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Submission to
New South Wales Workers' Compensation Scheme Inquiry
May 2012

This submission addresses two of the reform principles that are the subject of this inquiry as laid out in the Issues Paper released by the Minister for Finance and Services.

Those principles are that the scheme should

- "contribute to the economic and jobs growth, including small business, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements." (Principle number 2)
- "reduce the high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system". (Principle number 6)

Summary

Independent Contractors Australia has observed and commented on the NSW workers' compensation scheme since 2005. Our current comments are directed towards one primary issue—namely, the way in which the workers' compensation authority interprets and applies the definition of who is covered by the scheme and who is not.

We find the scheme to be one of institutional oppression directed towards self-employed, small business people in NSW. The authority has inflicted enormous harm on NSW small business people for over more than a decade. In our experience, the authority has a history of acting in a dictatorial manner, answerable only to itself. In our view, if the authority were a private-sector corporation, its actions would amount to the worst form of corporate behaviour, and would arguably be subject to sanction under corporate affairs and competition protection laws. However, because the authority is a state-protected monopoly, its appalling behaviour continues unrestrained.

The core problem is that workers' compensation legislation declares that the scheme applies only to employees and not to self-employed people (independent contractors). However, the authority uses a definition of what/who is an employee that is not consistent with the law and, through commercial intimidation, enforces its view upon small business people who do not have the finances or capacity to defend their position effectively.

There is a solution. The definition of who is in or out of the scheme needs to be shifted from a complex legal identification of employment/non-employment to an easily administered administrative trigger. This is explained below.

Previous ICA submissions and comment
Below are three attachments that are included as part of this submission which lay out the problem caused by the behaviour of the workers' compensation authority over a long period of time. These attachments are ICA public commentary and a submission made to the review of workers' compensation in 2005:

- NSW WorkCover destroys entrepreneurs (10 February 2011)
- NSW Workers' Compensation A contractors' mess (November 2006)
- Submission to NSW Review of Workers' Compensation. Definition of a Worker (28 February 2005)

The creation of NSW sovereign risk
The result of the behaviour of the workers' compensation authority is the creation of huge and damaging sovereign risk for people seeking to do business in NSW. There is a basic, simple, practical procedure that government should apply in its regulatory design and the way in which laws are applied. Rules must be clear, transparent and easy to understand. The regulator (policeman) should apply those rules with transparency, impartiality and in strict accordance with the law.

These definitional workers' compensation coverage rules in NSW are not simple or easy to understand. The regulator makes assessments without transparency and breaches the rules.

The consequence in NSW is that for business people (particularly small business people) the commonsense understanding of the rules is not consistent with the application of the rules by the authority. Whether an individual is complying with the rules or not is not a matter of clarity, but of lottery. It is merely luck as to whether an individual is subject to an alleged breach of the rules, fined and (often) bankrupted by the authority.

The outcome for NSW is significant damage done to commercial trust when undertaking business in NSW. People cannot know whether or not they have priced work correctly based on anticipated workers' compensation premiums. If they are targeted by the authority, the back-bill imposed upon them is of such a scale that it can lead to bankruptcy. In such an environment, people engage in lower levels of business activity, particularly small business. The wealth potential of NSW is squeezed and diminished.

The problem 'went away' but has 're-emerged'
During 2006 the aggressive activity of the workers' compensation authority seemed to reach a zenith. There was some evidence that during an eighteen-month period the workers' compensation authority was bankrupting up to some six (6) small business people a day in NSW (see some of the case studies below from 2011). There was consequently considerable media attention. ICA observed that ,from around 2007, the workers' compensation authority toned down its aggressive stance and we received fewer if any reports of continuing problems. However, during 2011-12 instances of heavy-handedness have re-emerged. ICA is currently monitoring at least two cases in which the behaviour of the authority has returned to its pre-2007 form.

Solution

There is and must be a solution to this problem. ICA does not believe that a solution can be achieved by 'fiddling' with the application of the current rules. Further complexity rather than simplicity will inevitably result. Simplicity can be achieved through creating an easy-to-understand administrative trigger to identify when a self-employed person is subject to workers' compensation coverage or not.

A suggested model is as follows:

1. All common-law employees would straightforwardly be within the workers' compensation scheme.
2. An independent contractor who provided evidence of current private accident and illness insurance would be excluded from workers' compensation coverage.
3. An independent contractor who invoiced without either an ABN or evidence of a current private accident and illness insurance policy would be included in workers' compensation coverage and the engaging business would have obligations to pay premiums.

Regulations or legislation could stipulate the minimum amounts of private accident and illness insurance required under (2).

NSW WorkCover destroys entrepreneurs

10 February 2011
http://www.contractworld.com.au/library/ica-NSW-WorkCover-destroys-entrepreneurs.php

For many years the New South Wales government has been destroying small businesses through its WorkCover laws. It has failed to fix these to make the laws clear about who owes premiums. Instead it harasses, intimidates and bankrupts self-employed, small business people.

- The story of June Gibson (just one victim) appears below.
- There are other stories below.

Summary of the problem and harassment

Under the New South Wales workers' compensation laws, a business does not pay premiums for self-employed contractors that it might engage. For example, if a high-rise building uses contract cleaners, the owners of the building do not pay premiums. The contractors have their own workers' compensation policy and pay their own premiums. But the NSW laws contain all sorts of confusing 'buts'---so much so that it's not completely clear if and when premiums have to be paid.

On many occasions, self-employed small business people engage contractors in their business. This is how self-employed entrepreneurs create, build and run their businesses. The contractors they use have their own workers' compensation policies.

But then the NSW WorkCover Authority conducts audits and declares that premiums have to be paid for the contractors. People are sent massive bills dating back years. Small business people are particularly targeted by WorkCover. To challenge the bill one first has to pay the bill and the review is conducted by WorkCover. Small business people cannot afford expensive legal challenges. WorkCover has bankrupted large numbers of small business people in this way. It amounts to harassment.

Here's just one typical story.

June Gibson: A victim of NSW WorkCover

June and her husband David live on the Central Coast of New South Wales. Their battle with WorkCover resulted in the loss of their business, their retirement nest egg and their house. They now live in rental accommodation. Their story is typical. June explained to us in 2007 how difficult it was to discuss with WorkCover the engagement of just one contractor who they had paid only $490. Here are June's notes from 2007:

My husband and I have run our own bricklaying business for many years. During that time we engaged both employees and self-employed independent contractors to assist us in the work on an on-off basis, depending on the work we had. We were consumers of the services of WorkCover NSW in their provision of workers' compensation arrangements.

We were required to pay workers' compensation premiums for our employees but not for the self-employed independent contractors. Up until 2000, the Australian Taxation Office required anyone who engaged self-employed persons in the building industry to withhold and remit tax under the Prescribed Payments System (PPS). We did this for all the self-employed independent contractors we engaged.

Up until 2000, we took as evidence of self-employment of the persons we engaged our holding of PPS forms and tax remittance. We did not pay workers' compensation premiums on any person we engaged where we had a PPS form, but we did pay premiums on all employees. We were audited by WorkCover NSW on two occasions. On each occasion the auditors accepted the PPS forms as evidence of self employment, which meant that workers' compensation premiums were not required to be paid. The use of PPS forms as evidence of self-employment in the building industry was common practice.

In 2004 WorkCover NSW conducted another audit covering the years 1998 to 2003. We again supplied the PPS forms. However, this time, WorkCover determined that only trade contractors who held an Australian Business Number (ABN) were self-employed. The problem with WorkCover's reasoning was that ABNs did not become operative in Australia until 2000. In the building industry ABNs replaced PPS forms in 2000.

We submitted that one person who we engaged in 1998-99 as a self-employed independent contractor, and for whom we held a PPS form, was a person for whom we should not pay workers' compensation premiums. Further, this person was, to all intents and purposes, a self-employed person who ran his own business, advertised his business and had multiple clients. This information about him has been discussed with WorkCover. However, they still insist that the lack of an ABN allows them to declare him not to be self-employed. The person in question is prepared to come to a hearing to provide evidence that he is a self-employed person running his own business.

We have discussed this issue with WorkCover on repeated occasions and are prepared to continue to discuss it with them. However, in 2006, WorkCover informed us that if we did not pay the alleged debt, they would bankrupt us. We have found the approach by WorkCover NSW to be very intimidating. They apply rules that are unclear and which they change to suit their circumstances. We find their approach one of harassment in which appeals against their decisions are confined to internal WorkCover NSW processes to which we are denied input. We seek consideration by an independent body external to WorkCover NSW.

We asked for an order that WorkCover NSW do not demand payment from us for premiums on the amount we paid the contractor. The amount we paid him was $490. If we had been required to pay premiums, the amount due would have been $68.60 (ie, multiply the amount paid by 14%).

Here is a newspaper article http://www.contractworld.com.au/pages/PDFs/June-Gibson-article-2006.pdf about June which shows that the original bill from WorkCover was for $54,000. WorkCover reduced this to $10,000 after two years of disputation---but by then the activities of WorkCover had destroyed their business.

Other small business people

There are many other similar stories to be had from files we have studied. Many cover bricklayers because WorkCover seems to have focused on them, in particular. We don't mention their names here or give full details, but their stories in one way or another are very similar to what happened to June Gibson. All of the bricklayers in the examples below were self-employed.

1. In 2006, a self-employed bricklayer received a bill for $9,000.

2. A western Sydney bricklayer who speaks little English was audited via fax. He had no face-to-face interviews with the auditor. He did not understand what was going on but received a bill for $64,000.

3. Another western Sydney bricklayer was back-audited for five years and received a bill for $150,000.

4. And another western Sydney bricklayer, who had gone out of business, was back-audited 5--7 years. He paid the bill of more that $10,000.

5. A central coast small business supplying homes with fixtures, fittings and homemaker products was audited going back 7 years. It received an assessment alleging under-declared remuneration of $714,000 based on the allegation that contractors were allegedly employees.

6. A husband-and-wife business in south Sydney underwent a five-year audit with an initial total bill exceeding $200,000. In one instance they were billed for a contractor who did some work for them, but was operating a business in Queensland and covered under Queensland workers' compensation. At one stage they received a bill for another $31,000 without supporting evidence as to why. They are paying off the debt because they cannot afford to fight WorkCover. Their business has closed and their marriage broken up as a result of the financial pressure.

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NSW Workers' Compensation
A contractors' mess
November 2006

http://www.contractworld.com.au/pages/PDFs/ICA-NSW-workers-comp-understand.pdf

The way in which NSW workers' compensation laws are applied is a mess, inflicting large-scale pain on small businesses in NSW in particular. Government reviews and changes to workers' compensation have failed to fix the mess.

ICA has been investigating the problem and reports as follows:

Background
The NSW workers' compensation scheme has been in significant financial trouble for some time. To recover its debts, the NSW Government has undertaken a number of aggressive money-raising programmes. One of these programmes has involved conducting audits of businesses who use independent contractors and, through that process, seeking to declare contractors to be employees. Once declared to be employees, workers' compensation premiums become payable on people for whom businesses previously believed that no premiums were payable.

During 2004–05, NSW undertook an audit programme of some 20,000 businesses each year. Most of these businesses have been small, often being businesses of one or a husband/wife partnership. Many of these businesses have used independent contractors like themselves to undertake jobs too large for them to do on their own. This has been very common in the construction sector. The audits have gone back up to seven years.

ICA has been contacted by large numbers of these small business people who have received huge back-dated bills, often amounting to many tens of thousands of dollars.

Why the definitional issue is important
Under the NSW workers' compensation scheme, independent contractors are not allowed to be covered by the scheme. Premiums cannot be paid on independent contractors and they are not allowed to make injury compensation claims. Why NSW chooses to do this is unknown.

Consequently, businesses who use independent contractors are not supposed to pay premiums on them. Typically, this applies in the building industry where, for

example, a company will use an electrician to undertake contract work. The company does not pay workers' compensation premiums on the electrician. The electrician arranges his or her own accident/illness or workers' compensation insurance.

Being clear about whether a person is an employee or an independent contractor is critical to the pricing of jobs and to a clear understanding about who has responsibilities and liabilities under workers' compensation.

If businesses are to operate within the law, the law needs to be clear. But in NSW, although the law is clear, the way in which the government chooses to apply the law is massively confusing. This is creating huge commercial problems and hardship for large numbers of small businesses in particular.

The definition is clear but the government badly applies and interprets its own laws

Under NSW law, the definition of who is an employee for workers' compensation purposes is quite clear. The law states that if a person works under a 'contract of service', he or she is an employee. That is, the common-law definition applies. Workers' compensation premiums must be paid on common-law employees.

But the NSW Government fiddles with the definitions. It claims that it 'deems' persons to be employees. This means, in some instances, that specific types of independent contractors are named as coming under the workers' compensation scheme. 'Shearers', for example, are deemed. This is clear. But if a job type is not specifically named, the common law definition continues to apply.

This is where the confusion arises because the NSW Government has set up a process where it decides who is an employee for workers' compensation purposes. Its procedures breach normal common-law processes. Consequently, vast numbers of businesses who genuinely believed that they were not allowed to include independent contractors in their returns have been caught with massive back-dated bills under a dubious application of the law by the Government. In fact, in many instances, if the law were to be correctly applied, many premiums that the government forces small businesses to pay would be illegal.

It happens like this:

- A small business will declare employees in its workers' compensation declaration and pay premiums. It will not declare independent contractors—as is required.
- The NSW WorkCover Authority sends sub-contracted external auditors to inspect the business's records.
- The auditor makes a recommendation to WorkCover NSW which the business does not see.
- The business receives a back-dated bill with no explanation but which alleges that numbers of independent contractors were actually employees.
- The business must pay the back-dated bill or be denied workers' compensation coverage. Without coverage, the business has no choice but to close.
- The business can appeal, but the appeal process is to an internal WorkCover committee.

- If a business wants to take the matter beyond WorkCover, they can appeal to the courts but this is a massively expensive process, the cost of which most commonly would vastly exceed the size of any bill.

ICA has spoken with auditors who say that the guidelines that the WorkCover authority supplies are vague and imprecise. ICA has looked at the definitions the WorkCover authority uses and concludes as follows:

- WorkCover claims that it has the capacity to 'deem' people to be employees. But this claim is false. The law clearly requires the authority to make an assessment based on common law. Ultimately only the courts can make a final decision but WorkCover instead applies its dubious and inconsistent interpretations.
- WorkCover breaches common law but it nonetheless succeeds against small businesses because it has set up an appeals process which is not independent and is designed to reinforce its own powers. In effect, it intimidates small businesses into paying premiums where, if the law were applied correctly, premiums would not be due.

The NSW Government is at fault for allowing this to occur. It is a case of gross maladministration of the law by the NSW government.

Hardship

The processes as described above, have caught significant numbers of small businesses in NSW and have caused massive financial hardship to them. Back-dated bills over five to seven years have been imposed on many small businesses, with amounts ranging from $1,000 to $200,000. This has destroyed businesses and working lives, and has led to many family break-ups in NSW.

ICA has been in contact with a group in NSW called the Small Business Reform Group. (www.sbrg.com.au). This is a networked group of people who have suffered because of this incorrect application of the law in NSW.

ICA will be publishing some of their stories. The truth needs to be revealed.

Failure to fix the way the law is applied

During 2005, the NSW Government conducted a review of worker definitions. ICA made a submission. Unfortunately, the review ignored the plight of small business in NSW. The review also ignored the incorrect application of the law being applied in NSW by WorkCover. The review did nothing to fix the problems.

In late October 2006, the NSW WorkCover placed on its website a 'self-assessment tool'. (See www.workcover.nsw.gov.au) This is supposed to give guidance to small businesses as to whether the people they engage are independent contractors or employees. ICA has tested the on-line tool using a number of the 'hardship' cases we have investigated. On each occasion the tool indicated that the people the WorkCover authority has levied premiums upon were independent contractors. That is, WorkCover's own interpretation of its law does not agree with the 'tool' it has created to advise businesses. ICA believes that the tool is misleading and unreliable about the real approach that WorkCover applies.

Fixing the situation

The only thing people in NSW in this matter want is clarity. They want to know upon whom premiums should be paid. If the way in which the law is applied is confusing and unpredictable, businesses cannot know how to comply.

What needs to happen is simple. The NSW Government must make crystal-clear who is 'in' and who is 'out' of the workers' compensation scheme. The situation has been, and continues to be, a mess. The people suffering are small businesses in NSW.

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Submission to NSW Review of Workers' Compensation
Definition of a Worker
28 February 2005

Independent Contractors of Australia is pleased to have the opportunity to respond to the NSW discussion paper: Definition of a Worker. The discussion paper is refreshing because it confronts an issue that has long created confusion and commercial uncertainty—namely, who is within the NSW workers' compensation scheme and who is out?

Background perspective

1 Structural confusion

The essential difficulty highlighted by the discussion paper (which is common to Australian workers' compensation schemes) is as follows:

- Workers' compensation is an insurance scheme that does not follow standard insurance structures. Most usually, a person covered by an insurance policy initiates coverage and directly pays the premium.
- Workers' compensation, instead, requires other entities (businesses) to pay the premiums for people who are covered (workers). The business is not insured but the worker is. The business pays.
- Workers' compensation schemes then take the view that persons who in their own right are businesses (that is, independent contractors) are to be refused workers' compensation cover and prevented from paying premiums for themselves.
- However, when independent contractors perform work for other businesses (as they must do), the workers' compensation scheme then tries to declare a wide range of work situations where the party doing the engaging must pay premiums for the independent contractor.

In effect, workers' compensation in one breath states that a whole range of persons are *not* to be within the scheme yet a whole range of those same persons are to be *within* the scheme. This is the cause of the confusion and uncertainty.

2. Deeming creates confusion

'Deeming' is an unhelpful term and a less-than-useful approach to resolving this structural problem and its concomitant confusion.
This is why:

Independent contractors are prevented in their own right from joining the workers' compensation scheme. The key identifying mark of an independent contractor is that he or she is a person who works under a commercial contract—the contract *for* services. Under commercial law and regulation, including the *Trade Practices Act* and various State Fair Trading Acts, status and regulatory coverage is clear. A person is identified as a business, no matter what their business structure or size, because they operate through a commercial contract. It is the identification of the commercial contract that leads to commercial regulation to be applied. Commercial law does not seek to deem persons working under a commercial contract not to be in their regulatory reach. Likewise, commercial law does not seek to deem persons who are not involved in a commercial contract to be in their regulatory reach.

Workers' compensation deeming, however, breaks with this commercial standard. Deeming seeks to declare persons who are clearly businesses for commercial regulation and transaction purposes to be 'employees' for workers' compensation purposes. This creates large-scale confusion. A business operates under a commercial contract and has business relationships with persons, but is expected in some instances under workers' compensation to treat some of those persons as not being businesses, but as 'employees' for workers' compensation purposes. And, in applying this contortion to commercial norms, the deeming provisions are technical, legalistic and inconsistent. Clarity is near-impossible.

Further, ICA's observation of deeming is that, as deeming provisions expand coverage under the NSW workers' compensation scheme is developing into a universal accident-and-illness insurance scheme by osmosis. Yet it would seem that this is not the policy intent. In addition, decisions on who or what to include in deeming provisions are too often an outcome of the management of political pressures rather than an assessment of proper system design that is consistent with policy.

The conclusion is that deeming creates confusion. Workers' compensation deeming not only makes it near-impossible to understand the law for those who try to comply, but creates opportunity for those whose intent is to break the law.

A suggestion

3. Limitations of this submission

The review appears to be narrowly focused on proposals to expand and redesign some aspects of deeming whilst not addressing the core problem of coverage design.

Because ICA finds the deeming approach to be counter-productive in terms of clarity, ICA's recommendations (below) do not specifically address the brief of the review. Nonetheless, ICA's perspective may be helpful for a longer term and more substantial review of how to design the system to achieve desired workers' compensation coverage.

4. Administrative triggers: Some modeling

Rather than taking the legalistic approach of declaring persons outside the scheme and then 'deeming' some of those persons back into the scheme, a more lasting solution might be to look to administrative triggers that businesses and individuals can easily understand.

A model for this is available by looking at income tax withholding obligations under Pay As You Go (PAYG) compared with Pay As You Earn (the old PAYE).

Under the now dismantled PAYE system, the power of the Australian Tax Office to require income tax withholding was exclusively tied to the finding of common-law employment. Under PAYE, the ATO suffered from the confusion about coverage that is now being experienced by the NSW workers' compensation system, and for several decades the ATO experimented with the (eventually hopeless) practice of deeming people to be employees. This never worked. Consequently PAYE was replaced by PAYG.

PAYG has three administrative and legislative legs that cause withholding to be enforceable—and enforceable on a wide basis:

(a) Withholding for employees and directors, etc.
(b) Withholding for independent contractors engaged directly via an ABN.
(c) Withholding for independent contractors under an agency.

The engagement of independent contractors' directly (as per (b) above) makes use of the Australian Business Number as the administrative withholding trigger.

This system has proven highly successful in clarifying withholding obligations. It appears that strong voluntary compliance is reported to have resulted. [Note: nothing of this sort will stop intentional fraud.]

There is an important difference, however, between income tax withholding and the NSW workers' compensation arrangements:

- Income tax withholding has the intent of capturing everyone.
- NSW workers' compensation has the intent of excluding some persons.

The Australian Business Number, however, was specifically designed to assist other regimes in regulatory administration where desired. The *A New Tax System (Australian Business Number) Act 1999* states:

> 3(3) [Other objects]
> The objects of this Act also include reducing the number of government registration and reporting requirements by making the system available to State, Territory and local government regulatory bodies.

The ABN system may assist as a part of an administrative trigger.

A full administrative trigger, however, cannot be modeled unless NSW decides exactly which self-employed, independent contractors it wishes to exclude from coverage. A fundamental question must be addressed—namely, is NSW happy for some persons in the State not to have access to compulsory work accident and illness insurance coverage?

Tasmania has addressed this question by declaring that all persons at work must be covered by accident and illness insurance of some sort. In Tasmania, an independent contractor providing commercial services to another business is within the workers' compensation scheme unless the independent contractor has alternative, private accident and illness insurance.

If NSW were interested in using administrative triggers, a possible model would be as follows:

4. All common-law employees would straightforwardly be within the workers' compensation scheme.
5. An independent contractor who provided evidence of current private accident and illness insurance would be excluded from workers' compensation coverage.
6. An independent contractor who invoiced without either an ABN or evidence of a current private accident and illness insurance policy would be included in workers' compensation coverage and the engaging business would have obligations to pay premiums.

Regulations could stipulate the minimum amounts of private accident and illness insurance required under (2).

Such a model should:

- Make quite clear to all employees, independent contractors and engaging businesses whether coverage was required or not and;
- Thus significantly improve voluntary compliance.
- Ensure that all workers were actively informed about work-related accident and illness insurance.
- Assist to ensure that persons on whom workers compensation premiums were not being paid (due to not being within the scheme) could not make spurious claims.
- Make it easier for the NSW workers' compensation authority to identify fraudulent non-compliance.

5. Conclusion

ICA does not believe that further deeming provisions will provide lasting solutions to the NSW workers' compensation coverage problem. Additional deeming may resolve some issues, but the core structure will remain flawed, thereby continuing the confusion, the uncertainty, the intentional and non-intentional non-compliance, and the auditing and enforcement complexity.

ICA does believe that simple, administrative triggers are more likely to produce lasting solutions because businesses will have high-level clarity that matches the processes of normal commercial transactions. The models described above may not suit NSW. But they are offered by way of demonstration to assist consideration.