

**Submission  
No 5**

**REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE  
WORKCOVER AUTHORITY**

**Organisation:** Office of the NSW Small Business Commissioner

**Date received:** 14/01/2014

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The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Sir/Madam,

**RE: Review of the exercise of the functions of the Workcover Authority of NSW (Inquiry)**

Thank you for giving me the opportunity to provide comment to the Review of the exercise of function for the Workcover Authority of NSW.

As the NSW Small Business Commissioner, I have been appointed to advocate on behalf of small businesses in NSW and support small businesses by providing dispute resolution services; delivering quality business advice through Small Biz Connect; and, speaking up for small business within government.

Since my appointment in 2011, I have worked closely with the senior management team of the Workcover Authority of NSW on a range of matters to ensure a fuller understanding of the issues impacting upon small business at a grass roots level. Through this engagement, it has become evident that the Authority is undergoing significant cultural change and this is being driven by a senior management team committed to creating a more responsive, flexible and innovative agency.

This has resulted in the Authority implementing a number of significant initiatives which will positively impact upon the small business sector, including:

- a simplification and reduction in premiums for smaller employers;
- the provision of premium incentives for those businesses that look after workers' health and safety;
- the introduction of a small business rebate scheme;
- the establishment of a dedicated Customer Service Centre for small businesses;
- the introduction of Community Relationship Officers providing 'outreach' services to regional and rural communities;
- the provision of tailored advice through the development of Industry Action Plans;
- the establishment of the Small Business Stakeholder Reference Group whose membership includes the NSW Small Business Commissioner, NSW Business Chamber and numerous industry associations; and
- the development and implementation of a small business strategy focussed on making it easier for small business to build and maintain safe and healthy work environments and meet their workers compensation and return to work obligations.

At an operational level, when the Office of the NSW Small Business Commissioner (OSBC) has referred particular issues from small businesses, whether they are related to premiums or work, health and safety, to the Authority we have found that staff at both the management and operational levels are starting to listen and engage with the small business sector. This indicates that the Authority is moving in the right direction when it comes to partnering with small business to get the right outcomes rather than forcing compliance through onerous systems and penalties.

However, there are two issues which continue to significantly impact upon the Authority's exercise of its functions in relation to small business. These are:

1. *The lack of clarity around the definition of 'deemed employee' versus 'independent contractor'*

As a matter of urgency, the Authority needs to provide clearer definitions of 'employee' and 'independent contractor' so there is greater transparency and certainty for businesses in relation to how the Authority will determine their workers compensation premiums.

Overwhelmingly, many small businesses are reporting their frustration with the current system and the way these definitions are applied by individual auditors during wage audits.

Under the *Workers Compensation Act 1987*, definitions are provided to guide employers, accountants, Scheme Agents, auditors and other interested parties, on remuneration taken into account for the purposes of assessing an employer's workers compensation premiums. The overarching aim of these definitions is to help ensure that there is a consistent approach to the declaration of remuneration for the purposes of workers compensation.

Due to current economic conditions and the changing nature of the workforce, the number of independent contractors undertaking work for small businesses is increasing across a range of industries. Many small business operators employ independent contractors as it enables them to manage peaks and troughs in demand. But in many cases small businesses engage independent contractors without fully understanding the definitions or implications of the legislation, which in many cases technically deems these independent contractors as employees.

The WorkCover Wages Definition Manual, March 2012, stipulates:

*"Many people working as contractors are treated as workers for workers compensation purposes. The Workplace Injury Management and Workers Compensation Act 1998 refers to them as 'deemed workers'. In those cases, the employer is treated as a 'principal', and is responsible for declaring remuneration for the purposes of workers compensation.*

*A contractor with an Australian Business Number (ABN) or a Department of Finance and Services - Fair Trading licence is not necessarily an independent contractor – they may still be a 'deemed worker' for the purposes of NSW workers compensation. The issue is whether the person is a worker in a particular case and must be determined on a case-by-case basis.*

*The final arbiter of whether a contractor is a deemed worker is the Workers Compensation Commission and this is decided on the individual facts of each case. WorkCover may also apply tests determined by other Courts. One relevant test is whether the contract can be construed as a 'contract of service' (which would usually result in a finding that the person is a worker) or a 'contract for services' (which would usually result in a finding that the person supplying the services is not a worker)."*

These requirements are complex and difficult for small businesses to understand and apply to their own business arrangements. This issue is further complicated by the fact that whether a person is a "worker" for the purposes of workers compensation is determined on a case-by-case basis by the Authority which maintains an extensive list of assessment criteria which makes the approach inconsistent and difficult to benchmark.

In the majority of circumstances, small businesses are trying to comply with the regulation (which is imposed on them by numerous government agencies at all levels of government) however they are being unfairly penalised by way of higher workers compensation premiums when independent contractors are deemed to be workers.

Finally, this issue is further complicated by the fact that the workers compensation legislation does not rely on the tax status of the person carrying out the work to determine whether that

person is a worker, deemed worker or contractor. This is a major source of confusion for small businesses, as they are required to report a lot of information to different government agencies, such as the Australian Tax Office and WorkCover, which use different definitions. Many small businesses have suggested that the tax status of a person carrying out the work should also be applied to the workers compensation scheme instead of there being separate definitions.

The NSW Small Business Commissioner is currently working closely with the Independent Contractors Association of Australia and the Authority of NSW in an attempt to resolve some of these matters.

## *2. The lack of consistency across state jurisdictions*

There is still much work to be done by the Authority to bring the NSW Workers Compensation Scheme in line with other jurisdictions. While recent reforms have led to substantial improvements and a reduction in premiums, businesses within NSW continue to have higher workers compensation premiums and more complex regulation imposed upon them.

For small businesses located in border communities, workers compensation premiums are a significant consideration in choosing where to locate their business, with many choosing to locate their business across the border in order to enjoy the benefits of lower premiums.

For example, a freight company contacted the NSW Small Business Commissioner about the fact that in the past they paid workers compensation premiums in both Queensland and NSW given they had drivers working in both states. The company had been audited on a number of occasions and the relevant state WorkCover authorities had agreed with this approach. However, recently WorkCover NSW undertook an audit which contradicted this approach and indicated that premiums should be paid according to the companies 'state of connection'. This would mean that premiums would increase for the company since NSW premiums are greater than those paid in Queensland. The company indicated it would be financially advantageous for them to move their entire business to Queensland.

It is imperative that appropriate changes are made to the NSW Scheme to align it more closely with its Queensland and Victorian counterparts in order to allow the NSW small business sector to remain competitive and open for business in NSW.

The Authority has begun to make significant cultural change and service delivery improvements however the challenge moving forward will be maintaining the momentum of change and continuing to find ways to deliver a more responsive, client-focussed and innovative approach to managing work, health and safety.

Please note I am not in a position to provide comment on the Workers' Compensation (Dust Diseases) Board at this time, given that my Office has not dealt with any small businesses matters which fall within its jurisdiction.

Should you wish to discuss any of the issues raised in this submission further please contact Julie Giuffre, Senior Advisor, Advocacy on

Yours sincerely

Yasmin King  
NSW Small Business Commissioner  
14 January 2013

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