WORKCOVER NEW SOUTH WALES

WORKERS COMPENSATION AND INJURY MANAGEMENT
FACT SHEET 10
INFORMATION ON TRUSTS

The purpose of this fact sheet is to provide a guide to employers, accountants, insurers/agents, auditors and other interested parties, on what trust distributions should be taken into account for the purposes of assessing an employer's workers compensation premium. For information on what other types of payments are considered remuneration for the purposes of calculating workers compensation premiums refer to WorkCover's *Wages Definition Manual* catalogue No.49.2, available from **www.workcover.nsw.gov.au**

The aim of this fact sheet is to help ensure that there is a consistent approach to the declaration of trust distributions as remuneration. This consistency will help make sure that each employer, covered for workers compensation through the WorkCover Scheme, pays their fair share of the cost of the Scheme.

WHO IS CONSIDERED A WORKER OF A TRUST?

Under workers compensation law, a person who is a 'worker' must be covered for workers compensation by their employer. A worker is any person who has entered into, or works under, a contract of service with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, oral or written – section 4 *Workplace Injury Management and Workers Compensation Act 1998*.

Persons engaged in certain types of work such as farm-related activities, are also deemed to be workers. Similarly, contractors engaged under contract to perform work may also be deemed to be workers under Schedule 1 *Workplace Injury Management and Workers Compensation Act 1998*. For more information see WorkCover's *Wages Definition Manual*.

A working beneficiary of a trust who has PAYG tax deducted from any payments or receives a superannuation contribution from the trust is considered to be a worker of the trust, as is any beneficiary (including a working director) who works for an incorporated trust. A working beneficiary who suffers a work-related injury is entitled to claim workers compensation.

WHAT TRUST DISTRIBUTIONS ARE COUNTED AS WAGES?

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.

Distributions to beneficiaries who are not workers of the trust are not counted as wages.

These individuals are not entitled to workers compensation in the event of an injury.

A distribution to a worker as 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. This remuneration would be regarded as wages for workers compensation purposes).

A distribution is considered in lieu of wages when a 'wages shortfall' occurs and the distribution is made in the financial year in which the work is done or in the following year. Any distribution that compensates for a wages shortfall, up to the value of the shortfall, is considered to have been paid in lieu of wages, and must be counted as wages.

A wages shortfall cannot be carried forward to the next policy year. For example a wages shortfall that occurred in say the 2004 policy year, cannot be used in determining if there is a wages shortfall for the 2005 policy year.

A wages shortfall occurs when the total wages paid to a working beneficiary (not including distributions) is less than 'market rate' for work done for the trust – for example:

Wage for the policy year (excluding distributions) (A)	$15,000
Market rate (assumed award rate) (B)	$40,000
Wages shortfall (B – A)	$25,000

Market rate for the work is $40,000 however; the beneficiary was only paid $15,000 incurring a wages shortfall of $25,000. If the beneficiary were paid $40,000 or more in wages (without distributions), there would be no wages shortfall.

CALCULATING THE MARKET RATE

The market rate is the minimum wage rate applicable to the work either:

(a) according to an industrial instrument in force under a law of the State; or

(b) if paragraph (a) does not apply, according to an industrial instrument in force under a law of the Commonwealth.

If the market rate cannot be established under a State or Commonwealth award or industrial agreement, the market rate is the average weekly earnings figure '*Full-time adult ordinary time earnings – NSW – Original – Persons'* for the February quarter prior to the relevant financial year, as published in Australian Bureau of Statistics publication *6302.0 – Average Weekly Earnings Australia.*

In 2004/05, the market rate is the relevant average weekly earnings figure for the February 2004 quarter; while for the 2005/06 year, it is the figure for the February 2005 quarter.

In 2004/05, the average weekly earnings is $991.40 per week and should be applied for each week or part thereof during which the beneficiary provided services on a full time basis – for example:

Wages for policy year (2004/05) (excluding distributions) (A)	$15,000
Market rate (52 weeks x $991.40) (B)	$51,553
Wages shortfall (B – A)	$36,553
Trust distribution received (C)	$50,000
Amount of distribution deemed 'in lieu of wages' (trust distribution up to value of shortfall) (D)	$36,553
Assessable wages (A + D)	$51,553

The balance of this trust distribution $13,447 (C) – (D) would not be assessed as wages.

SUBSEQUENT YEAR DISTRIBUTIONS

A distribution paid in a subsequent year may be considered as wages for the previous year, if paid in relation to work done in that year (section 174AA(3)(b) *Workers Compensation Act 1987*).

Example: a working beneficiary receives a trust distribution of $15,000 on 30 November for work done for the trust in the year ending the previous 30 June.

Wage for policy year ended 30 June (excluding distributions) (A)	$15,000
Market rate (assumed award rate) (B)	$40,000
Wages shortfall (B – A)	$25,000
Trust distribution received the following November (C)	$15,000
Amount of trust distribution deemed 'in lieu of wages' for premium calculation (trust distribution up to value of shortfall) (D)	$15,000
Assessable wages (A + D)	$30,000

Market rate for the work is $40,000; the beneficiary was paid $15,000 for the year ended 30 June incurring a wages shortfall of $25,000. The entire trust distribution of $15,000 is deemed 'in lieu of wages'. Workers compensation premiums would be calculated on the basis of assessable wages of $30,000. The difference between the assessable wages ($30,000) and the market rate ($40,000) would not be subject to workers compensation premiums.

MARKET RATE: PART-TIME OR CASUAL WORK

An hourly or daily rate should be used if the working beneficiary worked on a part-time or casual basis. This method must be used for all work done by that person for the entire policy year.

In the absence of an applicable industrial instrument specifying the rate, the following methods should be used to calculate an hourly or daily rate:

- an hourly rate should be determined by dividing the weekly figure by 40 (ie. weekly rate / 40 = hourly rate)
- a daily rate should be determined by dividing the weekly figure by 5 (ie. weekly rate / 5 = daily rate). The daily rate should be applied for each day the beneficiary provided services during the relevant period, regardless of the number of hours of service provided on those days.

Example: a working beneficiary works three days a week for the trust for 40 weeks of the policy year. There is no applicable wage rate under a State or Commonwealth industrial instrument for the work. Accordingly the average weekly earnings rate is used to calculate a daily market rate, (2004/05 daily market rate = $991.40 / 5.)

Wage for policy year (excluding distributions) (A)	$10,000
Market rate ($991.40 / 5 x 120 days) (B)	$23,793
Wages shortfall (B – A)	$13,793
Trust distribution received (C)	$40,000
Amount of trust distribution deemed 'in lieu of wages' (trust distribution up to value of shortfall) (D)	$13,793
Assessable wages (A + D)	$23,793

The balance of the trust distribution $26,207 (C) – (D) would not be assessed as wages.

MARKET RATE: MIXED DUTIES

Where a working beneficiary performs duties that fall within more than one classification (eg. a mixture of award and non-award, or managerial and non-managerial duties), the value of all duties must be taken into account when calculating the market rate. The value for each category should be calculated having regard to the duties performed. Employers must maintain records showing the basis for calculations, see *Wages Definition Manual* for record keeping requirements.

Example: A working beneficiary undertakes 30 hours per week on an award rate of $32,000 plus 10 hours per week managerial duties over the policy year.

Wage for policy year (excluding distributions) (A)	$ 8,000
Award rate for award duties ($32,000) (B)	$32,000
Non-award rate for non-award duties ($991.40 / 40 x 10 hours x 52 weeks) (C)	$12,888
Market rate (Award rate + Non-award rate) (D = B + C)	$44,888
Wages shortfall (D – A)	$36,888
Trust distribution received (E)	$40,000
Amount of trust distribution deemed ‘in lieu of wages’ (trust distribution up to value of shortfall) (F)	$36,888
Assessable wages (A + F)	$44,888

The balance of the trust distribution ($6,224) (E) – (F) would not be counted as wages.

FINANCIAL YEAR

In order to simplify reconciliation, trustees should consider aligning their workers compensation policy and financial years; contact the trust’s workers compensation insurer/agent for information.

Where workers compensation policy and financial years are not aligned a wages shortfall is calculated based on the workers compensation policy year, not the trust’s financial year. Example:

A trust has a workers compensation policy year ending 31 March 2004, and a financial year ending 30 June 2004. In determining if there is a wages shortfall, trust distributions will be pro rated on the following basis:

- 91/365 of distributions relating to the financial year ending 30 June 2003, plus
- 274/365 of distributions relating to the financial year ending 30 June 2004.

WHAT ARE THE PENALTIES FOR EMPLOYERS WHO MAKE OR PROVIDE FALSE RECORDS?

Trustees must make sure that the information provided to their insurer/agent is correct and can be verified through records such as award rates and/or job descriptions in position vacant advertisements. The penalty for providing false or misleading information to an insurer/agent to obtain or renew a workers compensation policy is up to 100 penalty units (currently $11,000 at the time of printing).

If a trustee’s declarations are found to be incorrect, then various penalties may apply – for example, insurers/agents may charge employers a late payment fee at the rate of 1.2 per cent per month compounded monthly on the balance outstanding at the end of each month. These fees are charged on any premium that the trustee has not paid because it under-declared the remuneration it paid.

If the trust is incorporated, the directors of the corporate trustee may be personally liable for this debt.

WAGE ESTIMATES

The trustees must provide the following information to the insurer within two months:

- **after the start of a policy period**, a trustee must provide an estimate of the remuneration which it will pay during the policy year including estimated trust distributions if applicable; and
- **after the end of a policy period**, a trustee must provide a declaration of the actual remuneration it paid during that period including any trust distributions in lieu of wages in respect of that period. If trust accounts are not finalised this should be the best estimate possible and clearly noted as an interim wages declaration. The insurer/agent must be advised of the correct amount when the distribution is finalised.

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, $2,200 at the time of printing).

For more information regarding wage estimates refer to the *Wages Definition Manual*.

A moratorium on some workers compensation late payment fees is currently in effect while WorkCover clarifies the distinction between employees and contractors. WorkCover has extended the moratorium to include disputed trust distributions to working beneficiaries. The moratorium will end on 30 June 2006. For more information see www.workcover.nsw.gov.au

CALCULATION OF COMPENSATION BENEFITS

A working beneficiary who has a work related injury or illness is entitled to claim workers compensation benefits in the same way as any other worker – see *Workers Compensation & Injury Management Fact Sheet 4 – Claims and Benefits* for information on workers compensation claims.

The benefits a worker may be entitled to include weekly compensation benefits, medical or related treatment, occupational rehabilitation services, ambulance service and hospital treatment, travel expenses to attend appointments, lump sum payment for a permanent impairment or pain and suffering, vocational re-education and retraining, work aids, equipment and work trials. When the injury results in the death of a worker, the dependent family members may be eligible for death benefits and funeral expenses.

Weekly compensation benefits are calculated in accordance with the *Workers Compensation Act 1987*. The level of benefits may be affected by a number of variables depending on individual circumstances.

Remuneration received by working beneficiaries, like those of other workers, is taken into account in the assessment of benefits payable if the worker is injured. The Act sets out a number of criteria for ascertaining the 'current weekly wage rate', such as whether the worker was paid under an award and, if not, whether there was an award that could fairly and reasonably have been applied to the work.

FOR FURTHER INFORMATION

Wages Definition Manual (catalogue no. 49.2)

Workers Compensation & Injury Management Fact Sheet 4 – Claims and Benefits (catalogue no. 1293)

Workers Compensation Act 1987

Workplace Injury Management and Workers Compensation Act 1998

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