



SUBMISSION TO WORKCOVER NSW REGARDING WORKERS COMPENSATION INSURANCE IN THE THOROUGHBRED RACING INDUSTRY

INTRODUCTION

Racing NSW (RNSW) is licensed as a Specialised Insurer and Self-insurer to provide workers compensation services to the thoroughbred racing industry.

The Australian Trainers Association (ATA) the National representative body for thoroughbred racehorse trainers.

In 2005 ATA became aware from its' membership that there were a number of issues causing concern to trainers and approached RNSW to seek clarification. These approaches were firstly not answered & eventually ATA was told RNSW would deal directly with the individuals concerned.

As recently as September 2009 this had not occurred.

The purpose of this submission is to highlight the issues, and table for discussion suggestions in relation to them.

Where Act is referred to it means the Workplace Injury Management and Workers Compensation Act 1998 (NSW)

ISSUE 1 - CORPORATE ENTITIES AND WORKING DIRECTORS.

RNSW has stated that “while it is the case directors of companies which have paid workers compensation premiums do have workers compensation coverage, the application of the legislation in the context of trainers is not clear. In light of the legislation, and given that the trainer holds as an individual the license which authorizes them to conduct the activities, the view has been taken that the trainer themselves is not covered for workers compensation purposes but that their employees are covered.”

The employees and the working director (trainer) are (usually) both remunerated by the same employer company and are entitled to the same treatment.

Trainers as a general practice do not pay staff unless they are sole traders.

We submit that RNSW must insure the corporate entity and if it continues not to do so, then it should decline the insurance entirely, so that the trainer can purchase a single policy from a Workcover agent in accordance with the Act.

ISSUE 2 - SCOPE OF ACTIVITIES.

RNSW indicates in its wages declaration form that it is constrained by its' Workcover License conditions to only insure "activities in the nature of thoroughbred horse training and racing" further it qualifies that to be "including pre-training but not breaking". It suggests "Therefore, you will need to separately insure any activities that fall outside the ambit of the RNSW policy".

RNSW is aware the Act prohibits this.

Workcover have previously informed us that the license conditions would not be an impediment to providing a full coverage.

RNSW appears to have no definitive guidelines on scope of activities.

When we have enquired in the past, we have variously been advised pre-training is covered only if it is on a registered racecourse, pre training is only covered for previously raced horses (because until they race they are not considered racehorses).

We did put the example of a previously unraced horse being brought to a race meeting and injuring a stablehand by standing on his foot and were informed there would be no cover, but had the horse previously raced then cover would apply. This is clearly absurd.

Further, the policy document issued by RNSW that we have sighted includes a clause stating, in part, "the NSWTRB's License is 'restricted to indemnifying Racing Clubs Associations and other employers whose main business activity is training horses and activities incidental thereto'"

Many trainers train on a part time basis especially in country areas, and where their main business is primary production, or some other type of employment or business. Most or all of these trainers are required to have two policies, as their other activities are not covered by RNSW, but they are required to have a RNSW policy.

Sometimes their employees also span both businesses.

ISSUE 3 - DEEMING PROVISIONS

The Act via Clause 9 (1) (c) of Schedule 1 states that “A person who:.....is engaged in riding work in connection with horse racing (but not harness racing) on the racecourse or other premises of a racing club or association,..... is, for the purposes of this Act taken to be a worker employed by the racing club or association.”

RNSW acknowledges this by meeting claims for trainers who are injured riding trackwork.

RNSW has recently contended “that the deeming provisions are intended to apply to jockeys / apprentice jockeys”

RNSW has used this argument to justify charging Claims Experience Premiums (CEP) to trainers based on claims for trackwork falls that should be ascribed to race clubs.

ISSUE 4 - PREMIUM COST TRANSPARENCY AND EQUITY

RNSW provides Workcover to Licensees, racing clubs and associations, also it covers its' own employees.

Premiums are charged to trainer licensees on the basis of a deposit premium and an “activity fee” based on the number of horses starting in races & barrier trials.

It is not clear how clubs & associations are charged, nor what premium RNSW pays for it's own employees.

RNSW requires trainers to provide wages declarations, we fail to understand why, when alledgedly premiums are levied on the basis described above.

RNSW claims to operate on a not for profit basis which results in “the total workers compensation premium paid by trainers in NSW is significantly less than your (their) counterparts in other States”.

This claim just does not stand up to scrutiny. Some NSW trainers appear to be paying premiums many times that of their interstate peers. We were verbally informed by a former RNSW insurance fund manager that “cross subsidization” occurred. If this is the case then the amount & extent should be transparent.

Most (but not all) trainers are defined as small employers under Workcover, and therefore exempt from CEP levies.

RNSW premium methodology does not recognize this. Some trainers are being levied with CEP of such magnitude as to destroy their business and penalize employment opportunities.

RNSW obtained considerable support from Federal and NSW State Governments for EI compensation, some of which was directed to Insurance premiums, including Workcover. Due to the effects of EI, most premiums actually fell due to lower levels of activity, and commensurate lower claims activity.

This windfall needs to be recognized as a one off, and it needs to be fully disclosed as to what industry segments benefitted from the deployment of these funds.

ISSUE 5 - INTERSTATE VISITING TRAINERS.

Trainers operating in the border areas of NSW, Vic., and Qld., and also visiting racecourses in Sydney and its environs from interstate are required by RNSW to obtain a NSW Workcover policy from them, regardless of whether they are only utilizing employees from their home state.

ISSUE 6 - DIVERSE EMPLOYMENT AND REWARD STRUCTURES

The racing industry has a wide range of participants & employment structures often aimed at minimizing tax.

There are corporate entities controlled by boards, unlicensed individuals, or professional trainers, solely engaged in the business of buying, training, and racing, horses for clients and syndicates of clients.

There are trainers who are sole traders, and who may or may not employ staff.

These businesses may employ other licensed trainers, trackwork riders, independent contractors, other licensed persons and in some cases unlicensed persons.

Trainers also contract their services to other trainers to break & pre-train horses and perhaps only have a few race starts per year because that is not the main focus of their business. They may or may not employ staff.

Yet other trainers train on a part time basis, training forming only a small part of their income, the main income source being from farming, veterinary practice,

plumbing, butchery, and almost any other trade or profession, in which they may be principal, director, sole trader, or employee.

Some trainers ride their own trackwork, and sometimes for other trainers. Trackwork riders are licensed as such, and often ride for a number of trainers on any one day.

Jockeys & apprentices also ride trackwork ,sometimes for a fee, and sometimes on the understanding that they will be selected for a race ride.

Stablehands not licensed to ride, may on occasion do so.

Trainers are sometimes leased, loaned, or be given a share in a horse on the understanding that there will be no charges back to the owner.

We have experience of assisting trainers when so called “cash in hand“ employees are injured. To pretend this situation is not widespread practice is naive.

OBSERVATIONS AND DISCUSSION POINTS

ISSUE 1

RNSW appears to have its' own interpretation of who is the employer and employee under the Act, that is based on historical practice.

This needs to be corrected. RNSW has conceded to us “This position may no longer be sustainable”.

If RNSW wishes to limit the scope to whom it provides cover, then it should do so by declining to cover the employer, corporate or otherwise.

ISSUE 2

RNSW needs to make clear the scope of its' Specialised Insurer license.

In our opinion the sole purpose of thoroughbreds is to race. Only those horses that are unable to do so for whatever reason, do not do so, and are disposed of. Therefore, it follows that **all** aspects of preparing thoroughbreds **are for the purposes of racing.**

We suggest RNSW has the latitude within it's License to provide cover for other activities.

However, it needs to define and clearly publicise what “main business activity” means.

This could be by reference to:

- animal numbers on a particular property, eg 40 horses vs 10 sheep;
- area, 10 hectares part of 60 hectares, not devoted to horses;
- training revenue is as a percentage of total revenue from all activities.

If a participant is engaged in activities outside the scope of its' policy RNSW should decline that client and allow employers to effect a single policy through a Workcover Agent.

RNSW should be required to make it clear, that participants must obtain a policy. Further, to make it clear whether it has the authority to require its licencees to participate in its workcover scheme or otherwise, bearing in mind the provisions of the Federal Trade Practices Act.

The interpretations of the Act applied by RNSW certainly do operate to minimize claims to the industry, but at a cost to participants, including trainers, in the form of lost entitlements and denying workers their rights. Further, confusion is widespread in the industry.

Thus, there appears to be a conflict between the regulatory and commercial interests of RNSW.

RNSW controls the main revenue stream for the industry, and claims ownership of the “product”.

It may be reasonable to suggest all participants in the industry , trainers, jockeys, apprentices, trackwork riders, ground staff, club & association staff, all **be deemed employees of RNSW** which can then administer its' own claims and pay all premiums thus greatly simplifying administration and eliminate contentious premium allocations.

This approach would lift a considerable cost burden from participants, thus benefitting the industry generally.

ISSUE 3

The ATA rejects this selective interpretation of the Act.

The ATA is of the view that due to the existence of “freelance” trackwork riders, the Act was deliberately framed to cover those persons.

The interpretation adopted by RNSW ascribes claims history to trainers who, under a Workcover Agents provided policy, would be defined as Small Employers and therefore not subject to a CEP. This causes an inequitable burden of the total premium cost to fall on trainers.

ISSUE 4

The recommendation here is for an open and transparent treatment of claims & premiums in line with sound business practice, even more appropriate because of the not-for-profit nature of the enterprise, perhaps fully published figures reviewed by the Auditor General.

The ATA accepts that ultimately premiums need to be claims based, however in order to be satisfied that trainers are meeting their equitable proportion of premium RNSW should disclose annual claims statistics ascribed to trainers and racing clubs / associations and RNSW itself, and indicate how the premium is distributed.

We have not yet been able to confirm the position in relation to whether participants can be required to utilize RNSW Workcover insurance, but suspect this is doubtful.

The ACCC has indicated that there are no Exclusive Dealing nor Third Line Forcing Authorisations current for the NSW Thoroughbred Racing Board or RNSW in relation to this matter.

If participants are free to utilize the mainstream Workcover system, or the RNSW Specialised Insurer as a market, then market pressures will constrain excessive premium levels and distortions.

ISSUE 5

The current RNSW practice appears to ignore the 2006 harmonization reforms recognizing what can loosely be described as the State of domicile principle.

RNSW should be satisfied a visiting trainer bringing his own employees on a temporary visit, and employing no persons in NSW, need only provide evidence of a state of domicile workers compensation insurance.

NO CHARGES BY WAY OF PREMIUMS OR ACTIVITY FEES SHOULD BE PERMITTED.

ISSUE 6

In our opinion the diversity of remuneration arrangements within the industry makes it almost impossible to be confident that the correct employer is identified.

For example we became aware of a circumstance where an unlicensed person engaged a trainer full time “under Contract” & required that trainer to engage staff also “under Contract” in both cases these were clearly employment situations and we advised so.

Consequently, because of situations such as that described, the use of cash in hand payments, and RNSW’s own problems defining the scope of its coverage we see considerable merit in the single **DEEMED EMPLOYER** approach mentioned under Item 2.

ISSUE 7 - WORKCOVER AND GENERALLY

As issuer of Licenses does Workcover have a responsibility to ensure those Licensees comply with the Act??

If persons have been deprived of coverage by erroneous interpretations or have incurred costs unfairly, who may be responsible for compensation??

RNSW and/or New South Wales Thoroughbred Racing Board is an enterprise constituted by an Act of the NSW Parliament. It holds a Specialised Insurers license & conducts Workcover activities under that license.

Australian domiciled insurers are required to have APRA approval.

Are Insurance Funds such as NSWTRB Insurance Fund regulated by APRA??

Is RNSW regulated by APRA?? (the Fund does not appear to be incorporated)
If not, what are the Prudential Financial controls??

It is a fact that RNSW is the only thoroughbred racing regulator in Australia that continues to provide an industry Workers Compensation scheme. Other state regulators relinquished this activity to Specialist Workcover Agents many years ago.

One possibly needs to question the ability of such a small organization to muster the required resources to effectively & prudentially manage the scheme.

The problems outlined in this submission tend to bear this out, as does the general upward trend of claims provisions that seem likely to exceed 50% of the total budget of RNSW in the mid term future.

