

# **Workers compensation insurance for contractors**

## *Explanatory Guide & Assessment Tool*



## Introduction

Workers compensation insurance is mandatory for employers who engage 'workers' under the *Workers Compensation and Injury Management Act 2023* (the Act).

It can sometimes be difficult to work out whether certain contractors fall within the definition of 'worker' or are excluded when an employer or their insurance broker is applying for, or renewing, a workers compensation policy.

The meaning of 'worker' and 'employer' is defined in section 12 of the Act.

A contractor will be covered by the Act as a 'worker' if they work for another person (the employer) under:

1. A contract of service – section 12(2)(a)
2. A contract for the performance of work – section 12(2)(c).

An employer will be liable to compensate a contractor who is a 'worker' and suffers a work-related injury whether or not a workers compensation policy has been issued or renewed and whether or not the contractor's remuneration has been declared to an insurer. Penalties apply if a workers compensation policy is not taken out for a worker as defined in the Act.

This explanatory guide and assessment tool provides practical guidance for employers, contractors, insurance brokers, and insurers when considering workers compensation insurance coverage of contractors, regardless of how contractors self-identify or are characterised commercially.

The guide and assessment tool outline a two-step process:

1. Step 1. Contract of service – section 12(2)(a) – consider whether a contractor is likely to be covered or excluded under the primary definition of 'worker' (contract of service)
2. Step 2. Contract for the performance of work – section 12(2)(c) – consider whether a contractor is likely to be covered or excluded under the extended definition of 'worker' (contract for the performance of work).

## Disclaimer

This publication provides general information only. It should not be interpreted as a statement of law. This explanatory guide and assessment tool should be read in conjunction with the *Workers Compensation and Injury Management Act 2023*. You should seek appropriate legal/professional advice about your particular circumstances.

## Step 1. Contract of service

### Contract of service – definition

Section 12(2)(a) of the Act states an individual is a worker if —

.....the individual has entered into, or works under, a contract of service with a person, whether the contract is express or implied, oral or written;

The person with whom the worker has entered into the contract, or for whom the worker works under the contract, is the worker's employer.

A large part of the workforce works under a contract of service as employees — and this includes some contractors.

### Key Fact

Businesses sometimes request or pressure a worker to obtain an ABN in the belief this will make the worker an independent contractor and therefore be excluded from legal protections including workers compensation.

Contractors can be considered a 'worker' under a contract of service, irrespective of whether the worker has a registered business name (ABN) or another name or self-identifies as an independent contractor.

Whether a worker is covered or excluded is not a matter of choice but depends entirely on section 12(2)(a) of the Act, the working arrangements and the specific terms and conditions of the contract.

**N.B. Whether the contractor does or does not have an ABN is not indicative of either coverage or exclusion under a contract of service**

### Contractor Assessment Tool: Contract of Service

Step 1. Refer to the *Contractor Assessment Tool: Step 1 - Contract of Service* to work out whether a contractor is likely to be working under a contract of service and therefore required to be covered as a 'worker' under the *Workers Compensation and Injury Management Act 2023*.

### Technical information & guidance

The legal tests for contract of service are in substance the same as the legal tests for 'employee' at common law and applied by the ATO under PAYG legislation. Evidence of PAYG payments is also prima facie evidence of an employment relationship that would establish the person is a worker under a contract of service.

The ATO publish a suite of simple documents to help employers classify their workers and distinguish between employees and independent contractors.

Employers, brokers and insurers are encouraged to utilise the ATO resources via the link below as part of any assessment of whether contractors could be working under a contract of service and therefore potentially covered as a 'worker' under the *Workers Compensation and Injury Management Act 2023*:

[Employee or independent contractor | Australian Taxation Office](#)

## Step 2. Contract for the performance of work

### Contract for performance of work – definition

An individual not employed under a contract of service may still fall under the extended definition of worker in the Act if contracted to perform work. This may include individuals regarded as contractors and sub-contractors.

Section 12(2)(c) of the Act states an individual is a worker if the individual has contracted with a person for the performance of work by the individual and —

- i. The work is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name; and
- ii. The individual does not sublet the contract; and
- iii. If the individual employs a worker, the individual performs part of the work personally.

The person with whom the worker has entered into the contract, or for whom the worker works under the contract, is the worker's employer.

### Key Fact

Businesses sometimes request or pressure a worker to obtain an ABN in the belief this will make the worker an independent contractor and excluded from legal protections including workers compensation.

Contractors can be considered a 'worker' under a contract for the performance of work, irrespective of whether the worker has a registered business name (ABN) or another name or self-identifies as an independent contractor.

Whether a worker is covered or excluded is not a matter of choice but depends entirely on section 12(2)(c) of the Act, the working arrangements and the specific terms and conditions of the contract.

**N.B. Whether the contractor does or does not have an ABN is not indicative of either coverage or exclusion under a contract for the performance of work**

### Contractor Assessment Tool: Contract for Performance of Work

Step 2. Refer to the *Contractor Assessment Tool: Step 2 - Contract for Performance of Work* to work out whether a contractor is likely to be working under a contract for the performance of work and therefore required to be covered as a 'worker' under the *Workers Compensation and Injury Management Act 2023*. Also refer to the examples.

### Technical information & guidance

The starting point for determining whether a contractor falls within section 12(2)(c) of the Act is the existence of a contract with another party 'for the performance of work'.

From there, it is necessary to consider each of the factors in s.12(2)(c). A three-step process applies:

- the work performed is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name; and

- the individual does not sublet the contract; and
- if the individual employs a worker, the individual performs part of the work personally.

To assess if a contractor is likely to be covered or excluded under section 12(2)(c) of the Act – the extended definition – you need to review the whole working arrangement.

This involves consideration of sections 12(2)(c)(i),(ii) and (iii) of the Act and relevant legal principles as to whether work is carried out in the course of, or incidental to, an individual's own trade or business.

Each step, and a summary of the legal principles, is outlined in more detail below.

### **Work performed by the contractor**

Section 12(2)(c)(i) of the Act only covers contractors if the work performed is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name.

The following are relevant factors relating to the work performed:

- there is a contract for the performance of work
- the work performed is not in the course of or incidental to the contractor's own trade or business
- the contractor does not hold themselves out to the public under their own name or business name as carrying out their own business
- the contractor generally performs work exclusively for a principal, rather than engaging in contracts in their own name with multiple clients.

### Is work in the course of or incidental to the individual's trade or business?

The foundational principles as to 'whether work is carried out in the course of, or incidental to, an individual's own trade or business' were established by Dixon J in the decision of *Humberstone v Northern Timber Mills* and subsequently approved in the High Court.

The principles (paraphrased from Dixon J) applicable to section 12(2)(c)(i) are:

1. The purpose of the exception or exclusion expressed by the words in question is to confine the benefit of the coverage it establishes to persons who:
  - do not conduct an independent trade or business
  - 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
  - do not in the course of that trade or business, as an incident of its exercise, undertake the work by entering into the contract.
2. The provision will cover persons who work for the principal but have no independent business or trade and persons who, though carrying on an independent trade or business, undertake a contract outside the scope or course of that trade or business.
3. The distinction it seeks to draw is between:
  - on the one hand an independent contractor whose relationship 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 person's trade

or because the contractor has no such general business or is not a general practitioner of their trade

- and on the other hand an independent contractor who performs work successively or perhaps concurrently for their customers or others in the course of a definite trade or business carried on systematically or who holds themselves out as ready to do so.

The term 'trade or business' is not defined in the Act. The term should be interpreted broadly to include any activity regularly carried on by the contractor for the production of income from performing work in the contractor's own name or under a business or firm name. It is not limited to defined 'trades' or tradespersons. The term is also given a broad meaning under commercial and corporations legislation.

### **Did the contractor sublet the contract?**

Section 12(2)(c)(ii) of the Act excludes contractors that have sublet the contract for the performance of work to someone else. Subletting the contract occurs when the individual delegates or transfers the contracted work to a third party, such as a subcontractor.

The Act does not exclude contractors simply because they have the ability or capacity to sublet.

Subletting should not be confused with employing someone else to assist with performing the work (see below).

### **Did the contractor employ any workers? If so did the contractor perform part of the work personally?**

Contractors may employ subcontractors who work together on the job.

Section 12(2)(c)(iii) of the Act excludes contractors if they employ someone else and have not themselves performed part of the work personally.

This specific exclusion does not apply just because the contractor employs others. The exclusion applies only if the contractor does not personally perform part of the work.

### **Contract for performance of work: questions to consider**

Consider the following questions as to whether contractors are likely to be covered or excluded under section 12(2)(c) of the Act – the extended definition:

- Is there a contract for the performance of work?
- What is the nature of the work performed under the contract?
- What is the contractor's trade or business?
- What work does the contractor regularly do?
- Does the contractor hold themselves out to the public under their own name or business name as carrying out their own business?
- What is the principal's trade or business?
- Does the contractor sublet any part of the contract? Do not confuse 'subletting' of the contract with 'employing' someone else to assist with performing the work.
- Has the contractor previously sublet the contract for the performance of work?

- Is the contractor likely to sublet the contract for the performance of work for the forthcoming insurance policy period?
- Does the contractor employ any workers?
- If the contractor employs any workers, did or will the contractor perform any part of the contract personally?

## Contractor Assessment Tool: Step 1 - Contract of Service [s.12(2)(a)]

**Step 1. Assess whether the contractor is likely to be covered as a 'worker' under a contract of service.**

Contract of service - Act	Assessment	
	Likely covered (worker)	Likely excluded
<p>The individual has entered into, or works under, a contract of service with a person, whether the contract is express or implied, oral or written.</p> <p>The person with whom the worker has entered into the contract, or for whom the worker works under the contract, is the worker's employer [s. 12(2)(a)].</p>	<p><b>Control</b></p> <p>The work done by the contractor is subject to the direction and control of the employer.</p>	<p><b>Control</b></p> <p>Contractor agrees only to produce a certain result and is not subject to control in actually doing the work.</p>
	<p><b>Remuneration</b></p> <p>Remuneration is paid on the basis of time worked, a price per item or activity, or commission.</p>	<p><b>Remuneration</b></p> <p>Remuneration is paid on the basis of a result or task completion, often for a fixed fee.</p>
	<p><b>Working hours</b></p> <p>Contractor has obligation to work for defined or regular hours. Contractor cannot reject offered/ contracted working hours.</p>	<p><b>Working hours</b></p> <p>Contractor sets own work hours. Contractor can reject offered working hours.</p>
	<p><b>Right to employ</b></p> <p>Contractor has no right to employ others to perform work.</p>	<p><b>Right to employ</b></p> <p>Contractor can perform work via other employees.</p>
	<p><b>Subcontract</b></p> <p>Contractor has no capacity to delegate or subcontract any aspect of their work to another person.</p> <p>Contractor must perform the work themselves and cannot pay someone else to do the work for them.</p>	<p><b>Subcontract</b></p> <p>Contractor can subcontract any aspect of their work to another person.</p>



Contract of service - Act	Assessment	
	Likely covered (worker)	Likely excluded
	<b>Equipment</b> Contractor does not provide all or most of the equipment, tools and other assets required to complete the work; or the contractor provides all or most of the tools, but the employer provides them with an allowance or reimburses them for expenses incurred.	<b>Equipment</b> Contractor provides all or most of their own equipment, tools and other assets required to complete the work. Employer does not give them an allowance or reimbursement for the expenses incurred.
	<b>Risk</b> Contractor bears little or no risk. The employer bears the commercial risk for any costs arising out of injury or defect in their work.	<b>Risk</b> The contractor bears the commercial risk for any costs arising out of injury or defect in their work.
	<b>Integration</b> The contractor serves in the employer's business. They are contractually required to perform work as a representative of the business.	<b>Integration</b> The contractor provides services to the employer's business. The contractor performs work to further their own business.
<b>Result:</b>	It is not necessary that each indicator point to the worker being either likely covered or likely excluded. It is whether the totality of the relationship indicates that the real substance, true nature, and overall practical reality is that the worker is either likely covered or likely excluded. No single indicator is determinative. A person may have some indicators of them being likely excluded, but they can still be a worker on overall consideration and weighing of the factors.	

## Contractor Assessment Tool: Step 2 - Contract for Performance of Work [s. 12(2)(c)]

**Step 2. Assess whether the contractor is likely to be covered as a ‘worker’ under a contract for the performance of work.**

Contract for performance of work – Act	Assessment	
	Likely covered (worker)	Likely excluded
<b>1. The work is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual’s own name or under a business or firm name [s.12(2)(c)(i)].....And</b>	<p>The work performed by the contractor is not in the course of or incidental to the contractor’s own trade or business.</p> <p>The work is not regularly carried on by the contractor in their own name or business or firm name.</p> <p>The contractor does not hold themselves out to the public under their own name or business name as carrying out their own business.</p> <p>The contractor works exclusively with one client rather than multiple clients.</p>	<p>The work performed is in the course of or incidental to the contractor’s own trade or business.</p> <p>The work is regularly carried on by the contractor in their own name or business or firm name.</p> <p>The contractor holds themselves out to the public under their own name or business name as carrying out their own business.</p> <p>The contractor works with multiple clients.</p>
<b>2. The individual does not sublet the contract [s.12(2)(c)(ii)].....And</b>	Contractor does not sublet contract.	Contractor sublets contract to someone else.
<b>3. If the individual employs a worker, the individual performs part of the work personally [s.12(2)(c)(iii)].</b>	Contractor does not employ others, or if employing others contractor performs part of the work personally.	If employing others, contractor does not perform part of the work personally.
<b>Result:</b>	If yes to 1, 2 <b>and</b> 3 the contractor is likely to be a worker and required to be covered. The person with whom the worker has entered into the contract, or for whom the worker works under the contract, is the worker’s employer.	If no to either 1, 2 <b>or</b> 3 the contractor is likely not a worker and not required to be covered.

## Examples: Step 2 - Contract for Performance of Work [s. 12(2)(c)]

### Example – Contractor likely to be covered as a ‘worker’ under a contract for the performance of work [s.12(2)(c)]

Darren pours concrete at new housing developments under a contract for the performance of work with a local residential building business. Darren and the business have a written contract in place governing their relationship. As part of that contract Darren is required to have an ABN and issues invoices with an ABN.

Under that contract Darren has the capacity to sublet the contract to someone else but has never done so and always performs the work personally.

Darren does not have a written contract with any other business to pour concrete or for any other labour or service – he works exclusively for the local residential building business. Darren does not hold himself out to the public under his own name or business name as carrying out a concreting business.

Contract for performance of work - Act	Tests to be satisfied	Applying the tests
<b>1. The work is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name [s.12(2)(c)(i)].....And</b>	<p>The work performed by the contractor is not in the course of or incidental to the contractor's own trade or business.</p> <p>The work is not regularly carried on by the contractor in their own name or business or firm name.</p> <p>The contractor does not hold themselves out to the public under their own name or business name as carrying out their own business.</p> <p>The contractor works exclusively with one client rather than multiple clients.</p>	<p>On face value it looks like concreting work is in the course of or incidental to Darren's own trade or business because he has an ABN. However, presence of an ABN and issuing invoices with an ABN is not enough.</p> <p>When considering the actual working arrangement Darren does not hold himself out to the public under his own name or business name as carrying out a concreting business. Darren works exclusively for a local residential building business.</p>
<b>2. The individual does not sublet the contract [s.12(2)(c)(ii)].....And</b>	Contractor does not sublet contract.	Darren does not sublet the contract.
<b>3. If the individual employs a worker, the individual performs part of the work personally [s.12(2)(c)(iii)].</b>	Contractor does not employ others, or if employing others contractor performs part of the work personally.	Darren does not employ others and performs the work personally.
<b>Result:</b>	<p>Each requirement of s.12(2)(c)(i),(ii) <u>and</u> (iii) must be satisfied. Darren's working arrangements are likely to satisfy each of the requirements of section 12(2)(c)(i), (ii) <u>and</u> (iii).</p> <p>Darren is likely to be a ‘worker’ under section 12(2)(c) of the Act. If Darren is a worker the residential building business that engaged Darren is Darren's employer under the Act.</p>	

### Example – Contractor not likely to be covered as a ‘worker’ under a contract for the performance of work [s.12(2)(c)]

A retirement village company contracts with Shelley to provide maintenance services around the retirement village, including painting gutters and repairing fences.

Shelley has an ABN and operates a residential maintenance business.

Shelley promotes the business services via social media and has multiple contracts with different clients.

Contract for performance of work - Act	Tests to be satisfied	Applying the tests
<b>1. The work is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name [s.12(2)(c)(i)].....And</b>	<p>The work performed by the contractor is not in the course of or incidental to the contractor's own trade or business.</p> <p>The work is not regularly carried on by the contractor in their own name or business or firm name.</p> <p>The contractor does not hold themselves out to the public under their own name or business name as carrying out their own business.</p> <p>The contractor works exclusively with one client rather than multiple clients.</p>	<p>Shelley is operating a business in her own name.</p> <p>Painting of gutters and fence repair is in the course of or incidental to Shelley's own trade or business which is residential maintenance services.</p> <p>Shelley promotes her residential maintenance service to many clients and has many contracts with different clients.</p>
<b>2. The individual does not sublet the contract [s.12(2)(c)(ii)].....And</b>	Contractor does not sublet contract.	Not applicable as section 12(2)(c)(i) has not been satisfied
<b>3. If the individual employs a worker, the individual performs part of the work personally [s.12(2)(c)(iii)].</b>	Contractor does not employ others, or if employing others contractor performs part of the work personally.	Not applicable as section 12(2)(c)(i) has not been satisfied
<b>Result:</b>	<p>Each requirement of s.12(2)(c)(i),(ii) <u>and</u> (iii) must be satisfied. Shelley's working arrangements would appear to fail the first test as the work is in the course of or incidental to a trade or business regularly carried on by Shelley in her own name. As she has failed the first test it is not necessary to consider section 12(2)(c)(ii) or (iii).</p> <p>Shelley is not likely to be considered a worker under section 12(2)(c) of the Act.</p>	