

WorkCoverSA

# Guide to deemed workers – building work (other than wall or floor tiling work)

November 2009

## **Important disclaimer**

While every effort has been made to ensure the accuracy of this guide, it is not a substitute for the *Workers Rehabilitation and Compensation Act 1986*, or the regulations or determinations made under the Act.

The information shown in this guide may change from year to year. To ensure the correct information is being used, or for further information, please contact WorkCover on 13 18 55.

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## Introduction

This brochure has been produced to help employers and/or workers who may be uncertain about the status of a person as a worker under the *Workers Rehabilitation and Compensation Act 1986* (the Act).

The information provided in this publication is correct at the time of printing and is provided as general information only. The specific issues relevant to your workplace should be considered in light of this general information.

To ensure correct information is being used, or if you are in doubt after reading this guide, please telephone 13 18 55.

## Who is a worker?

The Act provides for the rehabilitation and compensation of workers who suffer disabilities arising from their employment.

The Act requires that an employer register with WorkCover and pay a levy on remuneration paid to workers in their employ (unless they are exempted – see the WorkCover website for information on the small employer registration exemption). Under the Act, ‘worker’ is a broader definition than ‘employee’.

Whether someone is deemed a worker under the Act needs to be considered on a case-by-case basis, from the viewpoint of the worker-employer relationship, against well-tested common law principles.

The definition of ‘contract of service’ under the Act establishes that when a person (the principal) contracts with another person (the contractor) - and this includes otherwise independent contractors - for the purposes of the contractor undertaking work for the principal, the principal is deemed the ‘employer’ and the contractor is deemed the ‘worker’.

Under this provision and subject to meeting particular criteria, persons performing building work (other than wall or floor tiling work) can be a worker. Other examples of a deemed worker include persons performing work as entertainers, taxi drivers and cleaners.

## Important notes

Whether a worker is engaged to perform work on an ongoing basis or for a short period eg, for as little as one hour on a given day, or on a casual basis, an obligation exists on the employer to include remuneration paid to any such worker(s) in their calculation of levy payable.

A principal should ensure that an otherwise independent contractor who employs a worker(s) is, at all times when performing work for the principal, registered as an employer with WorkCover. If a contractor (who employs) is not registered, then under section 3(6) of the Act the principal is deemed the employer. It is therefore in the principal’s best interests to ensure that any contractors who also employ are registered with WorkCover.

Section 3(6) of the Act – states:

*Where in a prescribed industry or in prescribed circumstances a person (the principal) contracts with another person (the contractor) for the performance by the contractor of work undertaken by the principal, the principal shall, for the purposes of this Act, be deemed to be the employer of workers employed by the contractor.*

Regulation 5 Sub-regulation 10 *Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999* states:

*For the purposes of section 3(6) of the Act, a prescribed circumstance is where a person (the principal) contracts with another person (the contractor) who is not registered as an employer under the Act.*

## **How the Act relates specifically to building work (other than wall or floor tiling work)**

Depending on the terms of an individual contractual relationship, a person performing building work may be a worker on the basis of an employer/employee relationship as described above. (An apprentice is also a worker under the Act.)

Alternatively, an otherwise independent contractor may be deemed a worker under the provisions of the *Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999*. Regulation 5 extends the definition of ‘contract of service’ to persons performing building work (other than wall or floor tiling work).

Regulation 4 defines ‘building work’ as having the same meaning as the *Building Work Contractors Act 1995*. Accordingly, ‘building work’ means:

- the whole or part of the work of constructing, erecting, underpinning, altering, repairing, improving, adding to or demolishing a building
- the excavating or filling of a site for the above listed work
- onsite construction work associated with a pool or spa and paving and fencing (excluding post and wire).

Persons engaged in performing ‘building work’ (other than wall or floor tiling work) are deemed to be working under a contract of service and have the corresponding status of worker where the following conditions are *all* fulfilled.

Work performed under a contract, arrangement or understanding includes the following:

- Work carried out by the person (worker) in respect of the trade or business of the other party (employer) eg, carpentry work for a builder.

This would also include the situation where a hotel owner subcontracts directly with a builder to renovate his/her hotel and the builder does not supply materials. Whilst the renovations do not directly relate to the operation of a hotel, the work is for the purpose of the trade or business.

- Work performed personally by the worker (whether or not the worker supplies tools, plant or equipment).
- Where the worker does not employ any other person to carry out any part of the work. This relates to all the work required for the contract.

For example:

The contract is to lay a foundation. There are various stages to complete that contract and if the worker employs another to assist in any part of the work, say digging a trench, then the worker does not fulfil the requirement, having employed another to carry out part of the work. The person is an employer in their own right.

- Where the value of 'materials' supplied or expected to be supplied does not exceed 4% or \$50 of the contract price, whichever is the greater.

'Material' includes timber, bricks, paint, mortar, nails. It does not include plant, equipment or tools of the trade.

- Where the worker does not own or lease any item of plant or equipment, or any tool which exceeds the yearly indexed prescribed amount\*. (The value of any plant or equipment referred to is the price that at the time of entering into the contract or agreement, the worker would have reasonably been expected to pay for an equivalent new plant or equipment). A vehicle which is primarily used by the worker to transport tools, plant or equipment to a worksite is excluded when calculating the value of any tool, plant or equipment.

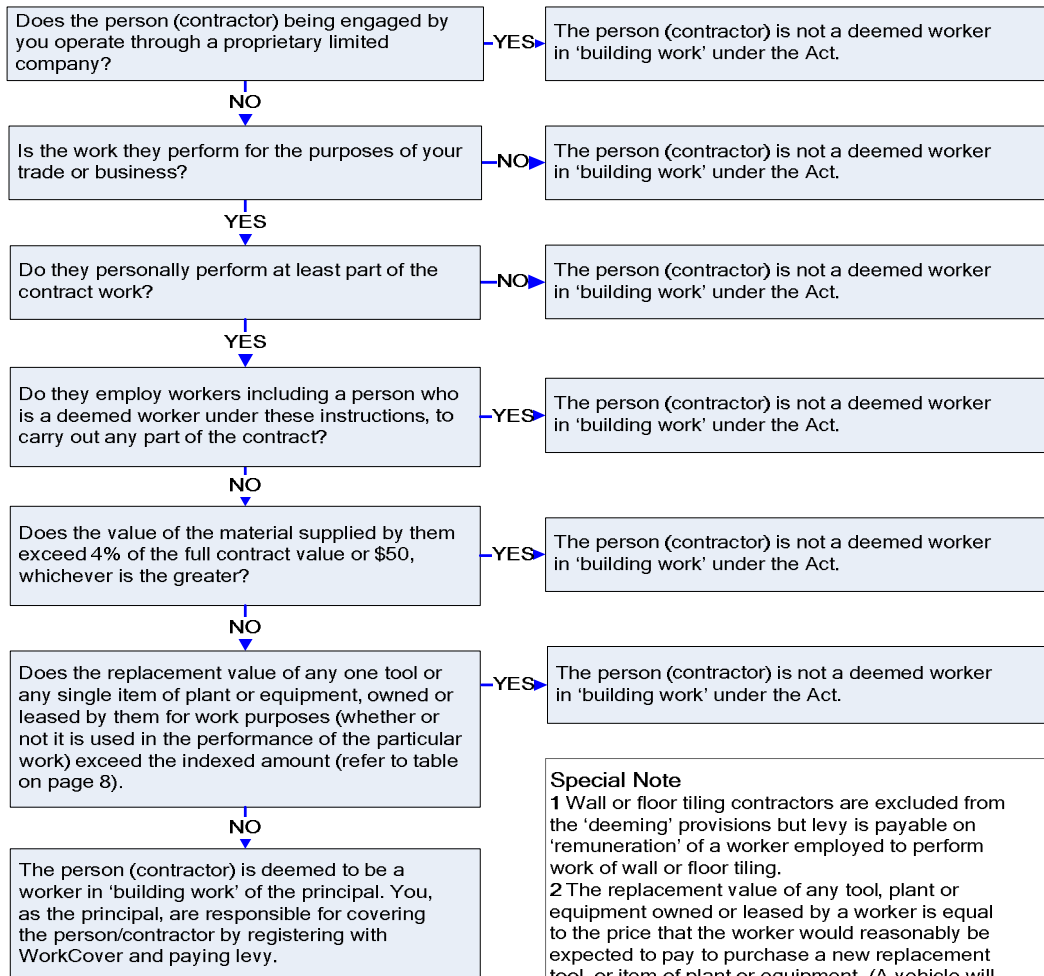
\* Refer to information at page 8.

A flowchart incorporating a range of questions is provided on page 7 to assist in relating 'building work' to the operation of the Act.

## Building work flowchart

### Is the person (contractor) performing the building work deemed a worker by the regulations?

*NOTE: \*\*\*The flowchart is a guide for either employers or contractors using the services of contractors in building work to determine if they are deemed to be their workers for the purpose of the Act. The regulations are not to be interpreted to deny coverage to persons working under a contract of service (ie, person may fail the deeming test yet still be a worker under common law criteria).*



#### Special Note

1 Wall or floor tiling contractors are excluded from the 'deeming' provisions but levy is payable on 'remuneration' of a worker employed to perform work of wall or floor tiling.

2 The replacement value of any tool, plant or equipment owned or leased by a worker is equal to the price that the worker would reasonably be expected to pay to purchase a new replacement tool, or item of plant or equipment. (A vehicle will not be taken to be used for work purposes if its sole or principal use is to transport the worker and any tools, plant or equipment, to any work site).

3 Under section 3(6) of the Act the principal is deemed the employer of the contractor's workers if the contractor is not registered as an employer with WorkCover.

## Replacement value of any tool or plant of equipment

Regulation 5 Sub-regulation (1)(a)(v) *Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999* states the value of any one tool, or any single item of plant or equipment, owned or leased by the worker for work purposes (whether or not it is used in the performance of the particular work) does not exceed:

- (A) in 1999 – \$12,000
- (B) in a subsequent year – an amount (calculated to the nearest multiple of \$100) that bears to \$12,000 the same proportion as the Consumer Price Index for the September quarter of the immediately preceding year bears to the Consumer Price Index for the September quarter, 1998.

The table below sets out the original and subsequent indexed amounts for the replacement value of any tool or plant or equipment from 1999 to 2009.

Year	Amount
2009	\$16,600
2008	\$15,800
2007	\$15,500
2006	\$15,000
2005	\$14,500
2004	\$14,200
2003	\$13,700
2002	\$13,200
2001	\$12,900
2000	\$12,200
1999	\$12,000

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**Free information support services:** TTY (deaf or have hearing/speech impairments):

(08) 8233 2574. Languages other than English: call the Interpreting and Translating Centre - (08) 8226 1990 and ask for an interpreter to call WorkCover on 13 18 55.

Braille, audio, or e-text: call 13 18 55 and ask for help in an alternative format.

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WorkCover is a statutory authority funded by employers to rehabilitate and compensate South Australians injured at work.