

CROSS BORDER PROVISIONS

Cross border provisions included in Schedule 1 of the *Workers Compensation Legislation Amendment Act 2002* commenced on 1 January 2006.

This operational instruction outlines new procedures as a result of these amendments. The former bilateral agreement with Victoria and previous cross border procedures no longer apply.

Effective 1 January 2006, Employers are required to determine the 'State of connection' of each Worker and arrange coverage under a Workers Compensation Policy as required in that State. A Scheme Agent will need to take into account the cross border provisions to determine:

- (a) whether an injured Worker is entitled to benefits in NSW
- (b) when a Workers Compensation Policy is required in NSW
- (c) when the Wages of particular Workers working in more than one jurisdiction should be included in NSW for the purpose of calculating premiums.

Determining a Worker's 'State of connection'

From 1 January 2006, Workers are only eligible for compensation in their 'State of connection', which is determined using the following tests:

- Test A – the State in which the Worker **usually works** in that employment.
- 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.
- 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.

If no State is identified by these tests, a Worker's employment may still be connected with NSW if the Worker was in NSW when the Injury occurred and the Worker is not entitled to compensation for the injury outside Australia.

An Employer will therefore only need to obtain Workers Compensation cover in their Workers' 'State of connection'.

General information regarding these tests is available at www.workcover.nsw.gov.au, including the Cross Border Guide and Fact Sheet No II – Information for Employers – Cross Border.

Commencement Dates

Cross border provisions, introduced on 1 January 2006 in NSW, apply to all Australian jurisdictions. Commencement dates for other Jurisdictions are:

- Queensland – 1 July 2003
- Australian Capital Territory – 3 June 2004
- Victoria – 1 September 2004
- Tasmania – 17 December 2004
- Western Australia – 22 December 2004
- South Australia – 1 January 2007
- Northern Territory – 26 April 2007

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Application to Policies

Employers are still required to maintain a Workers Compensation insurance Policy for all of their Workers. Cross border legislation determines the jurisdiction(s) in which Workers Compensation cover is to be obtained.

Employers should ensure that they have determined the 'State of connection' of each of their Workers. Employers should refer to www.workcover.nsw.gov.au for further information or phone the WorkCover Assistance Service on **13 10 50**.

It should be noted that even under the complementary cross border arrangements Employers may require coverage in more than one State as they may have some Workers with a NSW 'State of connection' and others connected with another jurisdiction.

Application to Premiums

From 1 January 2006, the Wages of Workers with a NSW 'State of connection' are to be included in an Employer's Wages estimates and declarations. It will no longer be appropriate to include the pro-rata share of Wages of Workers who only temporarily work in NSW and usually work in another State. The 'State of connection' for these Workers is that other State and Wages would not be included in NSW Wages estimates/declarations from 1 January 2006. The full Wages of a Worker 'connected' with NSW must be included in Wages estimates/declarations from 1 January 2006.

Example: Declaration of Wages

A company employs a managing director on a salary of \$100,000. The managing director works in NSW for 90 per cent of the time and spends the remaining 10 per cent of the time undertaking duties at the company's Queensland office. The company's Workers Compensation insurance Policy period runs from 1 July 2005 until 30 June 2006.

Test A identifies NSW as the managing director's 'State of connection', as they usually work in NSW. In the past, the Employer may have declared 90 percent of the managing director's total Wages in NSW and the remaining 10 percent in Queensland, on a pro-rata basis for the Policy period.

	Total Wages	NSW Wages	Qld Wages
	\$100,000	\$90,000	\$10,000

From 1 January 2006, the full Wages would be declared in NSW as the 'State of connection'.

	Total Wages	NSW Wages	Qld Wages
1 July – 31 Dec 2005	\$50,000	\$45,000	\$5,000
1 Jan – 30 June 2006	<u>\$50,000</u>	<u>\$50,000</u>	<u>N/A</u>
	\$100,000	\$95,000	\$5,000

For the Policy period, \$95,000 would be declared in NSW and \$5,000 in Queensland.

In 2006/07, total Wages (\$100,000) would be declared in NSW, if the 'State of connection' remains as NSW.

Employers will need to ensure that any increase or decrease in the level of Wages declared is accounted for in the hindsight Premium calculation undertaken at the end of the Policy period.

Should there be a fundamental change resulting in an increase or decrease in estimated Wages of 25 per cent or more, a revised initial Premium calculation may be processed, as per operational instruction 2.15, as detailed below:

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- (a) The Scheme Agent receives a written request from an Employer detailing the basis for the revision of the estimated Wages, or change in business activity, which may include a request for a Certificate of Currency – the Scheme Agent must be satisfied that the situation outlined is genuine.
- (b) Adjustments must only be made in relation to the component of the annual Premium that is not yet due. If the annual Premium has been paid, then no adjustment is allowed. Refunds are paid upon the Employer's declaration of actual Wages. If the Premium is the subject of collection activity after being overdue, no adjustment is allowed unless the Scheme Agent considers that the re-estimation of Wages is reasonable.
- (c) While upward adjustments can be made on multiple occasions, only one downward re-estimation should be allowed during any one 12-month period of insurance. Any further adjustments must be referred to the Appeals Branch of WorkCover.

Minimum Premium Policy

Where a business does not engage Workers or deemed Workers with a NSW 'State of connection', a minimum Premium Policy will still provide an assurance of coverage in case a contractor is found to be a Worker, and the Employer of the contractor is liable to pay compensation.

Application to Claims

Under section 9AA of the 1987 Act, compensation is only payable under the 1987 Act where a Worker is connected with NSW in respect to injuries occurring on or after 1 January 2006. When a Claim is received, the Scheme Agent should determine if NSW is the 'State of connection' as part of the normal Claims review process.

Similarly, prior to commencing provisional liability payments, the Scheme Agent should also take into account if the individual is a Worker in NSW. The *Claims and Provisional Liability Guidelines* outline that a condition for not commencing provisional liability payments is that the claimant is unlikely to be a Worker.

If NSW is not the 'State of connection', the Claim should be rejected. The Worker should be advised that they are only entitled to compensation in NSW if this State is their 'State of connection'.

Section 9AC of the 1987 Act establishes that a Worker should not be compensated twice for the same matter. If a Worker receives compensation from another jurisdiction, be it within Australia or overseas, that amount is recoverable against any amount of compensation paid by NSW.

Work injury damages claims for injuries from 1 January 2006 are to be determined in accordance with the 'substantive law' of the Worker's 'State of connection' at the time of the injury. Section 150E of the 1987 Act sets out the meaning of 'substantive law'.

Transitional arrangements

Amendments introduced by cross border provisions do not apply to any Injury received before 1 January 2006.

The death of a Worker as a result of an Injury received both before and an Injury received after the commencement of cross border provisions is to be treated as if the Worker died from an injury received after 1 January 2006.

Similarly, any incapacity for work as a result of an Injury received both before and an Injury received after the commencement of cross border provisions is to be treated as if the incapacity resulted from the Injury received after 1 January 2006.

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However, the liability of an Employer or Scheme Agent with respect to an Injury received prior to 1 January 2006 will not be affected by the transitional provisions relating to death and incapacity noted above for the purposes of determining liability to contribute under sections 15, 16 or 17 of the 1987 Act and apportionment of liability under section 22 of the 1987 Act.

Any Policy of insurance that an Employer has against liability under the 1987 Act and that is in force on commencement of cross border provisions continues to cover the Employer and remains in force.

Introductory period

From 1 January to 30 June 2006 WorkCover’s focus was on communication and education of Employers with regard to the new cross border arrangements, rather than seeking to recover penalties against Employers who had been incorrectly insured in another State when their ‘State of connection’ was in fact NSW, unless it appeared that the Employer was engaged in systematic Premium avoidance through action or inaction.

However, in the event of a successful Claim for compensation from a NSW Worker arising from a Claim during this period, WorkCover may seek recovery of the Claim costs.

Disagreement on ‘State of connection’

If there is a question about the ‘State of connection’, either on an insurance or claim matter, a Scheme Agent should discuss the issues with WorkCover. In this regard, should an Employer dispute the ‘State of connection’, the Scheme Agent should refer the matter to WorkCover. If necessary, the matter will be reviewed with the relevant authority in the other State and advice will be provided.

A Worker or Employer may ultimately utilise the dispute resolution processes of a State to resolve a disputed ‘State of connection’. While any determination as to a Worker’s ‘State of connection’ made in a designated court in another State with a corresponding law is to be recognised, such a determination may be appealed.

Other changes to the 1987 Act

As the ‘State of connection’ now determines a Worker’s entitlement to Workers Compensation benefits, section 13 of the 1987 Act – ‘Injuries received outside NSW’ has been repealed. Only those Workers with a ‘State of connection’, which is NSW, will be entitled to benefits under the 1987 Act.

Section 21 – ‘Sailors’ has also been repealed. Section 9AA(4) now establishes that if no ‘State of connection’ or no one ‘State of connection’ is identified by the ‘State of connection’ tests, a Worker’s employment is, while working on a ship, connected with the State in which the ship is registered or (if the ship is registered in more than one State) the State in which the ship most recently became registered. Compensation under the 1987 Act does not apply if the Commonwealth’s *Seafarers Rehabilitation and Compensation Act 1992* applies to the Worker’s employment.

References

Workers Compensation Act 1987 – sections 9, 13, 15, 16, 17, 21, 22

Workers Compensation Legislation Amendment Act 2002

Operational instruction 2.15

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