

**Submission
No 119**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Small Business NSW

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Yasmin King
Small Business Commissioner

The Hon. Robert Borsak MLC
Committee Chair
Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Borsak

Thank you for the opportunity to provide a submission to the Inquiry into the NSW Workers Compensation Scheme.

As the NSW Small Business Commissioner, I have been appointed to advocate on behalf of small businesses in NSW, provide low cost dispute resolution services, advise on reducing regulatory burden and to identify ways in which Government can create a climate in which the small business sector can flourish.

One of my first actions as the NSW Small Business Commissioner was to embark on a month long 'Listening Tour' throughout NSW. With the support of the NSW Business Chamber, I visited 28 locations across regional and metropolitan NSW throughout October and November 2011 to hear directly about the concerns, challenges, and rewards of being a small business operator.

I met with a total of 533 small business operators in numerous locations across the State including metropolitan Sydney, the Northern Rivers, Mid North Coast, Murray Riverina, Central West, Central Coast, and the Hunter. While each area faces its own unique challenges, many of the issues voiced by small business operators are shared across NSW.

One of the most common issues raised by small businesses across the State was concern over increasing workers compensation premiums and the negative impacts these premiums have on their businesses, and issues associated with the current WorkCover deeming provisions of worker status for the purposes of workers compensation.

It has long been recognised that there is a need to reform the NSW Workers Compensation Scheme to produce better outcomes for injured workers and employers. The NSW Government continues to reinforce its commitment to rebuilding the NSW economy and regaining the confidence of the small business sector; therefore it is essential that this Inquiry into the NSW Workers Compensation Scheme makes serious recommendations for a major overhaul of the Scheme which will align it more closely with its Queensland and Victorian counterparts.

Should you have any questions or require further information in relation to the attached submission, please contact me, Senior Policy Advisor in my office, on [redacted] or by email [redacted].

Yours sincerely

Yasmin King
NSW Small Business Commissioner



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**Submission to the Joint Select Committee on the
NSW Workers Compensation Scheme**

May 2012

Introduction

Small businesses are the backbone of Australia's economy, representing 96% of all businesses. An estimated 2 million small businesses across the nation provide nearly half of all employment. In NSW alone, there are 650,000 small businesses which provide employment for around 50% of the NSW workforce. In addition to contributing to the economy directly, the small business sector is a crucial platform which underpins the efficient operation of many medium-sized and large businesses.

In recognition of this important sector, small businesses in NSW now have a strong and independent advocate to speak on their behalf.

The inaugural NSW Small Business Commissioner, Ms Yasmin King, was appointed by the NSW Government in mid 2011 to support small businesses throughout the State by:

- providing low-cost dispute resolution services;
- advising on ways to reduce regulatory burden; and
- identifying ways in which Government can create a climate in which the small business sector can flourish.

One of the most common issues consistently raised by small businesses across NSW with the NSW Small Business Commissioner is concern over increasing workers compensation premiums and the negative impacts these premiums have on their businesses, and issues associated with the current WorkCover deeming provisions of worker status for the purposes of workers compensation.

It has long been recognised that there is a need to reform the NSW Workers Compensation Scheme to produce better outcomes for injured workers and employers.

The NSW Government continues to reinforce its commitment to rebuilding the NSW economy and regaining the confidence of the small business sector; therefore it is essential that this Inquiry into the NSW Workers Compensation Scheme makes serious recommendations for a major overhaul of the Scheme which will align it more closely with its Queensland and Victorian counterparts.

The need to reform the NSW Workers Compensation Scheme

The NSW Workers Compensation Scheme Issues Paper notes that the premiums paid by NSW employers are estimated to be between 20 and 60 per cent higher than equivalent employers in competitor states.

NSW small businesses are already disadvantaged by increasingly complex regulation and red tape which far outweighs that imposed on their Queensland and Victorian counterparts, making it increasingly difficult for many small businesses, especially those located in border communities, to remain competitive.

The current NSW Workers Compensation Scheme is just one example of regulation which places greater burdens on NSW businesses, compared to those in other jurisdictions, by way of higher workers compensation premiums and more complex regulation.

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.

It is absolutely essential that the NSW Government makes the appropriate changes to the NSW Scheme and aligns it more closely with its Queensland and Victorian counterparts in order to allow the NSW small business sector to remain competitive.

Workers Compensation System, Insurance, Premium, Benefit, and Regulatory Systems

A common concern of many small businesses is that governments regularly apply a “one size fits all” approach to regulation without taking into consideration the needs of small businesses.

The current Workers Compensation legislation contains a number of legislative weaknesses which disadvantage small business employers.

Currently, an injured worker may have access to negligence-based, lump sum damages for economic loss at common law, which are made when the injured worker takes legal action against their employer. To make such a claim, the following legislated criteria must be met:

- the work is the result of employer negligence;
- the injured worker must have at least 15% whole person impairment;
- a claim can only commence at least six months after the worker gave notice of the injury to the employer; and
- Court proceedings cannot be commenced more than three years after the date on which the injury was received, except with the leave of the Court.

Employer negligence

Of major concern is the fact that this legislation does not provide a strong test for employer negligence and is based on the absolute obligation on an employer to prevent work injury under work health and safety legislation. This obligation is a major impost on small businesses and is a direct incentive for small businesses not to employ. This was confirmed by small businesses on the Small Business Commissioner’s Listening Tour.

Increasing costs of medical payments

Many small businesses have also raised the issue of injured workers having the discretion to choose their treating doctor and rehabilitation provider. The Small Business Commissioner has heard numerous stories from small businesses about doctors and healthcare providers which undermine the medical profession by signing medical certificates for workers without critical review of their ability to work. This has wide ranging impacts on the workforce and economy and steps should be taken to legislate the certification of medical practitioners for WorkCover.

Wages definition

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. It is intended that the definitions will ensure that each employer covered for workers compensation through the WorkCover Scheme pays the correct premium amount.

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

Due to the current economic conditions, 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. They engage contractors assuming that as they are an independent contractor they will have their own arrangements for workers compensation, as they are not an “employee”. If an independent contractor has a company corporate structure then there is no issue. However only 30 percent of small businesses have a corporate structure, and small businesses find themselves engaging independent contractors without fully understanding the definitions or implications of the WorkCover legislation, which often deems those 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 1998 Act 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. 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, making the approach inconsistent and difficult to benchmark.

WorkCover maintains an extensive list of criteria which is used to assess whether a person is an independent contractor or a worker for the purposes of workers compensation. Yet another burden on small business operators is a requirement for the small business owner to maintain and include records about contractors in the declarations and other records they make and present to WorkCover and Scheme Agents.

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.

Further complicating this issue is 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 many 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 rely on 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 rather than a separate definition of worker and deemed worker.

The Small Business Commissioner is currently working closely with the Independent Contractors Association of Australia and the WorkCover Authority of NSW in attempt to resolve some of these matters. One proposal is to allow independent contractors to take out their own individual insurance policy which would be recognised by the NSW Workers Compensation Scheme. This would reduce the compliance burden on small businesses and would avoid any confusion about the status of a worker for the purposes of workers compensation. It could also potentially be a cost saving to the scheme, as the costs associated with the case by case determination of deemed workers would be removed.

Insurance for older workers

The NSW Workers Compensation Scheme must be updated to reflect changes in employment arrangements in NSW. Increasingly, people are working past retirement age however mature workers do not receive the same insurance benefits as younger workers.

As part of the 2012-13 Commonwealth budget, the Government has announced incentives to employ mature workers. Employers who give jobs to people aged over 50 will receive a \$1000 payment from the Federal Government. The initiative will provide the \$1000 payments to 10,000 employers with the only condition that the worker must be over 50 and retained for at least three months.

Given an aging population and given that the trends in mature workers will continue to rise the NSW Workers Compensation Scheme must ensure that older workers are not discriminated against, and that employers of mature workers are not disadvantaged by higher premiums as a result of employing mature workers.

Options for change

It is absolutely essential that the reformed NSW Workers Compensation Scheme strikes the appropriate balance between protecting injured workers as well as protecting employers, especially small businesses.

1. Severely injured workers

In theory, the suggestion that severely injured workers should receive improved return to work assistance (amongst other support) is favourable, however, the impacts of return-to-work programs on small businesses must be carefully considered.

The legislation must ensure that there is absolutely no onus on small businesses to provide return-to-work options for injured employees, such as flexible working hours or modified duties. Such a requirement on small businesses would significantly increase costs and many small businesses will simply not have the capacity to plan or offer suitable duties for returning workers.

In the event that small businesses are required to participate in such a program, WorkCover would need to provide a significantly funded assistance package for small businesses as well as ensure that the number of specialist small business advisors at WorkCover was increased to meet with demand.

2. Removal of coverage for journey claims

This option is supported.

3. Prevention of nervous shock claims from relatives or dependants of deceased workers

This option is supported.

4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

I note that stakeholders have argued that that existing arrangements for determining weekly benefits are overly complex, anachronistic and fail to deliver consistent outcomes for injured workers.

Any change which would simplify definitions or processes to the benefit of workers and employers is supported.

5. Incapacity payments – total incapacity

The suggestion that consideration be given to aligning weekly benefit payments more closely with other jurisdictions and to an earlier step down with capacity testing is supported. It is essential that arrangements in NSW are harmonised with other states and territories to the extent possible.

6. Incapacity payments – partial incapacity

This option is supported, provided that small businesses are not required to deliver any benefits to employees as they increase their hours of work, and that there is no onus on small businesses to provide return-to-work options for injured employees. These benefits must be clearly defined as part of the original workers compensation claim.

Further, the benefits need to be clearly defined and designed to meet the objectives of this workers compensation review, which are to enhance workplace safety whilst ensuring that workers compensation premiums are comparable with other States.

7. Work capacity testing

The option for work capacity testing is supported, however this option must be complemented by reforms to the legislation which remove the option for injured workers to choose their doctor and rehabilitation provider and which mandate that work capacity testing must be undertaken by a medical practitioner certified by WorkCover. This would ensure that injured workers are assessed consistently in accordance with workers compensation criteria and would likely improve return-to-work rates.

8. Cap weekly payment duration

This option is supported.

9. Remove “pain and suffering” as a separate category of compensation

This option is supported.

10. Only one claim can be made for whole person impairment

This option is supported.

11. One assessment of impairment for statutory lump sum, commutations and work injury damages

This option is not supported unless reforms to the legislation are made which remove the option for injured workers to choose their doctor and rehabilitation provider and which mandate that assessment of impairment, particularly in the situation where there is potential for payment of a statutory lump sum, commutation or work injury damages, must be undertaken by a medical practitioner certified by WorkCover.

12. Strengthen work injury damages

This option is supported.

13. Cap medical coverage duration

This option is supported and should be comparable with the benefits offered in other jurisdictions. Steps should be taken to legislate the certification of medical practitioners for WorkCover. This would have the potential to regulate medical expenses and would ensure that injured workers are being treated to recover from their injury and return to work.

14. Strengthen regulatory framework for health providers

This option is strongly supported. Steps should be taken to legislate the certification of medical practitioners for WorkCover rather than the option for injured workers to choose their doctor and rehabilitation provider should be removed.

The Small Business Commissioner has heard numerous stories from small businesses about doctors and healthcare providers which undermine the medical profession by signing medical certificates for workers without critical review of their ability to work.

15. Targeted commutation

This option is not supported, given that relaxing commutation thresholds for specific classes of claim on a time limited basis has the potential to increase workers compensation premiums for employers. It is noted that the Scheme Actuary and industry experts have advised against broadening access to commutations.

16. Exclusion of strokes/heart attack unless work is a significant contributor

This option is supported, however the legislated criteria for determining whether work is a “significant contributor” must be clearly defined as this clause would likely contribute to complex litigation in the determination of workers compensation cases.