Supplementary Submission by the

Housing Industry Association

Limited ACN 004 631 752

on

Productivity Commission Interim Report on National Workers' Compensation.

1 December 2003

SUPPLEMENTARY SUBMISSION

Introduction

The Housing Industry Association (HIA) is grateful for the opportunity to provide a supplementary submission in response to the Productivity Commission's Interim Report into the National Workers' Compensation. HIA is willing to attend the public hearings in Sydney on 4 December 2003 to provide further background to both this supplementary submission and our original submission dated 9 June 2003.

General

HIA supports the Productivity Commission's findings that multi-state employers face significant compliance burdens and costs from having to deal with multiple workers' compensation schemes and safety requirements. Therefore HIA supports an option for coverage under a single workers' compensation scheme as well as increasing access for employers to access self insurance under the Comcare Scheme.

Of specific interest to HIA is the development of a national framework for occupational health and safety. HIA strongly supports this as well as a smaller NOHSC Board and the development of template legislation. Obviously the issue of State/Territory acceptance needs to be addressed and HIA has genuine concerns about whether there will be universal acceptance of a national framework. Specifically, within the construction industry, risk management principles and codes of practice for various activities will need to address different practices between residential and commercial construction. Additionally, the importance of effectively resourcing a national framework will need to be addressed as will the State's various penalty regimes including industrial manslaughter.

Definitions

HIA welcomes the Commission's attempts to address the confusion between various definitions of employee and specifically the call for mutual recognition between various jurisdictions. Unfortunately, HIA submits that the Commission has not gone far enough with its recommendation to adopt the control test. Whilst this test has somewhat 'universal' recognition from an industrial relations perspective, its reliance on the existence of a large number of factors gives rise to both subjectivity and confusion. HIA draws the Commission's attention to the following two recent case studies:

In the matter *Abdalla, Abraham and Viewdaze Pty Ltd t/as Malta Travel (PR927971)*, the Full Bench of the Australian Industrial Relations Commission (AIRC) provided a list of relevant indicia that must be examined when determining whether a contract of service or a contract for service exists. These indicia are:

- Whether the putative (inferred) employer exercises or has the right to exercise control over the manner in which work is performed, place or work, hours of work and the like;

- Whether the worker performs work for others (or has a genuine and practical entitlement to do so);
- Whether the worker has a separate place of work and or advertises his or her services to the world and large;
- Whether the worker provides and maintains significant tools or equipment;
- Whether the work can be delegated or subcontracted;
- Whether the putative employer has the right to suspend or dismiss the worker engaged;
- Whether the putative employer presents the worker to the world at large as an emanation of the business
- Whether income tax is deducted from remuneration paid to the worker;
- Whether the worker is provided with paid holidays or sick leave;
- Whether the work involves a profession, trade or distinct calling on the part of the person engaged;
- Whether the worker creates goodwill or saleable assets in the course of his or her work; and
- Whether the worker spends a significant portion of his remuneration on business experts.

The facts of this case where that Mr Abdalla was a travel consultant who occupied business space at Viewdaze's premises and was paid by commission. The factors that seemed to identify an employment relationship were:

- Various references to 'employment' within in a document entitled 'Employment Contract';
- The lodgement of an employment declaration and the deduction and remittal of group tax;
- Further correspondence identifying Mr Abdalla as a casual employee;
- Mr Abdalla used the Respondent's (Viewdaze P/L) office equipment;
- The provisions of the *Travel Agents Act 1986 (Vic)*; and
- Existence of business cards

Factors which seemed to indicate that Mr Abdalla was an independent contractor were:

- References to independent agent in initial letter of offer and 'erroneously' titled Employment Contract;

- The absence of control that the Respondent exercised over Mr Abdalla;

- Payments of commission were credited to a particular account entitled "Univoyages'; and

- The non payment of salary or wages.

The key aspect of the case as determined by the Commission was the lack of control exercised by the Respondent.

The use of the Respondent's office equipment was deemed to be quite minor in the face of other factors and the tax situation was seen by the AIRC as being an error rather then a significant factor. Therefore the AIRC determined that Mr Abdalla was an independent contractor and not an employee.

In the matter *Brian Ryder and Beaulieu of Australia Limited 2003 WAIRC 08203*, The Full Bench of the Western Australian Industrial Relations Commission (WAIRC) overturned a decision of a Single Commissioner concerning whether Mr Ryder was an employee and not a contractor. By way of background, Mr Ryder was engaged as an area sales manager to sell carpets on behalf of the Respondent (Beaulieu of Australia). His period of 'employment' was from 1 October 1990 to 11 December 2001 although there were two separate 'employers' because the Respondent assumed greater control of the company in 1995.

In 1992, Mr Ryder formed Brian Ryder Carpets Pty Ltd with his wife. Mr Ryder was responsible for the selling and marketing of the Respondent's products throughout the State. He worked from home, called on customers, attended to complaints, set budgets, was paid a retainer, advised on market developments, worked 5 days per week, reported on a weekly basis, took 2 week's leave each year (was funded by his retainer and had to be applied for). Mr Ryder had business cards supplied by the Respondent and all payments were made to Mr Ryder's company. Mr Ryder had also signed a document agreeing to keep Respondent's company information confidential.

The Full Bench gave careful consideration to all of the factors and determined that Mr Ryder was an employee of the Respondent based upon the totality of the relationship. Indicative of this determination were the following factors:

- No detailed contract existed – in fact any documentation between the parties was somewhat ambiguous and payment of retainer indicated an employment relationship

- Payment of retainer was not linked to sales performance and therefore more akin to an employment relationship

- No benefits were paid for including superannuation

- Whilst Mr Ryder was able to set his own hours, evidence of business cards and regular contacts with a National Sales Manager as well as a requirement to

achieve sales targets and apply for leave all were strong indicators of an employment relationship

- The role of Brian Ryder Carpets P/L was solely that of a tax ameliorisation vehicle for Mr Ryder and his wife – the company's actual existence therefore did not support the existence of a contracting relationship
- Mr Ryder was entitled Area Sales Manager
- Mr Ryder did not employ anyone
- There was no evidence that Mr Ryder could delegate his duties
- Mr Ryder only sold the Respondent's products
- There was no evidence of a true agency arrangement
- Mr Ryder operated in a similar manner to other staff
- Mr Ryder was required to undertake written obligations of confidentiality
- Mr Ryder acquired no goodwill or other saleable assets
- All matters pertaining to the contract were the subject of execution and agreement between Mr Ryder as an individual and the Respondent

These two cases alone demonstrate how Tribunals interpret various factors and what weightings can be applied. The State Revenue Offices in both New South Wales and Western Australia have adopted their own extensive interpretations of common law and the control test to effectively extend payroll tax jurisdiction to many contracting arrangements. In NSW they have even gone as far as specifying labour components for various building trades. If you add to this differences in interpretation for superannuation purposes as well as 8 separate workers compensation perspectives, then you are left with a significant amount of confusion.

In light of the above, HIA requests that the Productivity Commission revisit this particular definition and consider adopting the Queensland definition as detailed in our earlier submission. The Queensland definition for workers compensation purposes relies on the Personal Services Business (PSB) tests from the Federal Alienation of Personal Services Income legislation. Specifically if a contractor is operating a Personal Services Business then it is not necessary for that contractor to be covered for workers compensation by the principal. The tests are simple to apply and interpret and less open to subjective analysis when compared to the control test.

Alternative Insurance Arrangements

Coupled to our comments above is HIA's continued support for alternative insurance arrangements. Not only should small unincorporated contractors be encouraged to utilise income protection or even sickness and accident arrangements, there is no suitable reasons for prohibiting them from accessing workers compensation arrangements for themselves. A true 'no fault' insurance system should operate to

benefit all industry participants, with participants having their own responsibilities if they are not employees. Opening up access can only benefit competition can only benefit competition within the insurance market. We request the Commission to examine our suggestions prior to issuing its final report.

Deeming

We note that the Productivity Commission stopped short of making any recommendations in its Interim Report about this issue. In our 6 June 03 submission, HIA flagged our concerns with deeming. In short, deeming undermines contractual relationships and attempts to impose a non-preferred regime onto contractors who have knowingly entered into a contractual arrangement. Notionally, courts are loathe to significantly alter contractual circumstances. We submit that legislators should adopt the same approach and we request that the Productivity Commission return to this issue.

Common Law Access and Statutory Benefits

HIA wishes to take this opportunity to reiterate our position that access to common law runs counter to the basic principle of a non-fault insurance scheme. Common law access is often slow and has high transaction costs. HIA submits that the proponents for common law access are those who are more likely to benefit from its operation. The reinforcement of statutory benefits is preferred. HIA is also willing to consider the development of a separate insurance product to respond to common law claims.

It is noteworthy that no jurisdictions have unfettered access to common law. Some jurisdictions including New South Wales, Victoria, Western Australia and Tasmania allow access to common law where there is a significant impairment as a result of a work place injury (ie. 15% for NSW, 16% for WA, 20% for Victoria and 30% for Tasmania). Northern Territory, ACT and South Australia do not allow access. Moreover the tests to claim common law access are different for those regions allowing access.

Therefore, both access and the requirements to claim differ across States and Territories. This makes it difficult for workers compensation to operate in a national framework. Moreover there has been a move over the past 15 or so years to reduce or deny access in some jurisdictions. For example, South Australia abolished access in 1992, the Northern Territory abolished access on 1 January, 1987 and Victoria modified access on 30 June, 1989.

Premium Setting

In our 6 June 03 submission, HIA expressed its concern about premium loading and its effects on the market. The Productivity Commission recommendations made no specific comments about premium loading and instead concentrated on issues of eliminating cross subsidisation and the provision of cost effective financial incentives. HIA supports these recommendations in lieu of continuing with premium loading.

HIA notes the Commission's recommendations for experience rated premiums for large employers only. Whilst our preference is for experience rated premiums to be

across the board, we accept that this would be very difficult to implement. Therefore HIA supports industry based premium settings for small to medium employers, providing the cost effective financial incentives are also available.

Dispute Resolution

HIA reiterates its support for alternative dispute resolution mechanisms, providing they are resourced effectively. Furthermore, any dispute resolution requires appropriately qualified and experienced people at the mediation stage as well as throughout the medical profession.

Housing Industry Association

1 December 2003

Attachment — provided by the Western Australian Department of Treasury and Finance – Office of State Revenue

Pay-Roll Tax — Guidelines on Subcontracting Arrangements

— Employment Agents

http://www.dtf.wa.gov.au/cms/uploadedFiles/RUL_PT6.pdf