

# CORRECTED VERSION

## ECONOMIC DEVELOPMENT COMMITTEE

### Inquiry into Labour Hire Employment in Victoria

Melbourne — 15 November 2004

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#### Witness

Mr P. Jamvold, Group Manager, Southern Division, Insurance Council of Australia.

**The CHAIR** — The committee welcomes Mr Peter Jamvold from the Insurance Council of Australia. The committee is inquiring into labour hire in Victoria. I believe the terms of reference have been provided to you. The inquiry has been going on for some time with a view to reporting by Christmas. The committee is an all-party committee. Because this is a formal hearing your comments are being recorded by Hansard and we will make a copy of that transcript available to you in about 10 days. You are welcome to correct it and return that to us. What you say today is covered by parliamentary privilege. That protection only lasts until the end of the proceedings. This is a public hearing so people may come in and out.

Peter, we have invited you along because through the course of this inquiry a number of witnesses have drawn our attention to hold harmless clauses. As we understand them, they are typically where a host employer might say to a labour hire firm, 'Yes, I will accept a contract from you but on the basis you will offer me a hold harmless clause which will indemnify me for any loss sustained'.

We do not understand the motivation behind them. It seems to us to be contrary to good OHS practice, and for that reason we are happy to have you along today to give us an overview as an insurance industry representative. It might be easier if you talk to us in general terms about how hold harmless clauses work, and we will just fire some questions at you.

**Mr JAMVOLD** — Yes, by all means. The interesting thing about hold harmless clauses is that they are not required by insurers. The second thing is that they usually do not work; it depends entirely on the quality of their drafting. Even if they are well drafted it is not clear that they will hold up in court because you cannot contract out of the duty of care. Thirdly, if insurers want to avoid a risk or limit a risk, there are much better mechanisms available to them than a hold harmless clause. I was really interested when you asked me to come along and talk to you about hold harmless clauses because essentially, if they are in a contract, they would be required by either party entering into the contract.

**The CHAIR** — We do not have great familiarity with them. At the start of this inquiry we did not know anything about them, and one or two people referred to them. Some people attending the committee's hearings have said to us it is not offered by an insurance company but it can be requested of an insurer.

**Mr JAMVOLD** — Excuse me if I state the obvious: the insurer is there to lay off risk. They do it by accepting a risk in return for a premium, but the objective of a hold harmless clause is to excise a risk. So if you are talking about the situation from the point of view of the host employer, the insurer will look at the risk associated with that host employer's labour hire situation and assess the risk and price it. As I said, insurers look on a hold harmless clause as being a not very effective way of regulating risk.

**The CHAIR** — So your view, if I have picked up the tone of what you have said accurately, is that you see them as ineffective and not good business practice?

**Mr JAMVOLD** — I would not say not good business practice, that is something I would not comment on — that is something between the two parties and has little to do with the insurer.

**The CHAIR** — But you do not see them as effective?

**Mr JAMVOLD** — From an insurance point of view in terms of regulating risk, they are not effective, as a general statement.

**The CHAIR** — If this committee were to recommend that hold harmless clauses with regard to labour hire arrangements be prohibited, would that cause the insurance industry any great grief?

**Mr JAMVOLD** — I would say in practice it would make no difference to insurers because they basically do not take them into account in assessing risk.

**The CHAIR** — Are there any other comments you wish to make? We might have short-circuited this hearing.

**Mr JAMVOLD** — I was going to say it is going to be a very short hearing.

**Ms MORAND** — Do you know how widespread it is, and how many companies do request and are provided with that kind of insurance?

**Mr JAMVOLD** — I do not because, as I said, they certainly turn up a lot and insurers take note of them, but that is about the extent of it.

**Ms MORAND** — Do you know if any of them are refused?

**Mr JAMVOLD** — Any insurers refuse to actually cover someone because they do not have one?

**Ms MORAND** — If a host employer requests a hold harmless clause — I suppose it might be outside your knowledge?

**Mr JAMVOLD** — The insurer does not provide it; it is not something provided by the insurer. I hesitate to say this because you people know a lot more about the subject than me.

**The CHAIR** — I think we know less than you, that is the problem.

**Mr JAMVOLD** — The essential relationship is obviously between the labour hire company and let us call them the host employer. It is likely the host employer will say, 'Look, Morand Labour Hire, I will take on your staff, but a requirement is you offset the risk'. It comes out through section 138 recovery through our friends the VWA. 'If I get hit with a recovery from the Victorian WorkCover Authority, then you will indemnify me for that'; that is the purpose of it.

**The CHAIR** — It has been raised with us though a connection with an insurer. I do not quite understand the chain. I understand what you are saying, that the host employer says, 'We might give this contract for providing labour hire employees to company A, but we require them to indemnify us for any loss we suffer'. Company A in turn must be going off to its insurer and seeking to somehow lay off that risk by having a policy written. That is the point where the labour hire company is saying to us, 'If it is sought from us, we will provide it to the host employer. We will have to find a source to indemnify risk. We will find an insurer or an underwriter who will provide that cover to us, but they don't offer it to us. We have to ask them for it. It is not a standard product they offer above the counter'. That was more or less the conversation we had. It is the relationship between the labour hire firm and the insurer that we are interested in exploring, albeit based upon an understanding that the initial request presumably comes from the host employer.

**Mr JAMVOLD** — Sure. I am not saying it would never happen, but the insurer is most unlikely to provide a policy under those circumstances, for a number of reasons. Firstly, the hold harmless clause is uncertain; and secondly, if you are going to indemnify someone for a risk which is not under their control — essentially it is under the control of the workplace and the person regulating that — you are taking on a risk which is basically unquantifiable. The last thing an insurer wants to do is to take on something like that. Essentially you cannot price it, which means you have to put on a huge price — a huge premium — to cover it. So it is not a situation that is likely to occur. My area also covers South Australia, incidentally, and exactly the same issue is going on there at the moment through what is called — instead of section 138 recovery — section 54 recovery. I know a bit more about the South Australian situation, having gone into it a bit more, and basically insurers in South Australia will not touch a labour hire company that has a hold harmless clause attached to its contract, for the reasons I have just mentioned.

**The CHAIR** — My recollection is that the indemnity insurance might have been to cover legal costs and the costs of defending a prosecution rather than the actual loss suffered by the injured worker. That might have been what they were trying to insure against.

**Mr JAMVOLD** — That is a completely different bit of business. If you are covering the risk of an injury in the workplace and the WorkCover authority, whether it be here or wherever, comes in and charges your company, which is then passed through to the labour hire company, that is one thing, and insurers do not like to look at that. But if you are looking at indemnification for something else — for example, legal costs or whatever — that is a completely different set of business. That might apply to any business with cover for directors and officers. That is much more likely to occur than to indemnify the actual injury and the consequences of that.

**The CHAIR** — Do you have any comment on the way that would work, particularly in the labour hire sector? We have heard today that prosecutions are not that frequent, but the claim made to us earlier was that the cost to the labour hire company was \$100 000 for the policy, which seems to be an awful lot of money.

**Mr JAMVOLD** — It depends on the risk, the number of people who pass through its books and the areas of work. For example, if it is providing staff for boning works and abattoirs, the chances are it might have a higher call on the courts than if were providing secretarial staff, for example. It really does depend on the risk.

**The CHAIR** — In your mind, speaking for the insurance council, there is no problem with the sourcing of insurance cover to indemnify a host employer against the legal costs associated with any prosecution if an injury is sustained by a worker on its site, and that is a legitimate form and a well-practised form of business?

**Mr JAMVOLD** — That is a different form of business, yes.

**Mr ATKINSON** — That is not necessarily well practised.

**Mr JAMVOLD** — It is not necessarily well practised, but it would be a completely different profile. The company could ask an insurer if it would provide cover for that.

**The CHAIR** — And it would do that on the basis that it just wants to be absolved of the hassles of a legal prosecution?

**Mr JAMVOLD** — It is like any other risk — it just does not want to carry that risk, so it is prepared to pay to have it insured against.

**The CHAIR** — I think we are done. We may come back to you. We probably do not understand enough about the circumstances in which this has been raised with us, and we may have to go back in the time available to us and pick the brains of the chap from the labour hire firm who spoke to us about this — there have been one or two, but there was one in particular — just so we can get our minds right around it. It is possible we will make a recommendation saying this needs to be explored a bit further. From what we understood, we did not think it was good OHS practice to have people trying to lay off the risk of injuries to workers. Nor is it good practice for labour hire firms to be advertising that one of the benefits of its services is that employees can more or less relieve themselves of the obligations for OHS; that is pretty sloppy.

We will have a copy of our very brief transcript to you in a week or so. Thank you for your time.

**Witness withdrew.**