

**Submission  
No 207**

## **INQUIRY INTO NSW WORKERS COMPENSATION SCHEME**

**Organisation:** Back Office Biz

**Date received:** 18/05/2012

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## **SUBMISSION TO PARLIAMENTARY INQUIRY INTO NSW WORKERS COMPENSATION ARRANGEMENTS**

Back Office Biz Pty Ltd (BOB) provides a service to independent contractors enabling them to fulfil their hopes and ambitions to improve their standard of living including higher income by becoming contractors.

BOB's services can be summarised as follows:

- Business administration support, access to financial services and appropriate insurances for independent contractors
- A job board (BOBNett) to assist locating contracting opportunities and to advertise their services
- Provide hirers with access to the job board to offer and engage independent contractors who are appropriately structured.
- Assist them to meet the compliance requirements with various government authorities

In relation to the Inquiry, genuine independent contractors (as sole traders) are not covered by Workcover, and by that exclusion there should be fewer claimants. However, the 'deeming' capacity within the Workcover system significantly impacts costs in this area. This not only reflects the cost of increased claims, but also the extensive costs involved in the auditing arrangements.

This submission is directed to the limited yet very important issue of companies engaging independent contractors who are arbitrarily and retrospectively deemed 'workers' by Workcover and its auditing arrangements. It has particular significance for small businesses in New South Wales, affecting both the hirer as well as the independent contractors.

### **PROBLEMS AFFECTING SMALL BUSINESS**

Small business regularly wishes to utilise contractors for extended periods of time for flexibility and productivity. Independent Contracting is an essential part of any modern business model both in Australia as well as overseas. It offers workers the opportunity to break free of an employment model with the consequential improved standard of living benefits and higher income capacity.

Of particular concern, NSW Workcover's auditors arbitrarily deem contractors who work predominantly for one hirer as a "worker" for the purpose of the Act, irrespective of whether they would pass a common law test. In other cases, they similarly deem contractors as 'workers' for the purposes of the Act on what are, in many cases, very dubious interpretations of common law.

The procedure then is for Workcover NSW to instruct its insurer to issue an assessment notice for retrospective payments, often including penalty payments. This imposition is applied for a period of up to 2/3 year after the business transactions have been concluded, allowing no ability for the business to include the cost in their relevant charge rate.

If the small business wishes to appeal, it has to pay the full amount before the appeals process takes place. The appeal is then heard by NSW Workcover itself, which puts into effect the assessment in the first place.

Most small businesses are then forced to go into voluntary administration/liquidation because

1. They don't have the liquidity to pay the assessment notice up front.
2. If they do, they then have to finance the litigation. The first step of which is to argue the case to the same body which hands down the assessment. (Workcover has an extraordinary conflict of interest in this whole process).
3. The small business then has to finance a further round of appeals to a court of law, to have the matter determined on its legal merits.

I note that Mr Vorbach, solicitor with HWL Ebsworth has outlined the unfairness, cost and complexity for small business of this legal process in his submission to this inquiry. I fully concur with his comments of the effect of this on small business and contractors.

The result is that a significant number of companies are being closed down due to this pernicious process. The business simply cannot recoup any retrospective charge as the business has included.

These small businesses are typically small businesses in which the owners have attempted to build the business with the intention of it providing for their retirements, usually forgoing other benefits.

The consequence of this process (ignoring its impact on business development/contractor remuneration/personal financial loss implications) is that Workcover loses on-going premiums applying to the employees of these what previously were perfectly good businesses.

#### **(A) TYPICAL CASE STUDY:**

This submission provides an indepth analysis of a current example, which highlights the unfairness (if not wrongness) of the decision as well as its personal impact on the people involved.

This small company is based on the Central Coast, primarily involved in providing roofing services- mostly roof repairs/restoration. It utilises a range of contractors on a regular to irregular basis. (Usually 5/6 sole traders and 2/3 Pty Company Limited)

All/most of the contractors utilise the services of Back Office Biz to ensure they are appropriately set up as contractors for compliance requirements as well as administration ease.

In April/May, NSW Workcover appointed auditors to audit \_\_\_\_\_ the end result of which was that two contractors who worked more than 80% of their time (actually 83%) taking jobs from \_\_\_\_\_ were deemed workers for the purpose of the Act.

In all other material criteria, the two contractors were set up and operated no differently to the other contractors, who were not deemed by the auditor.

In Summary, all the contractors did the following:

- Wanted to be contractors
- Worked for a result (i.e. paid per job completed)
- Operate a business bank account
- Engage services to handle their business requirements as a contractor
- Had an ABN
- Advertised their services (job board/business cards/letterbox flyers)
- Were required to rectify faulty workmanship
- Were entitled to delegate their work
- Worked without supervision
- Were not paid expenses/allowances
- Provide their own tools and equipment
- Maintained appropriate insurances (income protection and public liability)
- Had no obligation to accept work offered

The auditor when challenged on these criteria admitted "that he had no choice because they worked more than 80% of their time for the one hirer" which he said was an instruction to auditors from Workcover. (There were 4 witnesses to his comments, although- Workcover NSW now deny such instructions).

\_\_\_\_\_ extraordinarily strong case in which the contractors tick every box to be legitimately assessed as an independent contractor..

### WORKCOVERS' OWN PUBLIC DOCUMENTATION

Workcover provides a number of references on its website to assist businesses/contractors to make the appropriate decision regarding their arrangements. They, however, often overturn the results of their own advice:

#### (a) Self Assessment Tool

NSW Workcover provides a 'self assessment' tool on its website which enables business to test their engagement arrangements to ascertain whether the contractors being offered work are 'contractors' or workers' for the purpose of the Act.

In the \_\_\_\_\_ cases, the two individual contractors (as well as the previous partnership) are both classified as contractors when the self assessment tool is completed. Attachment 1 is the relevant

copies of the assessments, which categorically show that the two contractors concerned are in fact contractors by Workcovers' own criteria.

Initially, BOB understood that this self assessment tool, when introduced, provided legal protection for Companies who had obviously acted honestly and properly in completing the form from the crippling assessment of retrospective premiums.

This was subsequently changed by NSW Workcover to be a 'guide' Instead of legally protecting companies who acted with either honest intention or honest actions.

**(b) Appeal Criteria**

If a company wishes to appeal the inclusion of Deemed Worker/Contractors, the Company is provided with the attached document (Attachment 2) which outlines the relevant evidence they should provide in the Appeal.

In Sydney Re-roofing's case the answers to all points affirms that the two contractors 'deemed' in fact met the relevant criteria for the two individuals to be contractors. Attachment 3 is a copy of the appropriate response to the Appeal Criteria.

**(c) Fact Sheet: "Worker or Contractor"**

This Workcover document provided through their website is designed to enable businesses to know which workers should be included in the calculation of a workers compensation insurance premium to ensure the correct premium amount is being paid.

Inter alia it states the following:

- 80/20 rule. This is a taxation rule only. This is not considered for workers compensation purposes.

Yet despite this, this was the only material difference between the two contractors deemed by the auditor to be 'workers' for premium assessment purposes and the other contractors.

**EXECUTIVE SUMMARY OF CASE EXAMPLE:**

1. The two contractors work and are structured identically to all the other contractors engaged by
2. The only material difference is that the two contractors worked more than 80% of their time for  
(in fact 83%)

3. The auditor admitted in front of 4 witnesses that he had no choice but to deem them as contractors as a result of infractions from Workcover because they worked more than 80% of their time for a single hirer. (Contrary to their website documentation)
4. On all available testing criteria provided by Workcover the two contractors concerned are in fact contractors.
5. Workcover are proceeding with the declaration and have instructed CGU to issue assessment notices for the contractors.
6. The immediate effect of this action is to cause \_\_\_\_\_ into liquidation despite acting totally honestly and after 18 years of trading. (Its current entity and its previous entity.)
7. This completely destroys all of the work/effort to develop the business towards their impending retirement.
8. All employees of \_\_\_\_\_ and its contractors would be put out of work.

#### VIEW OF OTHER PARTIES:

Representations to NSW Workcover regarding the unfairness of the process based on the case in point have been or are being made by the following:

- Back Office Biz Pty Ltd
- Small Business Commissioner of NSW
- Independent Contractors Association of Australia
- NSW Business Chamber

It is often overlooked in the process of NSW Workcover seeking to pursue extra premiums from business that it also has the consequential effect of restricting the business of the contractors concerned. Back Office Biz provides a business service to contractors generally as well as to these two contractors; we know the devastating effect this will have on their attempts to build their contracting businesses to provide their families with a better life.

#### PROPOSED ACTION:

Workcover should be required to undertake the following procedures:

1. The self-assessment tool should be re-instated in a form where when it is correctly filled out, it should be a bar to the imposition of retrospective premium assessments. This would provide certainty for all parties.
2. That companies, to access that defence, are required to show proof that contractors engaged had certificates of currency of relevant income protection insurances.
3. The arbitrary nature of determining a 'contractor status' by Workcover for Workers Compensation purposes could be significantly improved by introducing the following criteria:

The contractor:

1. Has become an independent contractor by free choice
2. Works predominantly for a result, outcome or piece rate
3. Supplies his/her own tools and equipment
4. Is required to rectify his/her mistakes
5. Is entitled to delegate the work to others
6. Operates the following key function of business
  - Holds an ABN

- Has a business bank account
  - Advertises
  - Invoices
  - Carries business insurances
7. Usually does not work fixed hours

**FURTHER:**

I have become aware of and note the submissions and endorse to this inquiry by Doug Vorbach of HWL Ebsworth Solicitors. I concur with these submissions, which address similar concerns to these raised in my submission.

Steve Harrison

Managing Director