

WAGES

DEFINITION MANUAL

JUNE 2009

Disclaimer

This publication may contain occupational health and safety and workers compensation information. It may include some of your obligations under the various legislations that WorkCover NSW administers. To ensure you comply with your legal obligations you must refer to the appropriate legislation.

Information on the latest laws can be checked by visiting the NSW legislation website (www.legislation.nsw.gov.au) or by contacting the free hotline service on 02 9321 3333.

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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IMPORTANT INFORMATION

1. Paragraphs preceded by a number in the Wages Definition Manual are variously referred to throughout the Manual as ‘rules’. These rules provide guidance as to what is included in remuneration and how the provisions are generally applied for workers compensation insurance purposes.
2. The two main Acts referred to in the Wages Definition Manual are:
 - Workers Compensation Act 1987 (the Act), and
 - Workplace Injury Management and Workers Compensation Act 1998 (1998 Act).

INTRODUCTION

The purpose of this manual is to provide a guide to 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.

WorkCover's policy is where a payment to a worker is made in lieu of wages (regardless of the terminology used to describe that payment) then the payment is counted as remuneration for the purposes of calculating workers compensation premiums.

Many of the payments covered by the *Workers Compensation Act 1987* (the Act) definition of 'wages' are not of the type that might be generally thought of as wages – for example, the definition includes 'any other consideration in money or money's worth given to the worker' under a contract of service or a training contract. For this reason, WorkCover uses the term 'remuneration'.

The aim of this manual is to help ensure that there is a consistent approach to the declaration of remuneration. This consistency will help make sure that each employer covered for workers compensation through the WorkCover Scheme pays the correct premium amount.

This edition supersedes the October 2003 edition.

How the system works

Scheme Agents collect workers compensation premiums from employers on behalf of WorkCover to cover the costs associated with work-related injuries and diseases. This includes payment of benefits to an injured worker, to cover them for the loss of wages, treatment, rehabilitation and lump sums for permanent disabilities.

What can you use this manual for?

1. Employers and Scheme Agents can use this manual to help determine whether a particular payment is to be counted as 'remuneration' for the purposes of assessing the employer's premium. See Chapter B, which sets out WorkCover's interpretation in relation to many different types of payments.
2. The law governing whether a payment is remuneration for the purposes of workers compensation is set out in the Act and the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). The purpose of this manual is to provide general information about the law and how WorkCover interprets the law.

Why is this manual needed?

3. This manual is intended to assist all NSW employers to apply a consistent approach to the declaration of remuneration and help to ensure that all employers are treated fairly and consistently.

The manual deals with the definitions of 'remuneration' and 'worker' (and some related administrative matters eg record keeping and resolving disputes).

What is an employer's premium based on?

4. Each employer's workers compensation premium is based on various things, including:
 - the industry in which the employer operates
 - the amount of remuneration the employer pays to its workers
 - for those employers who are experience-adjusted (please see relevant *Insurance Premiums Order* (the IPO) for definitions), the cost of any claims made by their workers.

From 4.00 pm on 30 June 2008 some employers will no longer be required to obtain a workers compensation insurance policy for workers if they pay, or expect to pay, \$7500 or less in annual remuneration.

However, if an employer engages apprentices/trainees or are a member of a Group for workers compensation purposes, they are still required to take out a workers compensation insurance policy, no matter the amount of annual wages paid.

Remuneration includes wages and other amounts such as allowances, fringe benefits, superannuation and payments made to contractors who are deemed to be workers.

Penalties may apply if an employer provides incorrect wage declarations or fail to take out a policy when your wages exceed \$7500 per annum.

For further information on how premiums are calculated, refer to the relevant IPO available on the WorkCover website (www.workcover.nsw.gov.au).

Why is the level of weekly compensation benefits different to what an employer declares as remuneration?

5. Payments of weekly compensation benefits to an injured worker are calculated in accordance with the Act.

Weekly benefits form only one element of workers compensation benefits that an injured worker may be entitled to receive. Depending on the nature and severity of their injury, they may receive medical and other health-related treatments, rehabilitation, medication for their injury, or be entitled to a lump-sum payment for a permanent impairment or pain and suffering.

The relevant law

6. This manual sets out the criteria WorkCover applies in determining the amount of remuneration an employer must declare to their Scheme Agent. WorkCover also uses the same criteria for the purposes of:
 - determining an employer's appeal regarding the payments included in a worker's remuneration. See section 170 of the Act
 - considering an employer's understatement of wages. See section 174 of the Act
 - considering an employer's possible evasion of correct premiums. See sections 175 and 175A of the Act. For penalties for non-payment of premiums, see sections 155 and 156 of the Act.

Improving this manual

7. WorkCover welcomes your comments on this manual and any suggestions as to how it might be improved. The manual will be updated as required.

Any questions?

8. If you have any questions about this manual, please contact WorkCover at the address below.

Compliance Improvement Branch
WorkCover Authority of New South Wales
92–100 Donnison Street Gosford NSW 2250

or

Locked Bag 2906 Lisarow NSW 2252
Phone: Compliance Improvement Branch Hotline 4321 4808
Email: wageaudit@workcover.nsw.gov.au

If you are an employer wishing to dispute your Scheme Agent's assessment of your premium, check the information on disputes in Chapter L.

USING THIS MANUAL

Definition of 'worker' and 'remuneration'

9. Because each employer's premium is based on the amount of 'remuneration' the employer pays to its 'workers', it is important to be careful about determining who is a 'worker' and what constitutes 'remuneration'.

Each of those words is defined broadly. For example:

- **worker** includes many contractors (see Chapter F)
- **remuneration** includes many kinds of payments. The general rules about what is included as remuneration are set out in Chapter A. In addition, WorkCover has prepared a list covering many types of payments that employers make to workers. In the list, WorkCover sets out its interpretation as to which of those payments are to be counted as 'remuneration' (see Chapter B).

These broad definitions help to ensure that employers are treated fairly and consistently.

What records must employers keep?

10. Employers are required to keep records of:
 - the remuneration they pay their workers (and contractors who are deemed to be workers)
 - all information that may form the basis for calculating their workers compensation premium.

The employer must keep those records in good order and condition for at least **five (5) years** as outlined in section 174 of the Act.

See Chapter J for the rules about the records employers must keep.

Does a Scheme Agent's interpretation bind WorkCover?

11. The Scheme Agent is required to comply with this manual when deciding what is to be counted as remuneration for workers compensation purposes. This manual provides general information about the law and how WorkCover interprets the law. If an employer disputes what is included as remuneration, WorkCover will assess the matter consistent with the law and the principles in this manual.

What if an employer disputes the amount of its premium?

12. Any employer who queries or disputes the premium calculation made by their Scheme Agent should discuss the matter with the Scheme Agent.

If, after those discussions, the employer still believes the premium calculation does not comply with the law or the principles outlined in this manual, the employer may contact WorkCover to discuss a review of the issue. A formal review may be conducted under section 170 of the Act. See Chapter L for the rules about applying to WorkCover for a review.

CHAPTER A – MEANING OF ‘REMUNERATION’

Many of the payments covered by the Act definition of ‘wages’ are not of the type that might be generally thought of as wages – for example, the definition includes ‘any other consideration in money or money’s worth given to the worker’ under a contract of service or a training contract. For this reason WorkCover uses the term ‘remuneration’.

What is this chapter for?

13. An employer’s premium is calculated on the basis of ‘remuneration’ paid to ‘workers’. So the meaning of each of those terms is crucial. This chapter deals with ‘remuneration’. (‘worker’ is explained in Chapter F).

This chapter covers the general principles in relation to ‘remuneration’. The detailed list of WorkCover’s interpretation in relation to particular types of payments is in Chapter B. However, because of the complexity involved in each of the following areas, there is a separate chapter for:

- directors – see Chapter C
- trusts – see Chapter D
- superannuation – see Chapter E
- deemed workers – see Chapter G
- contractors – see Chapter H
- apprentices, trainees and government training programs – see Chapter I.

What payments are counted as remuneration?

14. The Act defines ‘wages’ broadly. (The definition is set out below).

To give employers and Scheme Agents guidance on WorkCover’s interpretation of the definition of ‘remuneration’, WorkCover has prepared a detailed list in Chapter B. In that list, WorkCover sets out its interpretation in relation to many particular types of payments.

Generally, a payment to a worker is ‘remuneration’ if it is made to, or for the benefit of, the worker. (‘Worker’ is explained in Chapter F).

What is the Act's definition of 'wages'?

Section 174 (9) of the Act defines wages as follows:

'wages', in relation to a worker:

- (a) includes salary, overtime, shift and other allowances, over-award payments, bonuses, commissions, payments to working directors (including payments as directors' fees), payments for public and annual holidays (including loadings), payments for sick leave, value of board and lodging provided by the employer for the worker and any other consideration in money or money's worth given to the worker under a contract of service or a training contract,
- (b) includes payment (whether by way of commission, fee, reward or otherwise) under a contract (whether referred to as a contract, agreement, arrangement or engagement) by reason of which the person paid is deemed by Schedule 1 to the 1998 Act to be a worker, after deducting such amount for costs necessarily incurred by that person in performing that contract as may be agreed on or, in default of agreement, as may be determined by the Authority, and
 - (b1) includes payments for long service leave (including a lump sum payment instead of long service leave and any payment under the *Building and Construction Industry Long Service Payments Act 1986*), and
 - (b2) includes a payment made in consequence of the retirement from, or termination of, any office or employment of a worker, being:
 - (i) a lump sum payment paid before or after that retirement or termination in respect of unused annual leave, or unused annual leave and a bonus, loading or other additional payment relating to that leave, or
 - (ii) an amount paid in respect of unused long service leave, or
 - (iii) an amount paid in respect of unused sick leave, and
 - (b3) includes the amount that is the employer's fringe benefits taxable amount (within the meaning of the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth) in respect of fringe benefits payable to the worker, and
 - (b4) includes a superannuation benefit, being money paid or payable by the employer in respect of the worker:
 - (i) to or as a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth, or
 - (ii) as a superannuation guarantee charge within the meaning of the *Superannuation Guarantee (Administration) Act 1992* of the Commonwealth, or
 - (iii) to or as any other form of superannuation, provident or retirement fund or scheme, including a wholly or partly unfunded fund or scheme, and
 - (b5) includes a distribution to a worker as beneficiary under a trust that is required to be included as wages by Section 174AA, and
- (c) does not include:
 - (iv) directors' fees (except to the extent that these fees are payable to working directors and are included as wages under paragraph a), or
 - (v) compensation under this Act, or
 - (vii) any GST component in a payment to a worker.

For information on how WorkCover interprets this definition, see this chapter for the general principles, and see Chapter B for the detailed list of WorkCover's interpretation in relation to particular types of payments.

Inclusion of trust distributions as wages

Section 174AA of the Act states the following:

- (1) A distribution to a worker as beneficiary under a trust constitutes **wages** for the purposes of section 174 to the extent that the distribution is in lieu of wages for work done for the trust by the worker.
- (2) Work that constitutes the provision of services to the trustee of a trust, or for the purposes of a business conducted by the trustee of a trust, is **work done for the trust**.
- (3) This section applies in respect of distribution to a worker only if:
 - (a) there is a wages shortfall in respect of work done for the trust by the worker
 - (b) the distribution is made in the financial year in which the work is done or in the following financial year.
- (4) There is a **wages shortfall** in respect of work done for the trust by the worker if the total wages (if any) paid or payable to the worker during the financial year in which the work is done is less than the wages that would be payable to the worker for that work if wages were payable at the market rate for that work (with the difference constituting the **wages shortfall** for the purposes of subsection (5)).
- (5) If the distribution does not exceed the wages shortfall in respect of the work, the whole of the distribution is in lieu of wages for work done for the trust by the worker. Alternatively, if the distribution exceeds the wages shortfall in respect of the work, the distribution is in lieu of wages to the extent of the shortfall.
- (6) For the purpose of determining whether a particular distribution is in lieu of wages for work done for the trust, the total wages (if any) paid or payable to the worker during a financial year for the work is taken to include any previous distribution (whether made during that financial year or the following financial year) that, by application of this section, is a distribution in lieu of wages for the same work.
- (7) The **market rate** for work is the minimum wage rate applicable in respect of the work (or work that is comparable to the work):
 - (a) pursuant to an industrial instrument in force under a law of the State, or
 - (b) if paragraph (a) does not apply, pursuant to an industrial instrument in force under a law of the Commonwealth, or
 - (c) if neither paragraph (a) nor (b) applies, as provided by the WorkCover Guidelines or as determined and notified by the Authority in the particular case.

Refer to Chapter D for more information on trust distributions.

CHAPTER B – WORKCOVER’S INTERPRETATION IN RELATION TO PARTICULAR PAYMENTS

(Supplement to section 174 (9) of the Act)

How do you use this list?

15. The list in this chapter sets out WorkCover’s interpretation as to what is remuneration (and what is not) as applied to many particular types of payments.

In the list, you can look up the type of payment about which you need guidance and then apply WorkCover’s interpretation to your situation.

You need to bear in mind that it is impractical for this manual to deal with every particular type of payment an employer might ever make to, or in relation to, a worker or a deemed worker.

In unusual cases, not covered by these guidelines:

- employers should contact their Scheme Agent for advice
- if a Scheme Agent is not sure, they may contact WorkCover to clarify whether the payment should be counted as remuneration
- if an employer disputes what is included as remuneration, WorkCover will assess the matter consistent with law and the principles outlined in this manual. This manual provides guidance about WorkCover’s interpretation of the law
- unless stated otherwise (eg fringe benefits) the gross amount is counted as remuneration.

Adoption leave

Adoption leave payments are counted as remuneration.

Advancement of salary payments

Payment in advance of salary or any other entitlements is counted as remuneration.

Allowances and expenses (see details under the headings about various types of allowances and expenses)

Although the terms ‘allowances’ and ‘expenses’ are sometimes interchangeable, the following principles generally apply regardless of the terminology applied to the payment:

- Any ordinary amount paid as part of wages under an award (such as shift allowance, skill allowance, etc) is counted as remuneration.
- Any consideration subject to fringe benefits tax is counted as remuneration.
- Other allowances may be counted, depending on the payment.

‘Award’ means any industrial instrument within the meaning of the *Industrial Relations Act 1996*, any agreement with respect to salaries or wages entered into between an employer and a union under any other NSW law, and any other award, agreement or other instrument under a Commonwealth, State or Territory law.

Annual leave and public holiday payments (including loadings)

Annual leave and public holiday payments are counted as remuneration.

Lump sum payments on termination for annual leave are counted as remuneration.

Apprenticeship Schemes

See Chapter 1.

Australian Construction Industry Redundancy Trust (ACIRT)

Payments to the Australian Construction Industry Redundancy Trust (ACIRT), known previously as the Construction Employees Redundancy Trust (CERT), are not counted as remuneration.

See 'Termination payments'.

Board and lodging

If the employer provides free or subsidised board and lodging to the worker as part of their conditions of employment (whether expressed or implied) and the benefit is subject to fringe benefits tax or identified on the worker's payment summary, then the benefit is counted as remuneration. The value to be given to the remuneration is the relevant market value of the total value of the board and lodging.

See 'Fringe benefits'.

Bonuses

Bonuses are counted as remuneration.

Book expenses

If the employer pays book expenses to the worker and the payment is subject to fringe benefits tax or identified on the worker's payment summary, then the payment is counted as remuneration.

See 'Fringe benefits'.

Camping allowance

See 'Living-away-from-home allowance'.

Car allowances and expenses

If the employer pays car allowances or expenses to the worker and the payment is subject to fringe benefits tax or identified on the worker's payment summary, then the payment is counted as remuneration.

However, if the employer pays car allowances or expenses to the worker and the payment is paid under an award at a rate specified by the award, the payment is not counted as remuneration. Any payment greater than the award rate is counted as remuneration.

If the employer pays car allowances or expenses to the worker and the payment is not paid under an award, any payment up to the nominated cents per kilometre rate as regulated in the applicable IPO is not counted as remuneration. If the payment is not under an award, any payment greater than the nominated cents per kilometre rate is counted as remuneration.

Further information in calculating the extent to which motor vehicle allowances are excluded from wages are included in the relevant schedule of the applicable IPO.

See 'Company car' and 'Fringe benefits'.

Charities, churches and public benevolent institutions

All fringe benefits provided to workers are counted as remuneration.

Charities, churches and public benevolent institutions may have different fringe benefit thresholds. These organisations should maintain with their wage records the appropriate fringe benefit thresholds for their organisations.

Worker benefits that are not subject to fringe benefits tax, that is they are less than the relevant Australian Tax Office (ATO) fringe benefit threshold, should be counted at the net value.

Once the worker benefits exceed the ATO fringe benefit threshold then the employer must declare those fringe benefits at the grossed-up value. That is, the portion of the benefit that exceeds the ATO threshold (called the non-exempt amount by the ATO) must be declared at the grossed-up value and the portion of the benefit that is below the threshold should be declared at the net value (ie actual value of the benefit).

Certain employers are deemed 'rebatable employers' by the ATO. These employers should declare the 'rebatable amount' of the worker benefits at the net value and 'non-rebatable amount' at the grossed-up value.

See 'Fringe benefits'.

Childcare expenses

If the employer pays the worker's childcare expenses and that benefit is subject to fringe benefits tax, then the payment is counted as remuneration.

See 'Fringe benefits'.

Clothing

If the employer reimburses the worker and the payment is subject to fringe benefits tax or identified on the worker's payment summary, then the payment is counted as remuneration.

If the employer provides free clothing (or otherwise directly funds clothing) as a benefit to a worker and the benefit is subject to fringe benefits tax or identified on the worker's payment summary, then the benefit is counted as remuneration.

See 'Uniform allowance' and 'Fringe benefits'.

Commission(s)

Commissions are counted as remuneration.

Community Development Employment Project (CDEP)

Remuneration an employer pays to workers in the CDEP is counted as remuneration for the purposes of calculating an employer's premium. However, the other costs funded by the Project are excluded (eg costs for equipment and rental).

Company car – private use of

If an employer provides a worker with a car (including a worker's private use of a car or through any type of leasing arrangements for private use), the benefit is counted as remuneration.

See also 'Car allowances and expenses' and 'Fringe benefits'.

Company house (market value of rental)

See 'Housing'.

Compensation payments

See 'Workers compensation payments'.

Construction allowances

Construction allowances are counted as remuneration. This includes productivity, height, dirty work, heat and cold and site allowances.

Any allowances that are paid as part of wages under an award (such as shift allowance, skill allowance, etc) are counted as remuneration.

Construction Employees Redundancy Trust (CERT)

See 'Australian Construction Industry Redundancy Trust (ACIRT)' and 'Termination payments'.

Contractors – deemed to be workers

See Chapter H.

Credit card expenses

Payment of personal expenses with an employer supplied credit card that are not subject to reimbursement by the worker but subject to fringe benefits tax is counted as remuneration.

See 'Fringe benefits'.

Directors' fees and payments

See Chapter C.

Dirt money

Dirt money is counted as remuneration.

Distant work allowance

See 'Living-away-from-home allowance'.

Dividends

See Chapter C.

Domestic worker's payments

Wages, salary, fringe benefits, superannuation and/or any other consideration provided by an employer for a domestic worker are counted as remuneration under the Workers' Compensation policy.

Early retirement benefits

See 'Termination payments'.

Employee share schemes

See 'Share Options'.

Entertainment expenses

If the employer reimburses the worker for entertainment-related costs and the payment is subject to fringe benefits tax or identified on the worker's payment summary, then the payment is counted as remuneration.

Payment of expenses with an employer supplied credit card that are subject to fringe benefits tax is counted as remuneration.

See also 'Fringe benefits'.

Fares

See 'Travel allowance'.

First aid allowances

First aid allowances are counted as remuneration.

Flexible work package payments

Any wages, salary and any other consideration in money or money's worth the employer provides to a worker as part of a 'flexible work package arrangement' are counted as remuneration.

Payments made to a worker whilst on a flexible work leave arrangement are not counted as remuneration.

For example, 5 year package, first 4 years employee works and receives 80 per cent of salary and 20 per cent is held by employer, 100 per cent of remuneration is counted. The 5th year employee does not work but receives the 20 per cent that has been put aside throughout the previous 4 years, this payment is not counted as remuneration.

Free housing

See 'Housing'.

Fringe benefits

Generally, if a non-cash component of a worker's remuneration is considered taxable under the *Fringe Benefits Tax Assessment Act 1986* then, for the purpose of calculating the employer's premium, it is counted as remuneration.

For more information about specific items attracting fringe benefits, see the relevant headings in this list.

At what value?

For any fringe benefit, the amount that is to be counted as remuneration is the value of the benefits calculated using the 'taxable value of fringe benefits' ending 31 March in the particular premium policy year, as specified in the *Fringe Benefits Tax Assessment Act 1986*. It is the actual value of the benefit provided (as determined by the *Fringe Benefits Tax Assessment Act 1986*), that is **the grossed-up amount**.

For example, a \$2000 gym membership would be valued at the grossed-up taxable amount which is \$2000 x the relevant FBT grossed-up formula amount (available from the ATO website).

When a policy is cancelled mid-term, the benefit declared should be calculated on a pro-rata basis having regard to the period elapsed.

When a business ceases to operate, the employer should declare the value of the benefit up to the date of ceasing the business as per the employer's FBT return.

What if the benefit is available to all of an employer's workers?

Any fringe benefits that are available to workers as an incidental benefit of employment are counted as remuneration.

See 'Charities, churches and public benevolent institutions'.

Gifts

Gifts and *ex gratia* payments that are not part of the employment contract, are not counted as remuneration.

Bonuses and incentive awards are counted as remuneration.

Government training schemes

See Chapter I.

Government training subsidies

See Chapter I.

Group apprenticeship schemes

See Chapter I.

Goods and services tax (GST)

The Goods and services tax component of any payment paid to a worker (or a contractor who is a 'deemed worker') is not counted as remuneration.

Height money

Height money is counted as remuneration.

Honorariums

Honorariums to volunteers or non-workers are not counted as remuneration. Volunteer workers are generally not covered for workers compensation, however, employers may still be liable for any injuries to volunteers. Employers should check with their Scheme Agent to ensure they have the appropriate coverage.

Housing

Generally, housing payments (including company house, free housing and housing loans) are counted as remuneration.

Remote housing allowances are not counted as remuneration.

The following payments are counted as remuneration:

- the current market rental value of a company house (less any amount the worker pays for the right to occupy the premises)
- the amount of temporary accommodation (associated with relocation) that is assessable for fringe benefits tax
- the taxable value of a housing loan that is offered to a particular worker as part of their 'salary package' and is subject to fringe benefits tax.

Housing loans (interest free or reduced interest)

See 'Housing'.

Income splitting

Wages, salary, fringe benefits and/or any other consideration provided by an employer for a worker as a result of an income splitting arrangement is counted as remuneration.

Interstate workers

Workers compensation insurance requirements vary throughout Australia. Employers must verify with the relevant State or Territory authority the legislative requirements of that State or Territory.

For policies which commenced prior to 4.00 pm on 1 January 2006

If a NSW based employer pays a worker who works both within NSW and interstate and the employer:

- does not have a workers compensation policy applying in the other State or Territory, then the worker's total remuneration is counted as remuneration in NSW
- has a workers compensation policy applying in the other State or Territory, then the amount to be counted corresponds to the proportion of the wages that can be attributed to the time the worker is in NSW. If not declared elsewhere, all remuneration paid should be declared in NSW.

For new or renewed policies commencing on or after 4.00 pm on 1 January 2006

The cross border provisions contained in the Act determine in which jurisdiction the worker is entitled to claim compensation.

A worker's 'State of Connection' is determined by the following cascading series of tests:

Test A – The State in which the worker usually works in that employment – where they spend the greatest proportion of their working time

Test B – *If no State is identified by test A*, the State in which the worker is usually based for the purposes of that employment – if they spend comparable periods of time in more than one State, is there a single State where they routinely report to in relation to their work

Test C – *If no State is identified by test A or B*, the State in which the employer's principal place of business in Australia is located – typically the address registered on the Australian Business Register in connection with the employer's ABN.

Wages, salary, fringe benefits and/or any other consideration provided by an employer for a worker who has a NSW 'State of Connection' is counted as remuneration against the employer's NSW workers compensation policy.

See also 'Workers Compensation and Injury Management Fact Sheet 11 – Information for employers – cross border'.

JobCover placement program

If an employer engages a previously injured worker under the JobCover Placement Program, then the wages the employer pays that worker are not counted as remuneration for the first 12 months of that person's employment.

See the JobCover Placement Program booklet (catalogue no. WC00534) issued by WorkCover for further details.

Loan payments

Repayment of loans to working directors/working beneficiaries/workers which are commercially based, legally documented and subject to taxation are not counted as remuneration. Otherwise payment of loan amounts to working directors/working beneficiaries/workers is counted as remuneration.

Laundry allowance

If the employer pays laundry expenses to the worker and the payment is subject to fringe benefits tax or is identified on the worker's payment summary, then the payment is counted as remuneration.

See 'Fringe benefits'.

Lease payments

Payment of lease/rent (in whatever form or name) for the provision of premises, equipment etc to working directors/working beneficiaries/workers which are commercially based, legally documented and subject to taxation are not counted as remuneration. Otherwise payment of rent to working directors/working beneficiaries/workers is counted as remuneration.

Leave loadings

Leave loadings and lump sum payments of leave loadings are counted as remuneration.

Living-away-from-home allowance

If the employer reimburses the worker or provides a 'living-away-from-home-allowance', (for items such as accommodation or meals and incidental expenses, such as telephone costs) and the payment is subject to fringe benefits tax or is identified on the worker's payment summary, then the payment is counted as remuneration.

The 'living-away-from-home-allowance' is usually paid where the worker has relocated for work purposes. For the treatment of allowances paid to a worker where the worker is temporarily away from their principal place of residence see, 'Travel allowance'.

See 'Travel allowance' and 'Fringe benefits'.

Long service leave

Payments for long service leave, including lump sum payments, are counted as remuneration.

Certain payments made under the *Building and Construction Industry Long Service Payments Act 1986* are counted as remuneration.

Long service leave payments made directly to workers in the building and construction industry by their employers are counted as remuneration. The amount to be counted is the payment to the worker less the reimbursement receivable from the Building and Construction Industry Long Service Leave Corporation in respect of those payments.

Payments made on benefits accrued before 30 June 2003 and paid after that date are counted as remuneration.

Lump sum payments in lieu of holiday, sick leave (and the like)

Lump sum payments in lieu of holidays, sick leave (and the like) including leave loadings and bonuses, are counted as remuneration.

Management fees

Management fees paid to working directors, working beneficiaries and employees for employment related activities are counted as remuneration.

See also Chapter C.

Maternity leave payments

Maternity leave payments are counted as remuneration.

Meal allowance

If the employer pays meal costs to the worker and the payment is subject to fringe benefits tax or is identified on the worker's payment summary, then the payment is counted as remuneration.

However, meal allowances as provided in industrial instruments to reimburse direct costs, are not counted as remuneration.

See 'Fringe benefits'.

Mechanical and Electrical Redundancy Trust (MERT)

MERT payments are not counted as remuneration.

See 'Termination payments'.

Ordinary time earnings

Ordinary time earnings are counted as remuneration.

Options

Share options are not counted as remuneration.

See 'Share options'.

Over-award payments

Any payment over the award rate is counted as remuneration.

Overseas employers

An overseas employer who engages workers in NSW must have a NSW workers compensation policy.

Wages, salary, fringe benefits, superannuation and/or any other consideration an overseas employer provides a worker working in NSW, is counted as remuneration.

Overseas workers (from overseas, working in NSW)

Wages, salary, fringe benefits and/or any other consideration an employer provides an overseas-based worker, working temporarily in NSW, is counted as remuneration. The amount to be counted corresponds to the proportion of the wages that can be attributed to the time the worker is in NSW. This applies whether the payments are made within or outside Australia.

Overseas workers (from NSW, working overseas)

Wages, salary, fringe benefits and/or any other consideration provided by an employer to any worker who is normally based in NSW while that worker is temporarily employed or working overseas, is counted as remuneration. This is to apply whether the payments are made within or outside Australia. Employers should also verify with the relevant overseas authority the legislative requirements of that country.

Overtime payments

Overtime payments are counted as remuneration.

Parental leave payments

Parental leave payments are counted as remuneration.

Paternity leave payments

Paternity leave payments are counted as remuneration.

Payments in lieu of notice

Payments in lieu of notice are not counted as remuneration.

See 'Termination payments'.

Payments made on behalf of the worker

If the employment contract requires the worker to pay additional expenses (eg while living away from his or her normal place of residence) and the employer reimburses these expenses and the payment is subject to fringe benefits tax or is identified on the worker's payment summary, then the payment is counted as remuneration.

If the employer spends money on behalf of the worker to the direct benefit of the employment of the worker (eg a computer course, training in relation to employment) then the payment is not counted as remuneration.

In any other case, the payment is counted as remuneration.

Penalty rates

Penalty rates are counted as remuneration.

Personal services income

Any personal services income attributed to an individual and not otherwise taken as salary or wages or other non-exempt form of remuneration is counted as remuneration.

Productivity allowance

Productivity allowances (including those paid in the construction industry) are counted as remuneration.

Profit sharing schemes

Benefits workers receive from profit sharing agreements are not usually counted as remuneration. However, when these benefits are provided in lieu of wages, then the benefit is counted as remuneration for the purposes of calculating workers compensation premiums.

Private use of company car

If an employer provides a worker with the private use of a company car and the benefit is subject to fringe benefits tax or is identified on the worker's payment summary, then the benefit is counted as remuneration.

See 'Fringe benefits' and 'Company car'.

Public and annual holiday payments (including loadings)

Public and annual holiday payments (including loadings) are counted as remuneration.

Redundancy payments

See 'Termination payments'.

Retrenchment payments

See 'Termination payments'.

Reward – payment by way of

Payment by way of a reward is counted as remuneration.

See 'Commission(s)'.

Rollovers and options

Payments made for rollovers and options in the broadcasting and/or publishing industry where no additional work activities are undertaken are not counted as remuneration.

Royalties

Royalty payments are not counted as remuneration.

Salary

Salary is counted as remuneration.

Salary package/sacrifice

Generally, any wages, salary and the value of fringe benefits and any other consideration in money or money's worth the employer provides to workers as part of a 'salary package' or 'salary sacrifice arrangement', are counted as remuneration. In the case of fringe benefits, the amount counted is the taxable value of the benefits according to the *Fringe Benefits Tax Assessment Act 1986*. See specific entries for details of particular benefits.

If the employer contributes to the worker's superannuation fund or pays any amounts of fringe benefits and those contributions or payments are debited to the worker's salary package, then they are counted as remuneration.

See 'Flexible work package payments'.

Severance payments

See 'Termination payments'.

Share of catch

Where a skipper or crew of a fishing vessel is paid by way of 'share of catch' then the value of the share of catch is counted as remuneration. The value of remuneration is calculated by multiplying the agreed percentage (share of the catch) by the sale price of the catch.

Share options

Share options provided under employee share schemes are usually not counted as remuneration. However, where these benefits are provided in lieu of wages, then the benefit is counted as remuneration for the purposes of calculating workers compensation premiums.

Shift allowance

A shift allowance is counted as remuneration.

Sick leave

Sick leave is counted as remuneration.

Lump sum payments (on termination) for sick leave are counted as remuneration.

Site allowance

Site allowances are counted as remuneration.

Staff discounts and benefits

If a staff discount is available to all workers as an incidental benefit of being employed by that employer, then the value of the discount is not counted as remuneration.

Any fringe benefits that are available to workers as an incidental benefit of employment are counted as remuneration.

Strike-breaking allowance

A strike-breaking allowance is counted as remuneration.

Study leave

Study leave is counted as remuneration.

Superannuation contributions and benefits

See Chapter E.

Telephone allowance

If the employer reimburses the worker for telephone-related expenses or provides telephone services as a benefit to a worker and that benefit is subject to fringe benefits tax or is identified on the worker's payment summary, then the benefit is counted as remuneration.

See 'Fringe benefits'.

Termination payments

Payments that represent a lump sum payment of accrued sick leave, annual leave, including leave loadings or bonuses, and long service leave, made on termination or retirement, are counted as remuneration.

Payments made in lieu of notice on termination arising from redundancy, severance, retrenchment or early retirement are not counted as remuneration.

Redundancy, severance, retrenchment, early retirement benefits or termination payments (that do not represent accrued sick leave, annual leave, including leave loadings or bonuses, and long service leave) are not counted as remuneration.

Contributions to the Australian Construction Industry Redundancy Trust (ACIRT) or the Mechanical and Electrical Redundancy Trust (MERT) are not counted as remuneration.

Ex gratia payments to workers on termination are not counted as remuneration.

Tips and gratuities

Tips and gratuities are counted as remuneration.

Tool allowance

If an employer reimburses the worker for tool-related expenses that the worker incurs as part of their employment, then the reimbursement is not counted as remuneration.

In any other case, the payment is counted as remuneration.

Traineeship schemes

See Chapter I.

Travel allowance

If an employer provides a worker with a travel allowance and that allowance is subject to fringe benefits tax or is identified on the worker's payment summary, then the allowance is counted as remuneration.

However, if the employer provides a worker with a travel allowance and the payment is paid under an award at a rate specified by the award, the payment is not counted as remuneration. Any payment greater than the award rate is counted as remuneration.

If the employer provides a worker with a travel allowance and the payment is not paid under an award then any payment up to the prescribed amount per night as regulated in the applicable IPO is not counted as remuneration. If the payment is not under an award then any payment greater than the prescribed per night rate is counted as remuneration.

Any payments to workers that directly reimburse work-related travel costs (eg where the costs relate to duties performed away from their usual place of work) that are not subject to fringe benefits tax and are not identified on the worker's payment summary, are not counted as remuneration.

If the employer pays the travel expense for another reason (eg as a form of additional remuneration or bonus for 'services' rendered under a contract of employment) then the payment is counted as remuneration.

Further information in calculating the extent to which travel allowances are excluded from wages are included in the relevant schedule of the applicable IPO.

See 'Fringe benefits'.

Travelling time

Any payment to a worker for work-related travel time is counted as remuneration.

Trust distributions

See Chapter D.

Uniform allowance

If the employer pays uniform expenses to the worker and the payment is subject to fringe benefits tax or is identified on the worker's payment summary, then the payment is counted as remuneration.

See 'Clothing' and 'Fringe benefits'.

Volunteers

See 'Honorariums'.

Workers' compensation payments

Any workers compensation benefits an employer pays to a worker (including the excess on the claim – which the employer pays) are not counted as remuneration.

Payments by an employer to an injured worker over and above the workers compensation benefits paid to workers by the workers compensation Scheme Agent or reimbursement of workers compensation benefits by the workers compensation Scheme Agent to the employer are counted as remuneration.

Working directors payments

See Chapter C.

CHAPTER C – FEES AND PAYMENTS TO DIRECTORS

How are fees to a ‘non-working’ director treated?

16. Any fees the employer pays to a ‘non-working’ director for performing their duties as a director are not counted as remuneration.

Non-working director’s duties include attending board meetings, setting strategic goals and overseeing and reviewing the company’s progress towards those goals. A non-working director would have no involvement in the day-to-day operations and/or perform administrative functions of the business.

How are fees to a ‘working’ director treated?

17. Any director is considered to be a ‘working’ director if they are performing work in the day-to-day operations of the business, which include administrative and management tasks.

Where a director is performing work in the day-to-day operations of the business and is receiving any form of consideration in money or money’s worth, then there is an implied contract of service between the director and the company. That is, the director is a working director and is therefore a worker for the purposes of NSW workers compensation legislation.

All payments to a working director (including fees, wages, salary, allowances, fringe benefits, superannuation etc) are counted as remuneration.

See ‘Fringe benefits’ in Chapter B for information on the calculation of the value of the benefits.

How are dividends treated?

18. Where the company’s constitution provides for dividend payments to members, including directors, then the payments are not usually counted as remuneration.

However, where a dividend is paid in lieu of wages, the payment is counted as remuneration for the purposes of calculating workers compensation premiums.

The amount of payment to be included is based on the hours worked and the type of work performed. The amount is limited to the current market value of the remuneration that would be paid to a worker undertaking the same mix of duties and hours of work, and with the same skills, together with any allowances or other remuneration paid to the director for employee-related duties.

To determine the current market value of the remuneration, the employer and scheme agent may consider various sources, including: industrial awards, position vacant advertisements relevant to the general location of the director, salary surveys, or evidence supplied by recruitment firms or employment agencies. The amount may be more than in an industrial award, if activities undertaken exceed those duties that would be required of an employee under that award. For example, making decisions that relate to financial strategy/management decisions.

In the absence of a relevant industrial award being appropriate, WorkCover can rely upon the ‘average weekly full time adult total earnings’ in accordance with statistical reports compiled by the Australian Bureau of Statistics (ABS) together with an allowance for the Superannuation Guarantee Levy.

CHAPTER D – TRUST DISTRIBUTIONS

When considering payments to trustees and beneficiaries of trusts, WorkCover looks at the nature of the trust arrangement and the reality of the payment.

Workers compensation legislation requires that distributions to beneficiaries for work performed for the trust are counted as wages.

Are distributions to a ‘non-working’ beneficiary counted?

19. Any distribution that an employer and/or trustee pays to a ‘non-working’ beneficiary of a trust is not counted as remuneration.

A non-working beneficiary would have no involvement in the day-to-day operations and/or perform administrative functions of the business.

Are distributions to a ‘working’ beneficiary counted?

20. A distribution to a worker who is also a beneficiary under a trust constitutes wages to the extent that:

- the distribution is remuneration for their work
- the distribution is a substitute, in whole or in part, for wages (and there is no other form of reasonable remuneration given to the worker for the work they perform).

The amount of the distribution to be included is based on the hours worked and the type of work performed. The amount is limited to the current market value of the remuneration that would be paid to a worker with the same or similar duties and skills, as those carried out by the beneficiary, together with any allowances or other remuneration paid to the beneficiary for employee-related duties.

To determine the current market value of the remuneration, the employer and Scheme Agent may consider various sources, including industrial awards, position vacant advertisements relevant to the general location of the employed beneficiary, salary surveys, or evidence supplied by recruitment firms or employment agencies. The amount may be more than in an industrial award if activities undertaken exceed those duties that would be required of an employee under that award. For example, making decisions that relate to financial, strategy and/or management decisions.

Who in relation to a trust is a worker?

21. The general position is that if a person is entitled to claim workers compensation benefits for a work-related injury or illness, then any remuneration paid to that worker is counted when calculating the employer’s premium.

Trustees

Whether remuneration paid to the trustee is to be counted depends on whether the trustee(s):

- **are individuals (including partnerships and sole traders).** In these cases, they are generally not entitled to workers compensation coverage, so any amounts the trust pays to them are not counted as remuneration
- **is a proprietary limited company.** In which case, any directors or beneficiaries employed by the trustee company will generally be workers for workers compensation purposes, so any amounts the trust pays to them are counted as remuneration.

Individuals employed by the trustees

Any individuals who the trustee(s) employs are covered by workers compensation and trustees are required to obtain workers compensation insurance covering those workers.

Directors

Directors of a trustee company are able to claim workers compensation benefits if they have a work-related injury, therefore any distribution paid to them for the work they do may be counted as remuneration (see rule 20 for further details). This situation is no different to the position of directors of other proprietary limited companies where the directors are considered to be employees of the corporation (which is the employer).

See Chapter C for further details.

Employed beneficiaries

An employed beneficiary is able to claim workers compensation benefits if they have a work-related injury, therefore any distribution paid to them for the work they do may be counted as remuneration.

See rule 20 for further details.

How are payments from a trust to a worker ‘through another trust’ treated?

22. Payments to workers (including trust distributions) for work done for a trust are counted as remuneration. This applies whether the payment is made from the trust directly to a worker or made through another entity or trust on behalf of the original trust.

Who do the WorkCover obligations apply to: the trustee or the trust?

23. The obligation to make declarations and ensure that the Act is complied with apply to the trustee or trustees. A workers compensation policy that covers all workers of the trust must be in the legal name of the trustee. For example:
- AB Smith as trustee for the Smith Family Trust
 - A & B Smith as trustee for the Smith Family Trust
 - AB Smith Pty Ltd as trustee for the Smith Family Trust.

Inclusion of trust distributions as wages

Section 174AA of the Act states

- (1) A distribution to a worker as beneficiary under a trust constitutes **wages** for the purposes of Section 174 to the extent that the distribution is in lieu of wages for work done for the trust by the worker.
- (2) Work that constitutes the provision of services to the trustee of a trust or for the purposes of a business conducted by the trustee of a trust is **work done for the trust**.
- (3) This section applies in respect of distribution to a worker only if:
 - (a) there is a wages shortfall in respect of work done for the trust by the worker, and
 - (b) the distribution is made in the financial year in which the work is done or in the following financial year.

- (4) There is a **wages shortfall** in respect of work done for the trust by the worker if the total wages (if any) paid or payable to the worker during the financial year in which the work is done is less than the wages that would be payable to the worker for that work if wages were payable at the market rate for that work (with the difference constituting the **wages shortfall** for the purposes of subsection (5)).
- (5) If the distribution does not exceed the wages shortfall in respect of the work, the whole of the distribution is in lieu of wages for work done for the trust by the worker. Alternatively, if the distribution exceeds the wages shortfall in respect of the work, the distribution is in lieu of wages to the extent of the shortfall.
- (6) For the purpose of determining whether a particular distribution is in lieu of wages for work done for the trust, the total wages (if any) paid or payable to the worker during a financial year for the work is taken to include any previous distribution (whether made during that financial year or the following financial year) that, by application of this section, is a distribution in lieu of wages for the same work.
- (7) The **market rate** for work is the minimum wage rate applicable in respect of the work (or work that is comparable to the work):
 - (a) pursuant to an industrial instrument in force under a law of the State, or
 - (b) if paragraph (a) does not apply, pursuant to an industrial instrument in force under a law of the Commonwealth, or
 - (c) if neither paragraph (a) nor (b) applies, as provided by the WorkCover Guidelines or as determined and notified by the Authority in the particular case.

In calculating the market rate of remuneration and in the absence of a relevant industrial award being appropriate, WorkCover can rely upon the 'average weekly full time adult total earnings' in accordance with statistical reports compiled by the ABS together with an allowance for the Superannuation Guarantee Levy.

CHAPTER E – SUPERANNUATION CONTRIBUTIONS AND BENEFITS

Are an employer's extra contributions counted as remuneration?

24. All employer contributions to superannuation schemes paid on behalf of a worker are counted as remuneration.

Is superannuation paid under an award or enterprise agreement counted?

25. Any employer contributions to superannuation schemes as part of an award or enterprise agreement are counted as remuneration.

Are Superannuation Guarantee Levy payments counted?

26. All employer contributions to superannuation schemes in accordance with the superannuation guarantee levy, or those parts of an award or enterprise agreement, are counted as remuneration.

Are additional contributions the employer pays on the worker's behalf counted?

27. If the employer contributes to the worker's superannuation fund and these contributions are debited to the worker's salary package, then they are counted as remuneration.

Are a worker's contributions counted?

28. Worker's contributions to superannuation schemes are counted as remuneration. However, these contributions form part of the worker's gross wages and are generally deducted from these wages. The amount the employer needs to declare is the gross wages before the worker's contribution has been deducted.

Are benefits paid to workers counted?

29. Benefits paid to workers from superannuation schemes are not counted as remuneration.

What happens if the only remuneration paid to the worker is superannuation contributions?

30. If the employer makes contributions to a worker's superannuation scheme or fund but does not pay the worker any other remuneration for the work the worker performed, the contribution is counted as remuneration.

CHAPTER F – MEANING OF ‘WORKER’

What is this chapter for?

31. An employer’s premium is calculated on the basis of ‘remuneration’ paid to ‘workers’. So the meaning of each of those terms is crucial. This chapter deals with the meaning of ‘worker’. (‘Remuneration’ is explained in Chapter A).

Does the tax law definition of ‘worker’ apply?

32. A person may be a worker for the WorkCover system, but not for the taxation law system. For this reason you need to consider each person under the laws applying to workers compensation.

See Chapters G and H for further information on deemed workers and contractors.

What does the term ‘worker’ include?

33. ‘Worker’ means:

- any person who has entered into, or who works under, a contract of service or a training contract with an employer (this includes some contractors, see Chapter H), whether by way of manual labour, clerical work, or otherwise or whether the contract is expressed or implied, is verbal or in writing.

The definition of ‘worker’ is in section 4 (1) of the 1998 Act. The definition is outlined at the end of this chapter (see rule 38).

As a general rule, if a person is entitled to receive workers compensation benefits if they have a work-related injury, then that person is counted as a ‘worker’ for the purposes of calculating the employer’s workers compensation premium.

Which contractors are treated as ‘workers’?

34. WorkCover’s interpretation of the contractors who are workers for the purposes of the law is set out in Chapter H, as is WorkCover’s interpretation of the payments (or percentages of payments) to contractors that are to be treated as remuneration.

How can I seek clarification on who is a ‘worker’?

35. WorkCover has worked with employers and associated groups to create a service to help employers determine which people should be included in their workers compensation premiums.

Employers can contact WorkCover’s Worker Status Service for assistance, which offers:

- the Workers Status Rulings Branch within WorkCover to provide specialised assistance to employers
- a web-based self-assessment tool on the WorkCover website to help employers determine the status of their workers
- a provision for employers to apply to WorkCover to issue a prospective private ruling as to whether a person, or class of persons, is a worker for premium calculation purposes.

A private ruling is a binding notice from WorkCover that states whether a person, or group of persons, are workers or contractors for the purpose of including wages for workers compensation premium calculations.

Further information can be obtained at www.workcover.nsw.gov.au/workerstatus.

How are interstate and overseas workers treated?

36. There are special rules relating to interstate and overseas workers.

For specific information on interstate and overseas workers, refer to individual topics in Chapter B.

See also Workers Compensation and Injury Management Fact Sheet 11 – Information for employers – cross border.

How is directors' remuneration treated?

37. If working directors receive payments (eg wages, salary, allowances, fringe benefits, fees, superannuation), that if paid to a worker would be counted as remuneration for premium assessment purposes, those payments will be counted as remuneration.

Treatment of remuneration for directors is captured in Chapter C.

How does the Act define 'worker'?

38. Section 4 of the 1998 Act defines 'worker' as follows:

'worker' means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing). However, it does not include:

- (a) a member of the Police Service who is a contributor to the Police Superannuation Fund under the *Police Regulation (Superannuation) Act 1906*, or
- (b) a person whose employment is casual (that is for 1 period only of not more than 5 working days) and who is employed otherwise than for the purposes of the employer's trade or business, or
- (c) an officer of a religious or other voluntary association who is employed upon duties for the association outside the officer's ordinary working hours, so far as the employment on those duties is concerned, if the officer's remuneration from the association does not exceed \$700 per year, or
- (d) except as provided by Schedule 1, a registered participant of a sporting organisation (within the meaning of the *Sporting Injuries Insurance Act 1978*) while:
 - (i) participating in an authorised activity (within the meaning of that Act) of that organisation, or
 - (ii) engaged in training or preparing himself or herself with a view to so participating, or
 - (iii) engaged on any daily or periodic journey or other journey in connection with the registered participant so participating or the registered participant being so engaged,

if, under the contract pursuant to which the registered participant does any of the things referred to above in this paragraph, the registered participant is not entitled to remuneration other than for the doing of those things.

The Act also 'deems' certain persons to be workers. Details of these deeming provisions are outlined in Chapter G.

CHAPTER G – ‘DEEMED WORKERS’

39. Schedule 1 of the 1998 Act lists different types of workers who are deemed to be workers for the purposes of workers compensation in NSW. They include:

- workers lent or on hire
- outworkers
- other contractors (see also Chapter H)
- contractors under labour hire services arrangements
- rural workers
- timbergetters
- salespersons, canvassers, collectors and others
- tributers
- mine employees
- mines rescue personnel
- jockeys and harness racing drivers
- drivers of hire-vehicles and hire-vessels (contract of bailment)
- caddies and others employed through a club
- shearers’ cooks and others
- fire fighters in fire districts
- workers at place of pick-up
- boxers, wrestlers, referees and entertainers
- voluntary ambulance workers
- ministers of religion
- ministers of religion covered by policies
- participants in training programs.

If someone is ‘deemed’ to be a worker, then they will be entitled to receive workers compensation for a work-related injury. For this reason, their employer (or principal) must cover them for workers compensation and include the remuneration paid to the ‘deemed’ worker in the employer’s wages declaration.

WorkCover can issue a private ruling to an employer to determine whether a person is a worker or not for the purposes of declaring remuneration. Further information regarding the services regarding private rulings can be obtained at www.workcover.nsw.gov.au/workerstatus.

See also, Chapter F.

CHAPTER H – CONTRACTORS

Why can contractor payments be treated as remuneration?

40. Many people working as contractors are treated as workers for workers compensation purposes. The 1998 Act refers to them as ‘deemed workers’ (see Chapter G). In those cases, the employer is treated as a ‘principal’, responsible for declaring remuneration for the purposes of workers compensation.

A contractor with an Australian Business Number (ABN) or a Department of Commerce Office of 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).

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.

Some of the indicators examined by the Workers Compensation Commission, the Courts and WorkCover in determining if a contractor is a deemed worker are whether the:

- arrangement is in writing
- contractor/deemed worker employs any person(s) to perform the work
- contractor/deemed worker works at stated hours on usual days and the contract specifies the hours and/or days
- contractor/deemed worker measures and inspects the site and provides a fixed price quotation inclusive of labour and material
- contractor/deemed worker deals directly with the client requesting the work or the principal contractor for whose benefit the work is to be done
- contractor/deemed worker can make a profit or loss over the market rate for a tradesman working in the industry
- contractor/deemed worker supplies the materials, plant and equipment used in completion of the job
- contractor/deemed worker could be liable for bad quality of work.

For this reason, it is important for employers to include records about contractors in the declarations and other records they make and present to WorkCover and Scheme Agents. See Chapter J and rule 52 for information about record keeping.

The amounts an employer pays to its contractors who are ‘deemed workers’:

- as **remuneration** are to be included in the total remuneration the employer declares when calculating the employer’s premium
- as **payments for materials, tools, equipment, or plant** are excluded when calculating the employer’s remuneration and premium. See rule 41.

What costs are deducted from remuneration paid to ‘contractors’?

41. In relation to contractors, the law provides that ‘costs necessarily incurred by that person in performing that contract’ (see section 174 (9)(b) of the Act) are not remuneration and are not used to calculate the employer’s premium. However, the Act does not define those costs. Nor does it set a process for how the value of a particular cost is to be determined.

The employer and the Scheme Agent should consider the estimated amount of ‘overhead costs’ that the contractor would be required to expend (or has expended) in providing services other than labour. Those costs might include, tools, equipment, materials and plant.

If the employer and Scheme Agent are unable to come to a reasonable assessment (through examining invoices, receipts or other documentary evidence) of the amount the contractor will be required to spend (or has spent), then they may use the standard ‘default’ percentages shown in the table below. The percentages shown in the table reflect the average situation for the average employer and the average type of contractor.

All GST paid to a contractor is not counted.

Service Supplied	Percentage of Contract Payment
Labour only	100 per cent
Supply of labour and tools Including hand-held tools, power tools, chainsaws, staple guns, and incidental materials such as, screws, pop rivets, glue and masking tape	90 per cent
Supply of labour and plant Such as cement mixers, conveyors, ladders, trestles and the like	80 per cent
Supply of labour, plant and materials	
Bricklayers supplying bricks	30 per cent
Carpenters supplying timber	30 per cent
Plasterboard fixers supplying plasterboard	30 per cent
Tilers supplying tiles	30 per cent
Electricians supplying conduit, wire and switchgear	50 per cent
Plumbers supplying pipes and fittings	50 per cent
Painters and decorators supplying paint and wallpaper	60 per cent
Carpet layers supplying underlay	70 per cent
Transport Industry Contractors	
Prime movers	30 per cent
From 10 tonnes to Prime Movers	50 per cent
Motor vehicles to 10 tonnes (including couriers)	75 per cent
Couriers – motorcycles	90 per cent
Couriers – bicycles	90 per cent
Cranes	50 per cent
Timber/Sawmilling (snigging, felling)	50 per cent
Earthmoving/Bobcat	
Up to 3 tonnes	75 per cent
3 tonnes and over	50 per cent

WorkCover can issue a private ruling to an employer to determine whether a person is a worker or not for the purposes of declaring remuneration. Further information regarding the services regarding private rulings can be obtained at www.workcover.nsw.gov.au/workerstatus. See also Chapter F.

CHAPTER I – APPRENTICES AND TRAINEES

For the purposes of this chapter the terms apprentice, trainee apprentice and trainee have the same meaning as in the *Apprenticeship and Traineeship Act 2001*.

Apprentices

42. *For policies commenced prior to 4.00 pm on 31 December 2006*

Wages to an apprentice are counted as remuneration.

For new or renewed policies commencing on or after 4.00 pm on 31 December 2006

Employers who engage an apprentice in recognised trade vocations as designated by the Commissioner for Vocational Training under the *Apprenticeship and Traineeship Act 2001*, are exempt from paying workers compensation premium on those wages paid. However, those wages will still need to be included/declared on the estimate and actual wage declarations supplied to the Scheme Agent.

Note: If an apprentice is injured at work, the cost of the apprentice's claim will still be used in the calculation of premium for experience-adjusted employers.

To be eligible an employer must have a valid workers compensation policy and have entered into a NSW Department of Education and Training (NSW DET) approved 'Training Contract' with the apprentice in a designated trade vocation. The apprentice must be identified in the training contract.

For new or renewed policies on or after 4.00 pm on 31 December 2006 to 30 December 2007

The apprentice premium exemption will be deducted from the employer's final premium. At the end of the policy period the Scheme Agent will calculate the premium using the actual amount of wages paid during the policy period (excluding apprentice/trainee wages). The Scheme Agent will rebate any credit owing as a result of this adjustment.

For policies commenced or renewed on or after 4.00 pm on 31 December 2007

The apprentice premium exemption will be applied to the employer's premium at the start of the policy period. This means that the premium exemption will reduce the initial invoiced premium. The exemption will be applied again when the final premium is calculated at the end of the policy period.

Group Apprenticeship Schemes

43. Apprentices employed under an approved Apprenticeship Scheme that is registered by the NSW Department of Commerce, Office of Industrial Relations are workers of the Scheme and not the 'host employer'. Therefore, remuneration the 'host employer' pays to the apprentice under one of these schemes, or that the Scheme reimburses to the employer, is not counted as remuneration for the host employer. Instead, the payment is counted as remuneration when the premium for the Group Apprenticeship Scheme is calculated.

Trainee Apprentice

44. *For policies commenced prior to 4.00 pm on 31 December 2006*

Wages paid to a trainee apprentice are counted as remuneration.

For new or renewed policies commencing on or after 4.00 pm on 31 December 2006

If the trainee apprentice is undertaking an apprenticeship in a trade vocation approved by the NSW DET, employers may claim the exemption. Employers should check to see if the apprenticeship is on the NSW DET 'list of apprenticeships' and the training contract is approved by the NSW DET. If these and any other conditions are met, the exemption may apply.

As the *Apprenticeship and Traineeship Act 2001* defines a 'trainee apprenticeship' as an apprenticeship under which the employer does not undertake to employ the apprentice for the whole of the term of the apprentice, employers should only claim the exemption for those periods they employ the apprentice.

Trainees

45. Trainees are defined as employees under the Australian Traineeship System.

For policies commenced prior to 4.00 pm on 1 January 2004

Remuneration paid to new entrant trainee workers employed under the Australian Traineeship System is not counted for the purposes of calculating an employer's premium. Instead, the worker is regarded as an employee of the Traineeship System and covered for workers compensation through that system. The definition of a new entrant trainee is outlined in the publication *Your Guide to Apprenticeships and Traineeships in NSW* on the NSW DET website, www.det.nsw.gov.au.

For new or renewed policies commencing on or after 4.00 pm on 1 January 2004

From 1 January 2004 employers will be required to meet workers compensation premium costs for new entrant trainees employed on or after 1 January 2004. The Government will continue to meet the cost of workers compensation premiums of new entrant trainees, who commenced their traineeship prior to 1 January 2004, for a period up to 31 December 2004 or the completion of the traineeship, whichever occurs first.

Government training schemes

46. If Centrelink or another Government Department directly pays an amount to a worker as part of a government-funded training scheme, that amount is not counted as remuneration for the purpose of assessing the employer's premium.

If an employer pays any amount to a worker for work experience or training as part of a government-sponsored training scheme and that payment is subsidised (wholly or partly) under the training scheme, then the total amount the employer pays to the worker is counted as remuneration.

Community Development Employment Project (CDEP)

47. Remuneration an employer pays to workers in the Community Development Employment Project is counted as remuneration for the purposes of calculating an employer's premium. However, the other costs funded by the Project are excluded (eg costs for equipment and rental).

Government training subsidies

48. If the Government pays an employer a subsidy to encourage the employer to employ or develop staff, then any amount the employer pays to the worker from that subsidy is counted as remuneration.

CHAPTER J – RECORD-KEEPING REQUIREMENTS

What records are employers required to keep?

49. Employers are required to:

- keep detailed records of all payments made to their workers
- keep copies of any other documents relevant to those payments
- provide access to them when required.

What are the legislative requirements about records for workers?

50. The employer's records about remuneration paid or payable to workers must:

- be in writing in English (or readily accessible and readily convertible into writing in English)
- record full details of each individual payment made to a worker including:
 - the worker's name, occupation and address
 - the date the payment was made
 - the period covered by the payment
 - the gross amount paid
 - details of all deductions including the amount of each deduction
- record all wage payments made in the date order in which they were paid
- be supported by confirming documents including copies of all payslips, cheque butts, bank statements, cashbooks, profit and loss statements, business activity statements, PAYG summaries or group certificates, fringe benefit tax returns, sub contractor workers compensation statements (section 175B of the Act), and any other relevant documents, including computer records
- be kept in a secure place and not subject to damage or loss
- be kept for at least five (5) years.

What are the requirements about records for contractors who may be 'deemed workers'?

51. The employer's records about contractors must comply with all the requirements about records for workers, and they must also:

- record a description of the services the contractor provided
- record full details of component parts of each payment made to the contractor – eg labour only, labour and materials, labour, materials and plant, or labour and plant
- contain documents that support the claim for contractor status such as evidence of questions, letterhead, business cards, contractor invoices, Certificates of Currency, ABN, and Department of Commerce Office of Fair Trading licences. Refer to Chapter H
- record payments to contractors, including full details of each payment made including the dates of payment and the amounts
- maintain copies of any private ruling decisions.

For further information on contractors, see Chapter H.

What records should employers keep about contractors who aren't 'deemed workers'?

52. Employers who determine that a 'contractor' is not a 'deemed worker' should keep the same detailed records about those contractors and any details of the contractor's workers compensation policies. The employer may find those records useful if they later need to justify to the Scheme Agent, or to WorkCover, that a contractor was not a 'deemed worker'.

The employer's records about contractors must comply with all the requirements about records for workers, and they must also:

- contain documents that support the claim for contractor status such as evidence of questions, letterhead, business cards, contractor invoices, Certificates of Currency (workers compensation, public liability etc.), ABN and Australian Company Number (ACN)
- record payments to contractors, including full details of each payment made including the dates of payment and the amounts
- contain copies of Certificates of Currency for the period of the contract
- maintain written statements by subcontractors that all workers compensation insurance premiums payable in respect of the work done in connection with the contract have been paid
- maintain copies of any private ruling decisions.

How long should employers keep the records?

53. Employers should keep the records in good order and condition for at least five (5) years. This is consistent with the ATO requirements.

What if an employer's records are stolen or destroyed?

54. If an employer claims that its records have been stolen or destroyed, it must provide written evidence to support the claim if possible – including a Police Report, Fire Brigade Report or Insurance Claim that specifically mentions the loss or theft of the records, computer, briefcase, etc.

What are the penalties for not keeping proper records?

55. The penalty for an employer who doesn't keep records properly is up to 500 penalty units (that is, \$55,000 at the time of printing).

When must the employer provide information to their Scheme Agent?

56. The employer must use their records to provide the following information to the Scheme Agent within two months:

- **after the start** of a policy period, an employer must provide an estimate of the remuneration which it will pay during the policy year
- **after the end** of a policy period, an employer must provide a declaration of the actual remuneration it paid during that period
- when requesting a Certificate of Currency.

Failure to provide a wage estimate or declaration may incur a fine of \$500, or prosecution and a penalty of up to 20 penalty units (that is, \$2200 at the time of printing).

What are the penalties for employers who make or provide false records?

57. Each employer must make sure that the information provided to the Scheme Agent in the declarations is correct. The penalty for providing false or misleading information to a Scheme Agent to obtain or renew a workers compensation policy is up to 100 penalty units (that is, \$11,000 at the time of printing).

If an employer's declarations are found to be incorrect, then various penalties may apply – for example, Scheme Agents may charge employers a late payment fee at the rate specified in the relevant year's IPO. These fees are charged on any premium that the employer has not paid because it under-declared the remuneration it paid. If the employer is a company, the directors of the company may be personally liable for this debt.

CHAPTER K – WAGE AUDITS OF EMPLOYERS

What rights do WorkCover and the Scheme Agent have to examine an employer's records?

58. WorkCover and its Scheme Agents have a legal right to audit an employer's records. They use this right to make sure that employers are paying the appropriate premium.

WorkCover and its Scheme Agents have a legislative right to access an employer's wages records under section 174 of the Act.

Section 174 stipulates that employers shall keep and maintain in good order records of all wages paid to workers employed by them and can be further required to provide these records to WorkCover or an authorised person under section 174 of the Act.

Details of the right to access wages record details are also outlined in policy documents issued by WorkCover's Scheme Agents. See policy conditions contained in the policy document issued to employers by their Scheme Agent.

It should be noted that even though certain payroll records contain sensitive information, such as tax file numbers, these records must still be made available when requested.

How does WorkCover select which employers will be audited?

59. WorkCover and its Scheme Agents utilise a range of data interrogation methods to review employers' policy details and develop risk profiles for identifying areas of high-risk for premium related non-compliance.

What notice of a wage audit must Workcover or the Scheme Agent give an employer?

60. The employer is to be notified in writing that they have been selected for a wage audit. The notice must include details of the auditor. That auditor is to contact the employer to make arrangements for the wage audit to take place.

Note: A wage audit would normally be conducted for three completed policy periods.

To what extent must the employer cooperate with an inspection?

61. An employer must cooperate in relation to a wage audit. In particular, they must cooperate in making arrangements for the audit to take place within a reasonable time after the initial request.

If the employer does not comply with the request to audit the employer's wage records, then the Scheme Agent may request that WorkCover issue an order requiring the employer to provide access to the requested records. WorkCover has the power to make those orders under section 174 of the Act. If an employer does not comply with the Order, the employer may be issued an infringement notice or be prosecuted and fined up to 500 penalty units (that is, \$55,000 at the time of printing).

How often may a Scheme Agent inspect a particular employer?

62. An employer may be inspected more than once. There is no limit on the number of times a Scheme Agent may audit an employer's records.

What powers does WorkCover have to request information in an inspection?

63. An employer must comply with WorkCover's request to provide information. If the employer does not comply, then WorkCover may make various orders directing the employer to provide information. WorkCover's powers to request this are set out in section 174 (5) of the Act.

Those powers include the power to do any one or more of the following:

- require an employer to supply information to WorkCover
- require an employer to make information available for inspection by someone authorised by WorkCover
- set the time in which the information must be supplied or made available for inspection.

What information may WorkCover request?

64. WorkCover may request:

- information that the employer is required to record in relation to remuneration. See Section 174 (1) of the Act. The record requirements are set out in rules 50 to 52 in this manual
- information of a specified kind that is in the employer's possession and is relevant to calculating premiums payable under policies of insurance
- information of a specified kind that is in the employer's possession and is relevant to determining whether the employer (or another employer) is required to obtain a policy of insurance or has paid the correct premium for a policy of insurance.

The records WorkCover may require include:

- financial statements
- minutes of Board meetings
- documents relating to contractual arrangements with other parties
- profit and loss statements, cashbooks, cheque butts, etc
- details of long service leave and superannuation payments by employers
- details of all contracts of employment (see Chapter F)
- any other relevant documents.

CHAPTER L – APPEALING A PREMIUM ASSESSMENT

What if an employer disputes the amount of the premium?

65. Any employer who queries or disputes the premium calculation made by their Scheme Agent should discuss the matter with the Scheme Agent.

If, after those discussions, the employer still believes the premium calculation does not comply with the law or the principles outlined in this manual, the employer may contact WorkCover to discuss a review of the issue.

A formal review may be conducted under section 170 of the Act.

How may an employer apply to WorkCover in relation to a dispute?

66. If an employer wishes to dispute their Scheme Agent's assessment of their premium, they may apply to WorkCover to make a determination in relation to the disputed aspects.

For the application to be considered:

- WorkCover must receive it within one month after the date on which the Scheme Agent issues the notice of the premium to the employer. (However, WorkCover may agree to extend that period). See Rule 67 below.
- it must be in the form approved by WorkCover and must contain all the information needed to consider the employer's application.

The application is made under section 170 of the Act.

For assistance please call WorkCover's Appeals Branch on 02 4321 5502.

When will WorkCover allow a time extension?

67. WorkCover will only allow an extension of time in special circumstances, relating to issues to do with the employer's ability to attend to normal business activities. WorkCover will generally not allow a time extension merely because of negotiations with a Scheme Agent, corporate governance issues, or the employer not knowing the law.

Can an employer withhold premium payment if they disagree with the calculation?

68. The employer must pay the premium to the Scheme Agent even if the employer:

- disputes the assessment of the premium
- has lodged an application with WorkCover for a review of the Scheme Agent's decision about the premium assessment.

If an employer's appeal is successful, their premium will be adjusted accordingly. See section 170 (3B) of the Act.

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