to restore the common law position prior to the Byrne decision. The Byrne decision applied the High Court decision in *Brisbane Stevedoring* in 1969 regarding the liability of co-tortfeasors, a common law position which has not changed for many decades (which is probably why the Byrne decision was never appealed).

It is certainly the case that prior to the Byrne decision, WorkCover Queensland adopted the position that the cover it provided to employers contained in section 8 of the WCRA did not oblige it to cover insured employers for liability assumed under contractual indemnities extended to principals. But this was not a position based in common law; rather it was a position based on the insurer's interpretation of the statutory cover that it provides through its terms of insurance. The Byrne amendments are about the insurer changing the scope of coverage it is willing to provide, and not, as the Explanatory Notes contends, a case of rectifying an incorrect interpretation of the common law in the Byrne decision.

Byrne amendments likely to exacerbate problems with contractual indemnities

The Byrne decision and its effect was widely reported on and provided some level of comfort to insured employers that WorkCover Queensland, as its workers' compensation insurer, would cover not just for their liability to pay damages to the injured worker, but also for liability assumed to a Principal Contractors pursuant to contractual indemnities (at least insofar as the damages would otherwise be payable to the injured worker under the WCRA).

The Byrne amendments propose changes to sections 8 and 10 and the introduction of new section 236B to reverse the impact of the Byrne decision:

- Section 10(4) clarifies that liability of an insured employer does not include liability assumed by the employer under a contractual indemnity extended to a principal;
- Under section 8, WorkCover Queensland would not be obliged to indemnify an insured employer for liability assumed under a contractual indemnity extended to a principal;
- Pursuant to a new section 236B:
    - WorkCover Queensland is able to bring a contribution claim against a principal notwithstanding any contractual indemnity extended by an insured employer to that principal.
    - A contractual indemnity is void to the extent that it requires the insured employer to indemnify the principal for the contribution claim made by WorkCover Queensland;

Section 236B is silent as to the situation where an injured worker claims against the principal *only* and the principal seeks to rely on a contractual indemnity in claiming against an insured employer. Given the precise wording of section 236B which only covers indemnity "for any contribution claim made by the insurer against the other person", it appears that not all indemnity provisions will be void, only those that relate to contribution claims by WorkCover. Therefore, in the event an injured worker claims against a principal and the principal relies on a contractual indemnity to claim from the insured employer, the contractual indemnity **is not void**, and pursuant to the revised definition of damages in section 10, WorkCover Queensland is not obliged to indemnify the insured employer in respect of its liability to the principal under the indemnity. Further, such a claim would not be prevented by the decision in *Bonser v Melnacis & Ors* - [2000] QCA 13.

Given that standard Public Liability policies available on the market exclude liability for claims by workers and contractual liability (as discussed above), employers who hold policies they believe are comprehensive with WorkCover Queensland may in practice encounter situations where they are uninsured. In the event of large loss claims and smaller employers, such situations may have catastrophic implications for employers and injured workers.

Although some insurance policies may be available on the market to cover this risk, smaller employers are either unlikely to know they exist or will find them cost prohibitive. If the changes proposed in the Bill are to proceed, it is our submission that legislative provision to ensure comprehensive insurance is available for employers should be made.

The proposed amendments otherwise deal inadequately or fail to address the problem of smaller employers being pressured commercially by principals to provide contractual indemnities in situations where insurance cover is either unavailable or inadequate.

These amendments will mean that WorkCover Queensland will only be liable to indemnify an employer to the extent of the employer's legal liability to the worker for damages under the WCRA. So, if an employer agrees to indemnify another party for damages beyond its legal liability under the WCRA, such as PIPA claims, the workers' compensation policy will not extend to cover those damages.

What is further unclear from the Bill and the WCRA, is whether an employer could secure cover for their liability to indemnify another party for "compensation" under the WCRA (as opposed to "damages"). Also, the proposed Section 236B(3) may not operate to defeat actions in contract against employers by third parties (e.g. for breach of warranty or, for breach of an obligation to insure).

Retrospective nature of proposed Byrne amendments

To further exacerbate the potential impact on employers, the effect of proposed Section 725 of the Bill is to make these changes retrospective if the claim by the injured worker has not been settled or a trial has not commenced. As the WCRA requires the election to pursue common law damages to be made no more than three years after the injury occurred, in reality this means that the Byrne amendments will apply to contractual provisions entered into up to three years ago.

The Explanatory Note defends the retrospective nature of the amendments by asserting that sufficient regard to the rights and liberties of individuals have been given because the amendments seek only to re-establish the Act's original policy intent and status quo concerning the indemnity provided to employers under workers' compensation insurance policies.

The reality in the construction sector is that commercial contracts are used to apportion risk and liability amongst the many parties who collaborate to build a project. These risks and potential liabilities are assessed by all parties prior to entering into commercial contract relationships. If a party entered into a commercial contract and assessed its risk against the background of the Byrne decision, which would have been reasonable given that the decision was not appealed by WorkCover, it would be manifestly unfair to now change the risk profile retrospectively and remove a contractual right agreed to and factored into the costings applicable to a specific project.

Employers who have since the Byrne decision extended contractual indemnities to principals assuming as per that decision that they are entitled to cover under their policies with WorkCover Queensland (at least to the extent that damages under the WCRA), will be left completely exposed and they will likely have inadequately provisioned or self-insured for the risk. Allowing the Byrne amendments to operate retrospectively is manifestly unfair and creates significant exposure for employers to be uninsured for events that have occurred up to three years ago.

Cost transfer from WorkCover to employers and Principal Contractors

The government asserts this amendment will save WorkCover Queensland an estimated $40 million per annum.[9] This represents a significant increase to the Department's estimate of these types of claims at $10-$15 million in the Parliament's Finance and Administration Committee (FAC) 2013 report.[10] The basis of the cost saving claim is not explained in the Explanatory Notes and it remains unclear to Master Builders how this was calculated.

Master Builders contends that while it is appropriate for the workers' compensation scheme to manage it liabilities and claims exposure responsibly, the objectives of the scheme require the consideration of not only costs to the scheme, but equally important considerations such as the impact on injured workers and fairness to employers when administering the scheme.

When the effect of amendments to the WCRA is to increase the risk that injured workers may be faced with a situation where their claim is against an uninsured employer, the objectives of the scheme are not being met. Equally, the objectives of the scheme are not being met when the scheme does not provide employers with full indemnity against claims from injured workers. Until the underlying issue of the exclusion from WorkCover of Principal Contractors and host employers is addressed, piecemeal amendments to the WCRA will continue to be ineffective and result in unjust outcomes for subcontractors, host employers, Principal Contractors and injured workers.

[9] Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016 Explanatory Notes, page 4

[10] Inquiry into the Operation of Queensland's Workers' Compensation Scheme' Report No. 28, page 223