



Victorian WorkCover
Authority

**Determining Rateable Remuneration for
Contractors under the
Accident Compensation Act 1985**

Guideline

Things you should know before reading these guidelines:

- ✓ Because the people you engage describe themselves as ‘contractor’, ‘consultant’ or ‘self-employed’ does not necessarily mean you are exempt from WorkCover.
- ✓ The fact that your contractor uses a company or business name or A.B.N does not necessarily exempt you from WorkCover.
- ✓ Just because a contractor you engage holds a WorkCover policy does not necessarily mean you are exempt from WorkCover.
- ✓ If a person works exclusively or predominantly for you, you are most likely liable for WorkCover premium.
- ✓ Just because a person works for others, doesn’t necessarily mean you’re exempt from WorkCover.
- ✓ Rulings/decisions from other regulatory bodies (eg Australian Taxation Office) do not necessarily apply to WorkCover – you must know our rules.

Contacts

WorkCover Advisory Service

This service is available to answer your initial queries. Telephone (03) 9641 1444 or 1800 136 089 (Toll Free).

Email us

Contact us via email at info@workcover.vic.gov.au with any general WorkCover or Health and Safety queries.

WorkCover Agents.

For specific claim or premium inquiries, please contact your WorkCover agent.

FOREWORD

The purpose of these guidelines is to provide a detailed guide to the determination of rateable remuneration for contractors under the *Accident Compensation Act 1985*.

The guidelines are designed to enable business professionals to:

- identify relevant legislative provisions;
- interpret the relevant legislative provisions; and
- apply the legislative provisions

The requirements of the legislation are illustrated by reference to court judgments and rulings and tests for day to day decision making.

Reference to judgments and rulings is made easy via Internet hyper-links cited throughout the guidelines.

While these guidelines have been compiled with care, they may be overruled by legislative amendments to the law, or by decisions of appellate tribunals or courts.

The guidelines are binding on the Victorian WorkCover Authority until replaced. However the guidelines are not binding on an employer liable to pay premium. An employer always retains the right to challenge a determination that is based on the application of these guidelines.

It is hoped that these guidelines will result in a broader understanding of the subject and greater consistency in decision making in the determination of rateable remuneration for contractors.

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INTRODUCTION

The definition of worker under the *Accident Compensation Act 1985* (the Act) falls under four main categories.

The first category is persons who have entered into or are working under a **contract of service**. There is no definition of “contract of service” in the Act. The term recognises the relationship between an employer and employee, which is often referred to as a master and servant relationship. With growth and changes to the business community and the introduction of many new and previously unconsidered employment situations the application of the term is continually developing.

The second category is persons who have entered into a **contract of apprenticeship**.

The third category includes a wide range of persons who have entered into **contracts for services** (commonly referred to as contractors or independent contractors) and who are **deemed** to be working under a contract of service and thus “workers” and covered by the WorkCover scheme.

The fourth category is persons who are working under contracts for services (i.e. they are contractors) but are deemed to be “workers” and thus covered by the WorkCover scheme.

Particular industries and workers receive special treatment under the Act. For example:

- Generally, all natural persons who work as timber contractors (e.g. felling trees or cutting firewood) will be treated as working under contracts of service for WorkCover purposes (refer to section 6 of the Act).
- Generally, persons engaged in driving a vehicle used for carrying passengers for a reward where the driver has not purchased the vehicle (whether by hire purchase or otherwise) will be treated as working under contracts of service for WorkCover purposes (refer to section 7 of the Act).
- Special provisions apply to share farmers, religious bodies, persons employed by the Crown and sports persons (refer to sections 11, 12, 14 and 16 of the Act).

Payments to **workers**, whether engaged on a permanent, temporary or casual basis, are generally rateable remuneration.

Part 1

Details the status of sole proprietors, partners and company directors under the Act.

Part 2

Details the relevant tests for determining whether a person is working under a contract of service in accordance with decisions handed down by the courts.

Part 3

Introduces **section 8** of the Act and details how the courts have interpreted this section over the years. An indicative test for determining whether payments for the performance of work may be rateable remuneration under section 8 is also included.

Part 4

Introduces **section 9** of the Act and outlines the concept of a relevant contract and details exemptions.

Part 5

Outlines **section 10A** of the Act.

Part 6

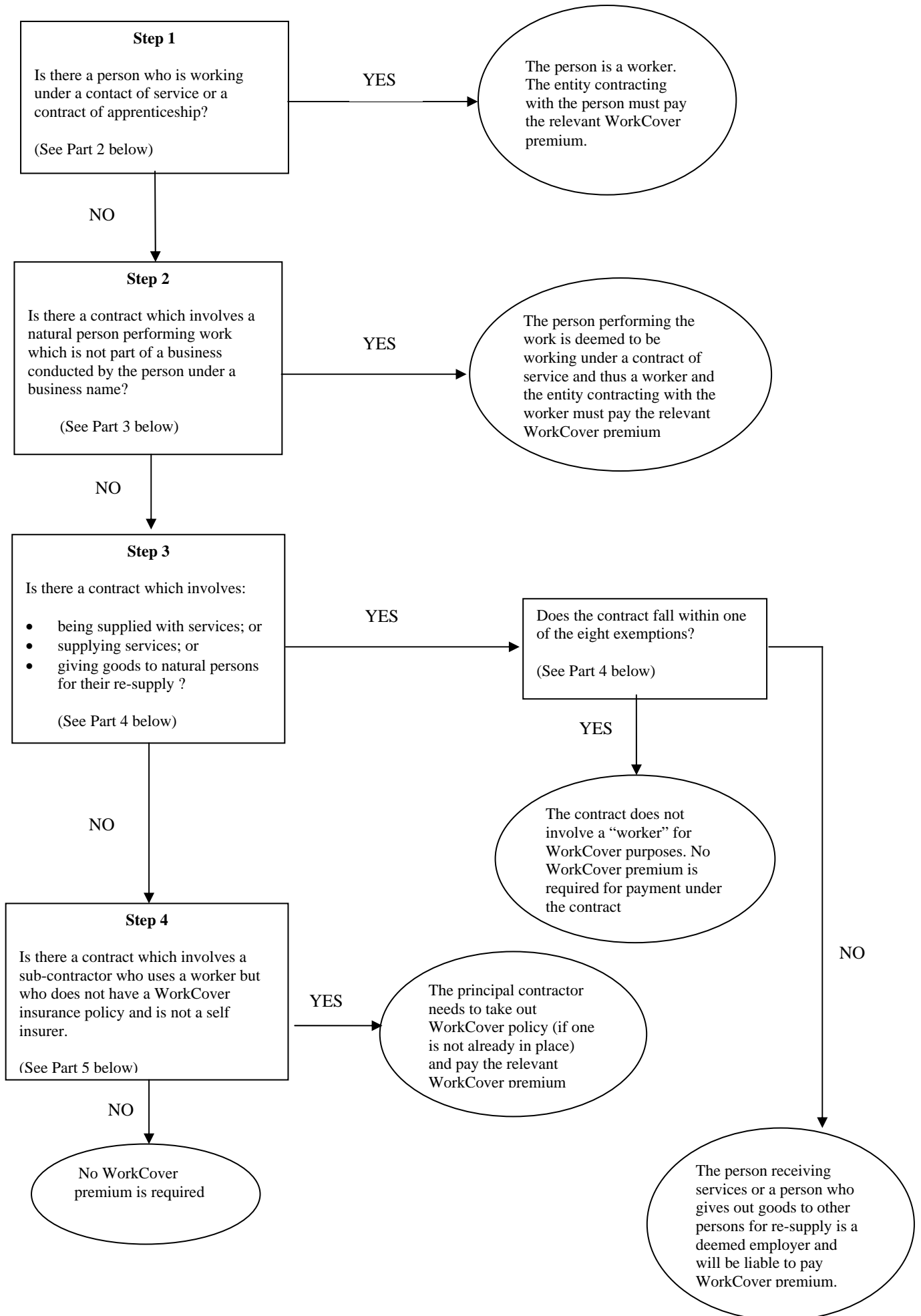
Outlines the treatment of employment agencies under the Act.

Part 7

Outlines the treatment of labour and non-labour components for the purposes of rateable remuneration.

The following flowchart sets out the basic steps involved in determining whether a person is a worker for WorkCover purposes. The flowchart should be read as a guide and not a complete summary of the relevant rules. A discussion of each of the steps is provided below.

BASIC STEPS FLOWCHART



PART 1: SOLE PROPRIETORS, PARTNERS AND COMPANY DIRECTORS UNDER THE ACT

Sole Proprietors

A sole proprietor (meaning the sole owner of an unincorporated business) is unable to employ him/herself in a separate capacity under a contract of service or a contract for services. He may engage others to work for him under contracts of service or otherwise but he cannot contract with himself either under his own name or under a business name he may use.

A sole proprietor may enter into a contract of service or a contract for services with a separate party and be treated as a worker of that separate party under sections 5, 8 or 9 of the Act.

Partnerships

A partnership is not a separate legal entity from its partners and cannot employ the partners and the partners cannot employ each other under a contract of service or contract for services. Partners can employ or engage other persons to work for the partnership or for them individually and these persons may be treated as workers under the Act.

A partnership may enter into a contract for services with a party separate from the partnership and the partner who performs the work may be treated as a worker under section 8 or 9 of the Act.

Companies

A company incorporated under the Companies legislation has its own legal status. A company can employ workers and enter into contracts for services with contractors.

The persons charged with the management of an incorporated company are its directors. The duties and powers of the directors are governed by the constitution of the company and relevant legislation. An incorporated company has its own legal status and is able to enter into a contract of service with a director who will then be treated as a worker under the Act. Whether a director had entered into such a contract of service is a question of fact. There would need to be evidence of such a contract such as for example Board Minutes minuting the fact, a wages book and group scheme documentation before a decision could be made.

Irrespective of whether a contract of service exists between a director and a company, all directors' fees are deemed to be remuneration for the purposes of the Act.

Trustees

Where a business operation is run via a trust, it is the "trustee" that is the employer and not the trust.

The trustee will generally be in the form of a natural person, a partnership or an incorporated entity.

PART 2: CONTRACT OF SERVICE

The first step in identifying whether a person is a **worker** under the Act is to determine if the person has entered into or is working under a **contract of service** (see *Step One of the Flow Chart*). While this determination will often be straightforward, there will be instances where the proper characterisation of a relationship is unclear in the first instance.

A contract's conditions, in the absence of being proven a sham, will stand as strong evidence as to the nature of the contractual relationship (a sham is an agreement or arrangement which in form does not reflect the true substance of that agreement or arrangement).

A contract in this context may be express or implied and may be oral or in writing.

However, any contractual conditions which purport to define a relationship being one of independent contractor/principal cannot alter the true nature of the relationship, where the true relationship disclosed by the facts and or behaviour of the parties is a contract of service.

It is therefore necessary to determine the characterisation of a contractual relationship by the rights and obligations that the contract creates, and not merely by the label the parties put on it.

An employee (a person working in a "contract of service") is a worker for WorkCover purposes.

An important distinction is made between **employees (persons working in contracts of service)**, on the one hand and **independent contractors** on the other. Fundamentally, this distinction is based on the difference between persons who work in their own businesses and those who work in a business conducted by somebody else.

Generally, it is clear whether a person is an employee or not. In more difficult cases, the courts have developed a number of tests which can be applied to determine whether or not the person is an employee or an independent contractor.

Tests for determining a contract of service

The basic test is whether the person concerned is running that persons own business or enterprise and whether the person has independence in the conduct of the persons operations.

The sub-tests include:

The Control Test

If a principal has the right to control what work a person does, how they do it and when they do it, the person is likely to be an employee or a person working under a contract of service.

The test of control will vary based on the industry standards and the nature of the work being performed by the contractor.

The test of control in determining a contract of service is not based on actual exercise of control, but the ability or right to exercise such control over the manner by which duties are performed.

The following factors are not meant to replace the test of control, but are simply used to assist in establishing whether the test of control is satisfied:

- An employee has no right to delegate his or her work.
- An employee has no right to employ others to perform his or her contractual obligations.
- An employee is usually required to work at set times.
- An employee usually works at the employer's place of business or at those locations as directed or approved by the employer.

The Integration Test

An employee is generally an integral part of, or is presented to the public as an emanation of, the business carried on by the principal (i.e the employer).

An employee has no ability to accumulate goodwill or saleable assets in the performance of his or her duties.

The Results Test

If a person is hired to produce a specific result or to complete a specific task, the person is more likely to be an independent contractor. In contrast, employees generally fill a position and have an on-going role unrelated to a specific task.

An employee is usually paid regularly irrespective of the work done (eg fortnightly) as opposed to an independent contractor who is usually paid based on the production of a result.

The Risk Test

Independent contractors are more likely to be exposed to a commercial risk in the event that work is not completed satisfactorily. Either they will be required to rectify any defective work, or they may be sued for any loss or damages arising from defective work. Employees are not usually exposed to these risks. Other relevant factors include:

- An employee bears no or minimal costs in the performance of his or her duties.
- An employee has no ability to make a profit or loss in the performance of his or her duties

If by using these tests it can be concluded that a person is really running a legitimately separate business from the principal then the outcome is likely to be a contract for services. However, if the reality is that a person is operating under similar arrangements to that of an

employee of the principal by another name then the outcome is likely to be a contract of service.

As to whether a person is running their own business or enterprise and whether they have independence in the conduct of their operations see further the discussion on **section 8** below.

Summary

An employee (i.e. a person working under a contract of service) is a **worker** under section 5 of the Act.

It is often not an easy task to decide whether a given person is an employee or an independent contractor. As such, whether a person is an employee or independent contractor is usually based upon a very fine balance of facts.

If it is not clear whether a person is working under a contract of service, it will be necessary to apply the above tests and come to a conclusion.

Relevant Judgment

[Hollis v Vabu Pty Ltd \(2001\) HCA 44](#)

PART 3: SECTION 8 CONTRACTORS

The second step in the flow chart above is to determine if persons working under contracts for services are deemed to be working under contracts of service under section 8 of the Act.

The purpose of section 8 of the is to provide WorkCover benefits to natural persons who perform work as contractors in the course of and for the purposes of a trade or business carried on by another person known as a principal. A contractor is deemed to be working under a contract of service with the principal under section 8 if all of the following conditions are satisfied:

- a person (“the principal”) in the course of and for the purposes of a trade or business, hires a **natural person** (the contractor) to perform certain work; and
- the contractor **agrees to perform the work**, which is **not** work incidental to a trade or business regularly carried on by that contractor in the name of that contractor or under a business name; and
- the contractor does not either subcontract the work or employ anyone to perform the work or, if he or she does employ someone, the contractor performs some of the work personally.

If all these conditions are satisfied, the principal engaging the contractor will be deemed to be the employer of the contractor and any amounts paid by the deemed employer to the contractor will be rateable remuneration, less any part that is not attributable to the performance of work (see part 7 in relation to how amounts not attributable to the performance of work are measured for the purposes of the Act).

Interpreting section 8

Section 8, along with equivalent legislative provisions in New South Wales, Australian Capital Territory and the Northern Territory, have been considered by the courts.

The words ‘*not being work incidental to a trade or business regularly carried on by the contractor in the name of the contractor or under a firm or business name*’ were considered by the High Court in [*Humberstone v Northern Timber Mills \(1949\) 79 CLR 389*](#) in relation to the predecessor provision to section 8.

In this matter, Humberstone was licensed to carry on business as a carrier. He owned a two-ton truck the off-side door of which contained the inscription “K Humberstone Carrier 118 Blyth Street”. Many years before, he had displayed a sign at Blyth Street and had carried goods for anybody who hired him. But for a very long time, perhaps twenty-five years, his work had been substantially confined to carrying logs, timber and boxes for the respondents. There had been a few occasions in that period when he did some particular job in the course of a return journey; but there was evidence that he had asked whether the respondents minded his taking a back load from one of their customers. No longer did he hold himself out as a carrier ready and willing to lift the goods of others. He had no telephone and he exhibited no business sign or advertisement.

He attended at the premises of the respondents about half-past seven in the morning of every working day except Saturday. He took whatever load he was requested and delivered it at the destination to which it was consigned. He was paid at a rate calculated upon the weight of the load and the distance it was carried. The amount due to him was made up weekly by the respondents. He bore the cost of the petrol and paid for the upkeep and licensing of his vehicle.

Dixon J stated at page 401:

“In my opinion the work which the deceased was performing for the respondents was not work incidental to a trade or business regularly carried on by him in his own name within the meaning of the sub-section ... I think that the purpose of the exception or exclusion expressed by the words in question was to confine the benefit of the conclusive presumption which it establishes to persons who do not conduct an independent trade or business, who are not holding themselves out to the public under their own or a firm or business_name as carrying on such a trade or business and do not in the course of that trade or business, as an incident of its exercise, undertake the work by entering into the contract. The provision will thus cover men who work for the principal but have no independent business or trade and men who though carrying on an independent trade or business undertake a contract outside the scope or course of that trade or business...But a consideration of the policy of the provision as well as of its text appears to me to show that the distinction it seeks to draw is between on the one hand an independent contractor whose relation with the principal is special or particular either because it is outside the course of the general business of the contractor or the general practice of his trade or because he has no such general business or is not a general practitioner of his trade, and on the other hand an independent contractor who performs work successively or perhaps concurrently for his customers or others in the course of a definite trade or business carried on systematically or who holds himself out as ready to do so.”

Then he said (1949) 79 CLR, at p 402:

“The suggestion which this language conveys of the existence of a business or the practice of a trade is much strengthened in sub-s. (6) by the words ‘carried on’, ‘regularly’ and ‘in his own name or under a firm or business name’. These all indicate a business or trade conceived as independently existing or exercised by a person holding himself out to the public under a name or style.”

Humberstone’s case is the authoritative case on the construction of section 8 (1)(a) of the Act which makes a distinction between two types of contractors:

1. An independent contractor whose contract with the principal is special or particular either because:

- it is outside the course of the general business of the contractor or the general practice of the contractor’s trade; **or**
- the contractor has no such general business or is not a general practitioner of his trade.

This contractor is not performing services incidental to (i.e. as part of) a trade or business regularly carried on by the contractor and will be deemed by section 8 to working under a contract of service.

Payments under the contract will be deemed remuneration provided:

- The principal, in the course of and for the purposes of a trade or business has hired a natural person contractor to perform certain work;
- The contractor agrees to perform that work; and
- The contractor does not either subcontract the work or employ anyone to perform the work or, if he or she does employ someone, the contractor performs some of the work personally.

2. An independent contractor who:

- performs work successively or concurrently for principals in the course of a definite trade or business carried on systematically; or
- holds him/herself out as ready to do so.

This contractor is performing services incidental to a trade or business regularly carried on by the contractor. Hence the contractor will not be deemed by section 8 to be working under a contract of service.

Payments under the contract will not be deemed remuneration under section 8.

The framework established by Humberstone's case has been applied by the courts with approval over many years.

The following matters relating to the application of 8(1)(a) and the *Humberstone decision* have arisen in the courts:

- 1) A person must agree to perform work to fall within section 8 (1)(a).¹
- 2) Case specific facts must be considered to determine what is outside/inside the course of the general business of a contractor.²
- 3) *In defining the meaning of 'holding out', Higgins v Jackson (1976) 135 CLR 174 made it clear that it is sufficient that the contractor becomes "known as" carrying on business regularly to be excluded by s.8(1)(a). The Higgins v Jackson decision was subsequently applied by the Compensation Court of New South Wales and the Federal Court of Australia.*³

¹ Hall v TAC, Administrative Appeals No.1994/31710

² Vince Petitto Pty Ltd v Rubino (1995) 12 NSWCCR 378

Hoskins v Boshane Pty Ltd & Another (1994) 10 NSWCCR 612

Harris v Cudgegong Soaring Pty Ltd (1995) NSWCC 18

³ Byrne v Mulholland (1995) 11 NSWCCR 739

- 4) The decision in ***Brown v Contemporary Carpet Services Pty Ltd (1997) 14 NSWCCR 360*** is an example of where the ‘holding out’ by a contractor during a period where the services of the contractor were substantially confined to one principal substantially contributed to a finding that the contractor was carrying on an independent business.
- 5) It is a requirement to undertake a broad review of a contractor’s business history when applying section 8. That is, the review of a contractor’s circumstances must discover the steps undertaken by a contractor to establish an independent business. In this context the review required must be broad in scope and must not be limited to the consideration of the financial year in which the contract is made.⁴

The requirement for a broad review under section 8 is in contrast to section 9(1)(e)(v) of the Act which effective from 1 July 2002, requires the relevant review to be restricted to a 12 month period.

Section 8 Indicative Test

Status of the Test

The Victorian WorkCover Authority may usually be satisfied that a contractor carried on an independent business for the purposes of section 8 for a given financial year if the following indicative test is satisfied, and no contra indications exist. A mere reliance on the indicative test without regard for the content of the arrangement will not protect employers from penalties for under declaration of contractor payments if that content is at odds with the indicative test. The VWA must at any particular point in time apply the law as it understands it to operate. In using the indicative test, it should be recognised that the test cannot supplant the terms of the law.

While the indicative test has been compiled with care and is intended to assist in the interpretation of the law in given circumstances, the test does not have the effect of an estoppel against the operation of the law.

The Victorian WorkCover Authority will have regard to all information it considers necessary to gain a full understanding of a contractor’s operations for the purposes of making a determination in respect to a contractor.

The indicative test has been issued subject to these necessary reservations.

Re: St Jegan Tomas And: Anton Tomas and Dusko Peraic (1983) 74 FLR 137

⁴***Ballantine v Owglo Pty Ltd (1989) 5 NSWCCR 106***

Grant v TAC (2000) VCAT 1100

C&S Insulation Services Pty Limited v John Clive Copley (1997) ACTSC 2

McIlvain v The Council of The Shire of Gunnedah (1998) NSWSC 447

Objective of the test

The objective of the test is to obtain an indication of the usual practice of the contractor during a given financial year under review.

The questions relate to the contractor's business generally during a given financial year and responses should encompass dealings with all principals during the given financial year.

In using this test it is essential to note that it cannot supplant the terms of the law.

The Indicative Test

In the financial year in question : -

1. *Did the contractor perform the same services for two or more businesses as a contractor?*
2. *Did the contractor usually enter into work agreements where the contractor was free to work for more than one business at a time?*
3. *Did the contractor usually employ staff or subcontractors?*
4. *Did the contractor usually provide significant tools, equipment or materials?*
5. *Was the contractor usually legally liable for rectifying faulty materials or workmanship?*
6. *Did the contractor usually quote competitively for work?*
7. *Did the contractor usually quote a business name?*
8. *Did the contractor regularly advertise a business or promote the contractors services to two or more businesses?*
9. *Did the contractor usually submit invoices for the contracted work?*

Note : It is irrelevant whether or not a contractor has a A.B.N.

Scoring the Indicative Test

It is essential to note that indicative test scores do not supplant the terms of the law.

Questions 1 - 6

Each 'YES' response = (2) **TWO POINTS**

A 'NO' response = **ZERO POINTS**

Questions 7 - 9

Each 'YES' response = (1) **ONE POINT**

A 'NO' response = **ZERO POINTS**

The maximum score for any financial year is **15** points.

The Victorian WorkCover Authority may usually be satisfied that a contractor carried on an independent business for the purposes of section 8 for a given financial year where the contractor:

- **Scores 9 or more points for the given year; or**
- **Scores at least 4 points in the given year and 9 or more points for the year preceding the given year,**

and no contra indications exist. That is the answer provided by this test does not appear to be inconsistent with the substance of the working arrangements.

Examples Where Working Arrangements Are Inconsistent With Test Scores:

Example 1

John Smith is a painter and was a regular casual employee of Painting Pty Ltd from July 1998 until 30 June 2003. The company appropriately declared its payments to John as remuneration throughout this period. On 1 July 2003, Painting Pty Ltd initiated a new working relationship with John and explained that it can only offer contract work in future – but most day-to-day work arrangements would remain unchanged. To assist John in the transition process, the company advised:

- John was now free to work for other businesses and that painting work will also be available with its subsidiary: Painting Number 2 Pty Ltd;
- John was now responsible for all tools and equipment on the job but the company would provide John with these items;
- It had obtained paper-work for John to complete that would create an A.B.N and a business name for John that were necessary to gain future work with the company;
- John was now required to run an advertisement for his painting services in the local newspaper and must submit fortnightly invoices based on a revised hourly rate;

- The same working conditions will apply when working for Painting Number 2 Pty Ltd;

Throughout 2003/04, John worked only for the two companies in accordance with above conditions. John was content with the new arrangements as they allowed him to maintain his income without much change to his day-to-day work. He decided that if he received calls arising from his advertisement, he would advise he is unavailable as the two companies had promised him ample work and he was content to continue working with them.

The companies did not declare John's contract payments as remuneration because they each scored 9 points for John for the 2003/04 year.

Despite 9 points being achieved under the indicative test, The Victorian WorkCover Authority (VWA) considers that the working relationship is at odds with the result of the indicative test. The VWA considers that payments to John under the above circumstances are rateable remuneration on grounds that John does not carry on a business in accordance with these guidelines.

Example 2

David performed contract joinery work for Acme Builders Pty at its premises during the first half of 2002/03. The contract did not have an end date and work was undertaken as directed by the company. While David was responsible for his own hand tools, the company's workshop was well equipped with a range of machinery to perform the contracted work. David's written contract allowed him to work for other businesses and made him liable to make-good any faulty workmanship. David was paid weekly upon submitting an invoice to the company. The company provided regular work for the first half of the year which kept him busy five days a week and he had no need to obtain work from others. However, the company experienced a down-turn in business during the second half of the year and was unable to offer David work for the foreseeable future. Several weeks later, David was able to secure a contract on similar terms with ABC Joiners Pty Ltd. The contract did not have an end date and David worked five days a week for ABC Joiners Pty Ltd and did not work for others. David worked under this arrangement until early 2004 at which time he secured full-time employment with Melbourne Builders Pty Ltd.

Both Acme Builders Pty Ltd and ABC Joiners Pty Ltd did not declare David's 2002/03 contract payments as remuneration because they each scored 9 points for David for the 2002/03 year.

Despite 9 points being achieved under the indicative test, The Victorian WorkCover Authority (VWA) considers that the working relationship is at odds with the result of the indicative test. The VWA considers that payments to David under the above circumstances are rateable remuneration on grounds that David did not carry on a business during 2002/03 in accordance with these guidelines.

PART 4: SECTION 9 INDEPENDENT CONTRACTORS

Unlike section 8, the operation of section 9 of the Act is not restricted to contracts involving natural persons. As a result contracts involving incorporated entities as well as natural persons are caught by section 9 (*see Step Three of the Flow Chart*).

The section is phrased as a general rule or principle, which is then followed by a large number of exemptions. Careful analysis of the terms of the section and its various sub-sections is necessary to determine the status of particular working relationships.

The Relevant Contract

Section 9(1)(a)(b) and (c) establishes at first instance a wide definition of a relevant contract, but then lists a number of exceptions.

The contracts which are relevant (at first instance subject to the exclusions) are those where in the course of a business carried on by a person, that person:

- supplies services to another person for, or in relation to, the performance of work;
- receives services of persons from another person for, or in relation to, the performance of work; or
- gives out goods to natural persons who perform work and re-supply the goods to the first person (This includes the practice of giving out goods to outworkers or home workers).

Exemptions from a Relevant Contract

There are eight exemptions where a contract is not a relevant contract. If any one of these exceptions applies the contract will not come within the ambit of section 9.

The majority of the exemptions are identical to section 3C(1) of the *Pay-Roll Tax Act 1971* and should therefore generally be interpreted in accordance with State Revenue Office rulings.

The eight exceptions are as follows:

Section 9(1)(d) of the Act exempts contracts where the provision of labour is ancillary to the provision of materials and/or equipment.

9(1)(d) should be interpreted in accordance with State Revenue office Ruling PT.054.

Section 9(1)(e)(i) of the Act exempts contracts where the services rendered under the contract are not ordinarily required by the principal, and the contractor ordinarily renders those services to the public generally.

9(1)(e)(i) should be interpreted in accordance with State Revenue office Ruling PT.057.

Section 9(1)(e)(ii) of the Act exempts contracts for the provisions of services of a kind ordinarily required by the principal for less than 180 days in a financial year.

9(1)(e)(ii) should be interpreted in accordance with State Revenue office Rulings PT.053 and PT.068.

Section 9(1)(e)(iii) of the Act exempts contracts where services are provided for a period or periods in aggregate that do not exceed 90 days in a financial year.

9(1)(e)(iii) should be interpreted in accordance with State Revenue office Rulings PT.052 and PT.068.

Section 9(1)(e)(iv) of the Act exempts contracts for service where the amounts paid or payable is at a rate of not less than \$500,000 per annum.

9(1)(e)(iv) should be interpreted in accordance with State Revenue office Ruling PT.055, however, the relevant pay-roll tax amount is \$800,000, rather than \$500,000 for WorkCover purposes.

Note: This exemption was repealed with effect from 1 July 2002.

Section 9(1)(e)(v) of the Act exempts contracts where the Victorian WorkCover Authority is satisfied that services are rendered by a person who ordinarily renders services of that kind to the public generally.

Effective from **1 July 2002**, the section 9 (1)(e)(v) exemption was amended to include the words “in that financial year” after the words “public generally”. From 1 July 2002, the exemption should be interpreted in accordance with State Revenue Office Ruling PT.091.

For all financial years prior to and including 2001/02, the Victorian WorkCover Authority will usually be satisfied that a contractor ordinarily rendered services to the public generally if the financial year indicative test on page 15 of this document is satisfied and no contra indications exist.

Section 9(1)(f) of the Act exempts contracts where the contractor employs or engages other persons, whether employees or contractors, to perform some or all of the work required under the contract.

9(1)(f) should be interpreted in accordance with State Revenue office Ruling PT.076.

Section 9(1)(g) of the Act exempts a contract under which a person provides services for or in relation to the door-to-door sale of goods.

Unless a contract is exempt by reason of one of the exemptions listed above, the following applies in respect of a relevant contract:

- A person receiving services or a person who gives out goods to other persons for re-supply is a **deemed employer** and will be liable to pay premium;
- A person who performs work for or in relation to which services are supplied to another person is deemed to be a **worker** while performing such work as is a

natural person who re-supplies goods to an employer after performing work on them.

PART 5: SUB-CONTRACTORS DEEMED TO BE WORKERS

Under the Act, a contractor may be held liable where it sub-contracts work to another contractor and a person who carries out work is injured.

More precisely, under section 10A of the Act where a contractor (“the principal contractor”) in the course of its business contracts with another person who is not and is not deemed under section 8 and 9 to be a “worker” (“the subcontractor”) to do some of the work undertaken by the principal contractor, the principal contractor will be liable to pay WorkCover compensation if a worker employed by the subcontractor who carries out the work is injured, and the sub-contractor:

- does not have a WorkCover insurance policy; or
- is not a self insurer.

If the principal contractor is liable to pay compensation, he or she is entitled to be indemnified in most circumstances by the subcontractor.

Not only may the principal contractor be liable to pay compensation, it may be liable to pay premiums in respect of those workers who are employed in the execution of the work under the contract.

Accordingly, in circumstances where a principal contractor is sub-contracting work, it should ask the subcontractor (provided it is not otherwise a worker or deemed to be a worker of the principal contractor under the tests discussed above) whether the sub-contractor is a self-insurer or the holder of a current WorkCover insurance policy in respect of its workers.

If the subcontractor is not a self-insurer or the holder of a current WorkCover insurance policy in respect of the relevant workers, then the principal contractor should take out a WorkCover policy in respect of the relevant workers (if one is not already in place) and if a relevant worker is injured pay a premium based on the remuneration paid to those workers. The alternative is to not engage that subcontractor.

PART 6: EMPLOYMENT AGENCIES ENGAGED IN ‘ON-HIRING’

The following steps should be taken in respect to workers being ‘on-hired’ by employment agencies:

(a) Contract of Service

Where there is a contract of service (i.e. common law employer/employee relationship), between the worker and the agency the temporary is always a worker of the employment agency under section 5 of the Act in respect of work performed for third parties under that contract.⁵

(b) Contract for Services

Where an employment agency contracts with a third party for a temporary to perform work for a third party whether the temporary is working for the employment agency under a deemed contract of service (s8) or is a deemed worker (s9) should be determined in the following sequence.

Firstly, consider whether there is a liability under section 8 of the Act.⁶

Secondly, if the temporary is not deemed to be working under a contract of service under section 8, consideration must be given to section 9.

Thirdly, consider the provisions of section 10A of the Act.

Additionally where a contract arises between the end user and the person performing the work **the end users may have a liability under sections 5, 8 and 9 of the Act.**

⁵**Drake Personnel Ltd & Ors v Commissioner of State Revenue (2000) VSCA 122**

⁶**Rolfe (aka Curnow) v Blanshard & Others (1993) 9 NSWCCR 20**

PART 7: LABOUR AND NON-LABOUR COMPONENTS

Once it has been established that a person is deemed to be working under a contract of service or a worker of the principal under section 8 or 9, it is then necessary for the principal to calculate what remuneration is to be declared in respect of payment to the contractor.

Section 8(1) deems the amount payable by the principal to the contractor in respect of the performance of work under the contract to be remuneration.

Section 9(2)(c) deems amounts paid or payable by an employer for or in relation to the performance of work relating to a relevant contract or the re-supply of goods by a worker under a relevant contract to be remuneration paid or payable during that financial year.

Note: section 9(6)(c) elaborates on the term “**resupply of goods**” as used section 9(1)(c) to include where the principal supplies goods to the worker; and the worker either, resupplies the goods to the Principal in an altered form or condition; or supplies goods to the principal in which the originally provided goods have been incorporated.

If the amount paid in respect of the performance of work is part of a larger amount, it is the part paid in respect of the **performance of work** that is deemed to be remuneration and which needs to be identified.

Where the deemed remuneration specified in sections 8(1) and 9(2)(c) is only part of the larger amount that was paid or is payable by the principal, the part which is not attributable to the performance of work (and in the case of section 9 the re-supply of goods by a worker under the relevant contract) may be prescribed (i.e. determined by regulations).

Regulation 13 of the Accident Compensation Regulations 2001 prescribes the relevant deductions for particular classes of contracts to be deducted where the amount paid to the contractor by the principal includes the costs of materials and equipment provided by the contractor at his or her own expense. For periods prior to 19 March 2001, refer to **Regulation 8 of the Accident Compensation Regulations 1990**

The purpose of prescribed deductions is to provide administrative efficiency for employers and the WorkCover system. A prescribed deduction is intended to represent the percentage of a contract price that is generally paid for materials and equipment in respect of that class of contract. This saves the need for the employer to calculate and substantiate these amounts on a case by case basis. On some contracts the true costs attributable to materials or equipment may be more or less than the amount prescribed, however, if a deduction has been prescribed only that amount can be deducted from the total contract price – no more and no less.

By deducting the prescribed amount from the total contract price, the remuneration to be declared is identified.

If there is no deduction prescribed for a class of contract then, the remuneration is the total contract price less amounts, if any, paid under or in relation to the contract which do not relate to the performance of work (and in the case of section 9, the re-supply of goods by a worker under the contract).

As WorkCover is a self-assessing system in respect to remuneration, the evidentiary burden of proving that the total contract price includes exempt amounts lies with the employer. That is, if it is not clear from the contract document itself, the employer must be able to demonstrate the amounts are exempt by providing supporting documentation for each contract. It is inappropriate for an employer to state general percentages for a complete financial year.

Written evidence may be documentation such as:

- contract costing that show the allowances for materials and/or equipment;
- copies of invoices clearly showing the breakdown of the contract costs;
- copies of the contractor's tax returns showing deductions for materials and/or equipment;
- a copy of the contract (if the contract was evidenced in writing).

Any written evidence provided must clearly identify:

- the names of the parties involved;
- the expense amounts;
- the exact nature of the expenses;
- the date the expense was incurred or the contract arrived at.

If principals/employers fail to keep sufficient records to enable them to substantiate that the contract payment includes amounts that are not attributable to the performance of work the whole contract amount is the remuneration for the purposes of the Act.

If the principal/employer believes that part of a contract amount is rateable and certifies remuneration accordingly, then the supporting documentation must, in accordance with section 69 of the *Accident Compensation (WorkCover Insurance) Act 1993*, be kept for five years from the date of certification.

Flowcharted Process for Determining Remuneration

