



[www.contractworld.com.au](http://www.contractworld.com.au)  
[office@contractworld.com.au](mailto:office@contractworld.com.au)  
ABN: 54 403 453 626

## **NSW Workers' Compensation A contractors' mess November 2006**

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](http://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.

- Click here for ICA submission.  
[<http://www.contractworld.com.au/reloaded/ica-nswworkerscomp.php>]
- Clear here for NSW Review.

In late October 2006, the NSW WorkCover placed on its website a ‘self-assessment tool’. (See [www.workcover.nsw.gov.au](http://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.